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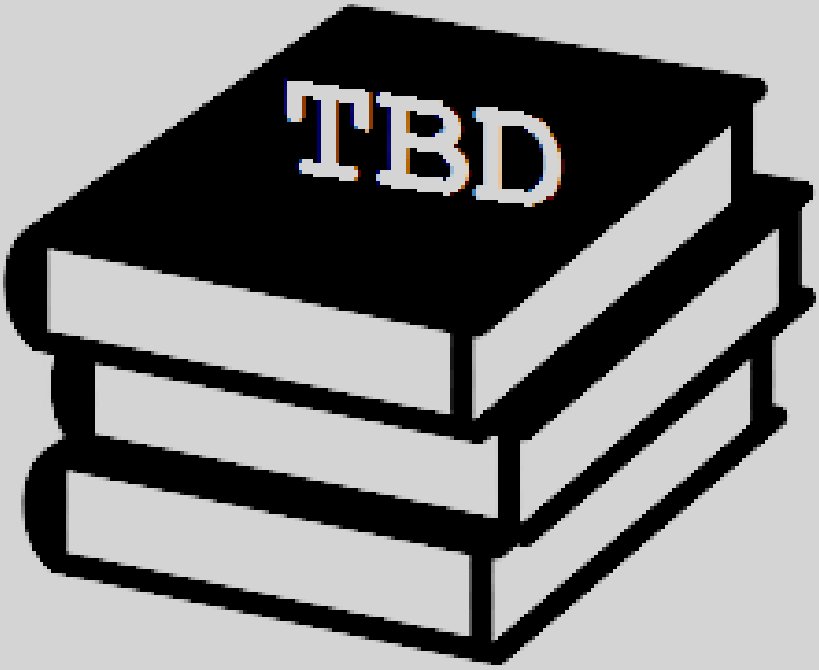

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IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES – REPORT NO. 2015-03

CASE NUMBER: SC15-1170

_____/

MOTION FOR REHEARING

The Standard Jury Instruction Committee in Criminal Cases ("Committee"), by and through its Chair, respectfully requests that the Court reconsider its actions regarding the explanations of constructive possession. The Court has both rejected the Committee's proposed definition of constructive possession and accepted the Committee's proposal to delete a paragraph related to constructive possession. We recognize that the effect of these actions leaves the jury without meaningful instruction on the law applicable to cases in which the defendant constructively possessed drugs in a place not within his or her control.

Specifically, in the definition of constructive possession, jurors are instructed that the substance had to be in a place the defendant controlled: **Constructive possession means the person is aware of the presence of the substance, *the substance is in a place over which the person has control*, and the person has the ability to control the substance** (emphasis added).

However, the Court struck the following paragraph:

Give if applicable.
In order to establish (defendant's) **constructive possession of a substance that was in a place [he] [she] did not control, the State must prove** (defendant) **(1) knew that the substance was within [his] [her] presence and (2) exercised control or ownership over the substance itself.**

The Court's decision to delete this "*Give if applicable*" paragraph, in conjunction with its decision not to alter the definition of constructive possession, will make it difficult (without a special instruction) for jurors to understand the law in a case in which a defendant was not in actual possession of, but knowingly exercised control over, drugs located in a place not in his or her control.

One common example of constructive possession of a substance in a place not controlled occurs when law enforcement finds drugs in the center console of a

car in which the defendant was a passenger, and the driver/owner claims he was unaware of the drugs' presence. Most judges would view this fact pattern as one involving constructive possession of drugs located in a place not controlled by the defendant. Assuming the jurors found the driver's testimony credible, they would need a meaningful instruction on constructive possession to guide their deliberations.

One solution is for the Court to not strike the "*Give if applicable*" paragraph. But the Committee continues to believe that the paragraph is legally incorrect. Specifically, the paragraph requires that the State prove the defendant knew the drugs were *within the presence* of the defendant. The Committee asks the Court to assume that a gang-leader in Miami is recorded on a wiretap telling a fellow gang member to pick up a bale of marijuana that washed ashore on a Fort Lauderdale beach. The lower-level gang member picks up the bale of marijuana, is arrested, and confesses that he was instructed to do so by the defendant/gang leader, which the wiretap corroborates. This fact pattern differs from the "drugs in the center console" scenario because the drugs would not be found *within the presence* of the defendant. Nevertheless, the gang leader should still be found guilty of constructively possessing drugs even though he was miles away from the bale of marijuana.

It is unclear why the pre-April 7, 2016 standard instruction required the State to prove the defendant knew the drugs were *within his presence*. However, the Committee was under the impression that constructive possession did not require the defendant to have geographical proximity to the drugs. It seems clear that the instructions were meant to require the State to prove the defendant had *knowledge of the presence of the drugs*, not *knowledge that the drugs were within the defendant's presence.*

Assuming the Court maintains its decision to reject the Committee's proposed definition of constructive possession, the Committee suggests two possible solutions. One, the Court could retain the "*Give if applicable*" paragraph but edit it as follows:

Give if applicable.

In order to establish (defendant's) **constructive possession of a substance that was in a place [he] [she] did not control, the State must prove** (defendant) **(1) knew ~~that the substance was within [his] [her]~~<u>of the presence of the substance</u> and (2) exercised control or ownership over the substance itself.**

A second option is for the Court to keep the paragraph stricken but to add a sentence to the Comment section that reads: "A special instruction will be necessary in cases where there is evidence the defendant knew of the presence of a controlled substance and exercised control or ownership over the controlled substance, but the substance was not in a place the defendant controlled."[1]

The Committee prefers the first option. The Committee recognizes that it had recommended deletion of the "*Give if applicable*" paragraph, but that recommendation was predicated on there being a new definition of constructive possession, which was proposed as: "…not in actual possession but aware of the presence of the substance and having the power and intention to control the substance…."[2]

Regarding a second matter for reconsideration, the Committee notes that the phrase "ability to control" was eliminated in all but one place. The one place "ability to control" remains is in the paragraph defining constructive possession. The majority of the Committee believe the phrase "power and intention to control" should be used throughout each instruction in lieu of "ability to control."[3]

The Committee proposed "power and intention to control" because jurors are probably confused by the notion that "ability to control" is the equivalent of "able to reach out and touch." A recent case that highlights the phrase "ability to

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[1] If the Court adds a sentence to the Comment sections, the drug paraphernalia instructions should refer to "drug paraphernalia" and not "controlled substances."

[2] The Committee continues to believe that "control of the place" is a *relevant* factor in determining constructive possession, but is not a *defining* factor of constructive possession. "Control of the place" is a *relevant* factor because of the inference that one who controls a place also controls items and substances in that place. *U.S. v. Cochran,* 683 F. 3d 1314, 1318-1322 (11th Cir. 2012). But "control of the place" is not a *defining* factor of constructive possession because one can constructively possess an item or substance in a place not controlled. For example, in *Evans v. State,* 26 So. 3d 85 (Fla. 2d DCA 2010), the court held there were sufficient incriminating circumstances for a jury to conclude that the defendant constructively possessed drugs in a house not owned by him.

[3] The vote was 8-3. The three dissenters do not think "power and intention" should be used in lieu of "ability" anywhere in the instruction.

control" should not be construed as "reach out and grab" is *Session v. State,* No. 5D15-2321 (Fla. 5th DCA March 18, 2016). Thus, even if the Court maintains its decision to treat "control of the place" as a *defining* factor of constructive possession, the Committee asks the Court to consider using:

Constructive possession.

Constructive possession means the person is aware of the presence of the substance, the substance is in a place over which the person has control, and the person has the ~~ability~~power and intention to control the substance.

If, in the paragraph that defines constructive possession, the Court is unwilling to use "power and intention" in lieu of "ability," then the Committee recommends that "power and intention" not be used anywhere in these instructions.

In summary, the Committee respectfully requests the Court consider two changes:

1) Retain, with some editing, the "*Give if applicable*" paragraph regarding the State proving constructive possession of drugs in a place not controlled by the defendant OR keep that paragraph as stricken but add a sentence in the Comment section about the need for a special instruction;

and

2) Substitute "power and intention to control" for "ability to control" in the paragraph that defines constructive possession to maintain internal consistency. If the Court is unwilling to do that, the Committee recommends the Court replace all instances of "power and intention" with "ability" to maintain internal consistency.

Respectfully submitted this 13th day of April, 2016.

s/ Judge F. Rand Wallis

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CERTIFICATE OF SERVICE AND FONT SIZE

I hereby certify that this Motion for Rehearing has been prepared using Times New Roman 14 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) and a copy has been sent by email to Mr. Richard Summa at Richard_summa@fd.org, this 13th day of April, 2016.

s/ Judge F. Rand Wallis
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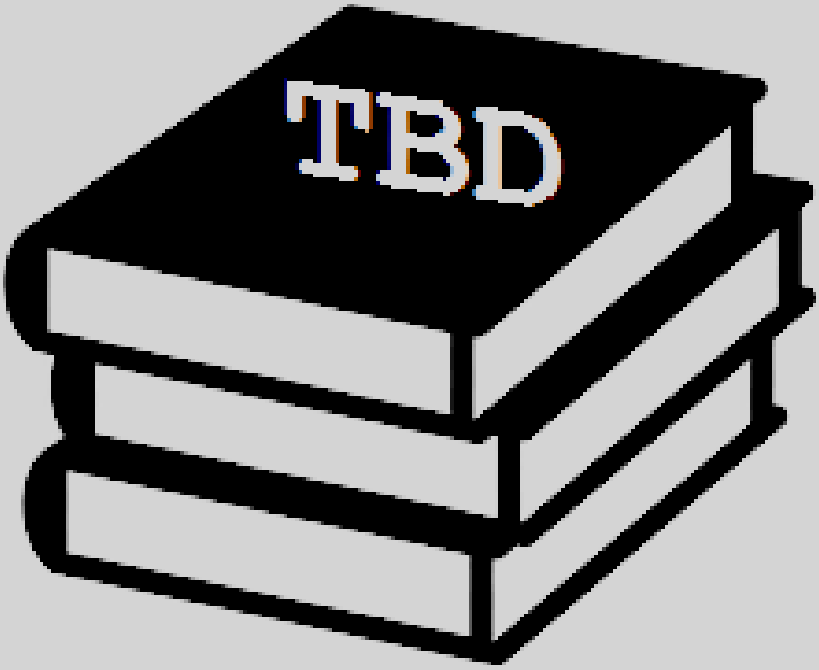

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