IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY INSTRUCTIONS CRIMINAL CASES REPORT 2011-05 **CASE NO.: SC11-**

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

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

	Instruction #	**Topic**
Proposal 1	**3.9(f)**	**Eyewitness Identification**
Proposal 2	**3.6(m)**	**Affirmative Defense: Temporary Possession for Purposes of Legal Disposal**
Proposal 3	**3.6(n)**	**Affirmative Defense: Lawfully – Obtained Controlled Substance**
Proposal 4	**3.13**	**Submitting Case to Jury**

The proposals are provided in Appendix A. Words to be deleted are shown with strike-through marks; words to be added are underlined.

Proposals #1, #3, and #4 were published in *The Florida Bar News* on November 1, 2011. Proposal #2 was published in *The Florida Bar News* on April 30, 2011.

The comments for these proposals are contained in Appendix B.
A comment for the **Eyewitness Identification (3.9(f))** proposal was received from the Innocence Project of Florida, Inc.

Comments for the **Temporary Possession for Legal Disposal (3.6(m))** proposal were received from Mr. Rick Combs, Mr. Richard Summa, Speaker Dean Cannon, Cmdr. Darlene Dickey from the Escambia County Sheriff, the President (Mr. Peter Paulding) of the Florida Police Chiefs, the President (J. Harell Reid) of the Florida Sheriff's Association, Mr. Michael Ramage of the Florida Department of Law Enforcement (FDLE), and the Attorney General's Office (Ms. Carolyn Snurkowski, Mr. Thomas Winokur, and Ms. Charmaine Millsaps).

Comments for the **Affirmative Defense- Lawfully-Obtained Controlled Substance (3.6(n))** instruction were received from Mr. Richard Summa and Ms. Cherry Grant.

No comments were received for the **Submitting Case to Jury (3.13)** instruction.

The referral letter from the Court for an **Eyewitness Identification** instruction is contained in Appendix C.

A minority report for the **Eyewitness Identification** instruction is contained within Appendix D.

The 9th Circuit's Model Criminal Jury Instruction for **Eyewitness Identification** is contained in Appendix E.

Explanation of Proposals

Proposal 1 – 3.9(f) – Eyewitness Identification

In a letter dated August 15, 2011 (Appendix C), the Court requested the committee propose a jury instruction addressing eyewitness identification. The referral letter led to a lengthy discussion about the wisdom of having an eyewitness identification instruction. Some members were concerned that an eyewitness identification instruction would run afoul of Fla. Stat. 90.106 which prevents a judge from commenting to the jury on the weight of the evidence. Also, there was some concern that having a standardized jury instruction would lead to a change in trial court rulings regarding the admissibility of expert testimony in this area. The majority of members viewed the referral letter from the Court as a directive, however. Thus, pursuant to the referral letter, the committee reviewed a number of standard eyewitness jury instructions. Eventually, the committee decided to use the Ninth Circuit's instruction (contained in Appendix E) as a template but to make some changes to it.

#1 - The committee unanimously agreed to add an italicized note at the beginning of the instruction that reads: *"Give if eyewitness identification is a disputed issue and if requested."*

#2- Before publication, the committee unanimously voted to change the language of the 9th Circuit's instruction (in the second numbered paragraph) to: ". . .was the result of improper influence…" (instead of ". . .was the result of subsequent influence). However, after publication, the committee voted 8-3 to

change the wording. The final proposal reads: "**Whether the identification was the product of the eyewitness's own recollection or was the result of influence or suggestiveness."**

#3- The committee, by a vote of 6-3, added: "**The circumstances under which the defendant was presented to the eyewitness for identification."**

#4 - By a vote of 7-3, the committee added: "**Any instance in which the eyewitness did not make an identification when given the opportunity to do so."**

#5 - The committee's published proposal included the 9th Circuit's language about: "The strength of earlier and later identifications." After considering the comment from the Innocence Project, however, the committee decided by a vote of 6-5 to delete this sentence. The majority view was that this proposed factor was too vague and that confidence in an identification does not necessarily mean that the identification is reliable.

#6 – The committee also decided by a vote of 8-1 to add language concerning cross-racial and cross-ethnic group identifications. This idea also came from the Innocence Project's comment.

A committee member proposed to add an italicized note telling the judge to give only the numbered paragraphs that apply to the particular case. That proposal was defeated by a vote of 5-4. The majority felt it was best for the entire instruction to be read to the jurors. Another member proposed that there be an italicized note stating that the numbered paragraphs should be given only when requested by a party. That proposal was defeated by a vote of 7-2.

The comment from the Innocence Project was discussed at the December 2011 meeting. One committee member (Mr. Blaise Trettis) suggested the committee adopt a number of ideas from the Innocence Project such as giving more information to jurors about how accuracy of identification increases with length of observation; asking jurors to consider whether the eyewitness received information or feedback from the police or prosecutors about the identification; instructing jurors to consider whether the offender was disguised or whether the witness had an unobstructed view of the offender; whether the witness was prejudiced by opinions or descriptions in photographs or newspaper accounts; whether there was a double-blind administrator if a lineup procedure was used; whether people in a line-up matched the eyewitness's pre-lineup description of the offender; whether the defendant stood out from persons in the line-up; whether there were multiple identification procedures; whether the people in the photo

array were shown simultaneously or sequentially; whether a showup procedure was used; whether the offender had a weapon; and whether the event was highly stressful for the eyewitness. All of these proposals were defeated by a vote of either 8-2 or 7-3. However, as mentioned above, some of the Innocence Project's ideas were incorporated in the final proposal.

Note: At first, the committee voted 8-2 to add a preliminary paragraph from the federal 8th Circuit's standard instruction that informs jurors: "In general, a witness uses his or her senses to make an identification. Usually the witness identifies an offender by the sense of sight—but this is not necessarily so, and other senses may be used." After publication, the committee reconsidered its position and decided by a vote of 8-3 that this paragraph did not fit and was not all that useful because it did not pertain to eyewitness identification.

A minority report is contained in Appendix D.

Proposal #2 – Affirmative Defense: Temporary Possession for Legal Disposal

A former committee member (Judge Terry Terrell) proposed a new "temporary possession for legal disposal" instruction. This proposal was reviewed and amended by current committee member, Mr. Brian Iten. The committee's proposal was published in *The Florida Bar News* on April 30, 2011. However, the published proposal then had to be altered in light of the eight comments that were received.

Speaker Dean Cannon provided a comment opposing the published instruction because this defense does not exist in the statutes. The Committee disagreed, however, because the defense does exist in the case law.

Mr. Michael Ramage, General Counsel for FDLE, objected to the published instruction by claiming that "the instruction will have the unintended consequences of 'legitimizing' hundreds if not thousands of actual and constructive possessions of controlled substances and will promote the unregulated and dangerous self-disposal of controlled substances." He noted that the "prescription defense" should not be intermingled with a "legal disposal" defense; that there really isn't an existing problem with legal disposal cases; that there are ambiguities with the law regarding the length of possession for temporary disposal; that the instruction doesn't cover the situation where a defendant is consuming drugs and the police then catch him or her; that the defense is likely to be abused; that the burden of persuasion should be on the defendant; that the affirmative defense is too easy to satisfy; that there should be a requirement that a defendant provide evidence that he or she notified law enforcement about his or her intent to dispose of the drugs;

and that the instruction promotes the uncontrolled and dangerous disposition of controlled substances.

The committee discussed these concerns and revamped its proposal to address some of these concerns (discussed below), but the conclusion of the committee was that its proposals should simply reflect the law and that the committee should not make policy decisions. It was the feeling of the committee that it should send a proposal to the Court and that the Court will decide whether the benefit of a standard "legal disposal" jury instruction outweighs the cost of additional abuse.

Mr. Rick Combs objected to the published instruction because it covered all controlled substances. He argued that the instruction should be limited to prescription medications. The committee disagreed. The committee could think of no logical reason why the "legal disposal" defense would not apply to all controlled substances. Mr. Combs also opined that the burden of persuasion to prove the defense should be on the defendant. This idea was also discussed by the committee. Although it was generally believed that the burden of persuasion might ultimately be allocated to the defendant, the committee was not comfortable creating law. Thus, the committee followed its standard affirmative defense format – an italicized instruction informs the judge that it is not yet clear who has the burden of persuasion for the affirmative defense, that it is not unconstitutional for the burden of persuasion to be allocated to the defendant, and that the trial judge should read *Dixon v. United States*, 548 U.S. 1 (2006) for further guidance. The instruction provides alternatives for the trial judge on allocating the burden of persuasion because the law usually – but not always - ends up being either a) the defendant has to prove the defense under the preponderance of the evidence standard or b) the state has to disprove the defense under the beyond a reasonable doubt standard. It is not clear that the usual level of proof will be utilized by the courts, however. For example, one way the judiciary may try to deter the abuse of a legal disposal defense is to make the defendant prove the defense under the beyond a reasonable doubt standard.

The President of the Florida Sheriff's Association (J. Harrell Reid), a Commander from the Escambia County Sheriff's office (Darlene Dickey), and the President of the Florida Police Chiefs Association (Peter Paulding) all objected to the published instruction. Their objections were covered in the comment from FDLE.

The Attorney General's office provided a comment that gave the committee a number of ideas to address the concerns raised by the law enforcement community. The AG's office suggested the word "disposal" be used instead of "disposition," that there be an element the drugs were innocently acquired; that there be an element that the possession must be brief and disposal without delay;

that the defense be separated from the prescription defense; that the defense not be allowed in cases of disposal to avoid arrest, and that the burden of persuasion should be on the defendant. The AG's Office also requests the Court hold an oral argument on this instruction.

In response, the Committee adopted a lot of the ideas from the AG's Office. The proposal sent to the Court in Appendix A uses the term "disposal," not "disposition." The committee added an element that the defendant acquire the controlled substance without unlawful intent. The committee separated the "legal disposal" defense from the "prescription defense." The committee added an element that the possession must be brief and the disposal without delay. The committee also added a provision about how the defense does not apply in cases of "disposal to avoid arrest." The one area where the committee did not agree with the AG is that the committee did not think it appropriate to decide which party bears the burden of persuasion of the affirmative defense.

Finally, Mr. Richard Summa of the Leon County Public Defender's Office sent a comment wherein he suggested the committee separate the prescription defense from the legal disposal defense. The committee agreed and the proposal in Appendix A fixes that problem. Mr. Summa also suggested a change to the standard Possession instruction (25.7). That instruction is under review. Mr. Summa also suggested that the committee allocate the burden of persuasion to the state under the beyond a reasonable doubt standard by applying the rule of lenity. The committee rejected this suggestion. As stated previously, the committee decided the decisions to be made about the burden of persuasion were best left to the judiciary.

The revamped proposal sent to the Court in Appendix A was not published. It was thought that the "legal disposal" defense instruction and the "prescription defense" instruction should travel together.

Proposal #3 – Affirmative Defense: Lawfully-obtained Controlled Substance

A committee member (Mr. Brian Iten) proposed a new "prescription affirmative defense" instruction because of cases such as *McCoy v. State*, 56 So.3d 37 (Fla. 1st DCA 2010) and *Ayotte v. State*, 67 So. 3d 330 (Fla. 1st DCA 2011). The committee struggled with the instruction, however, because the case law on the topic has not been fully developed. Nonetheless, the committee thought it would be better to have some instruction than nothing at all if for no other reason than to highlight issues that need to be addressed.

The biggest problem for the committee was that there are two prescription defense statutes but they are worded differently. For Fla. Stat. 499.03(1), the defense is if the drug has been obtained by a valid prescription of a practitioner

licensed by law to prescribe the drug. For Fla. Stat. 893.13(6)(a), the defense is if the drug was *lawfully obtained* from a practitioner or pursuant to a valid prescription or order of a practitioner while acting in the course of his or her professional practice. (Emphasis added). To make matters more uncertain, the Fourth District's case of *Knipp v. State*, 67 So. 3d 376 (Fla. 4th DCA 2011) only refers to the Chapter 499 defense and does not even discuss the differently-worded prescription defense in Chapter 893.

The committee debated at length: 1) whether a person who obtains a drug unlawfully can use the prescription defense; 2) which party bears the burden of persuasion of the affirmative defense; 3) whether the prescription defense was available to a person charged with Possession with Intent; and 4) what are the contours of the agency relationship when a person claims he or she is holding the drugs for someone who has a prescription. Ultimately, the committee concluded it could not create law and that these issues will have to be decided by the judiciary in an actual case. The proposal passed by a vote of 10-1.

The proposal simply states that there is a prescription defense to possession and trafficking via possession. An italicized note informs the judge that it is unclear which party bears the burden of persuasion for the affirmative defense, that it is not unconstitutional for the burden of persuasion to be allocated to the defendant, and that the trial judge should read *Dixon v. United States*, 548 U.S. 1 (2006) for further guidance. The instruction provides alternatives for the trial judge on allocating the burden of persuasion because it is highly likely that the law will end up being either a) the defendant has to prove the defense under the preponderance of the evidence standard or b) the state has to disprove the defense under the beyond a reasonable doubt standard. Definitions for "practitioner" and "prescription" are taken from the statutes. The Comment section informs litigants about other issues that need to be developed.

There were two comments received after the November 1, 2011 publication. Both comments came from Assistant Public Defenders (Mr. Richard Summa and Ms. Cherry Grant) who objected to the published instruction on the statutory inference in Fla. Stat. 499.03(2) - jurors can infer that someone who possesses a controlled substance without proper labeling does so unlawfully. The commentators thought such an instruction would either be unconstitutional or a comment on the evidence or would run afoul of *State v. Walker*, 461 So. 2d 108 (Fla. 1984)(a statute criminalizing the possession of controlled substances in anything other than the original container was unconstitutional).

The committee did not agree with the analysis by the commentators but decided to delete any reference to the statutory inference for two reasons. First, the majority of the committee was persuaded by the fact that Fla. Stat. 499.03(2) does not explicitly state that an inference is created. Instead, the statute states: "The

possession of the drug under subsection (1) by any person not exempted under this section, which drug is not properly labeled to indicate that possession is by a valid prescription of a practitioner licensed by law to prescribe such drug, is prima facie evidence that such possession is unlawful." Since it is not clear that the use of the "prima facie" language creates an inference, the committee amended its published proposal. Additionally, there are exemptions for certain people (such as licensed pharmacists and licensed practitioners) that the inference does not apply to. A question arose whether the state had to establish that the defendant did not qualify for the exemption before it got the benefit of the inference. Since there was no consensus on how to deal with the statutory exemptions, the committee deleted any reference to an inference for that reason also.

Proposal 4 – 3.13 – Submitting Case to Jury

A committee member (Judge Jacqueline Hogan-Scola) proposed some changes to this instruction. The additional language about the foreperson giving everyone a fair chance to be heard passed by a vote of 10-1. The committee unanimously agreed to add a paragraph about the jurors communicating with the judge in writing. The committee also unanimously agreed to add language instructing jurors about viewing exhibits that had been put into evidence. No comments were received after the November 1, 2011 publication.

Conclusion

Proposal #4 is not likely to be controversial. But proposals #1- #3 raise a host of issues and the Court may want to republish and hold an oral argument.

Respectfully submitted this _____day of December, 2011.

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I hereby certify that this report has been prepared using Times New Roman 14 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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