

**7.3(a) UNLAWFUL DISTRIBUTION OF (NAME(S) OF ENUMERATED
CONTROLLED SUBSTANCE(S)) CAUSING DEATH**
§ 782.04(1)(a)3., Fla. Stat.

In the absence of an express concession that the homicide was not excusable or justified, the trial judge must also read Instruction 7.1, Introduction to Homicide.

To prove the crime of Unlawful Distribution of (name(s) of enumerated controlled substance(s)) Causing Death, the State must prove the following six elements beyond a reasonable doubt:

1. (Defendant) **unlawfully distributed** (name(s) of enumerated controlled substance(s)).
2. **At the time of the distribution, (defendant) had knowledge of the presence of the substance.**
3. **At the time of the distribution, (defendant) was 18 years of age or older.**
4. (Victim) **is dead.**
5. (Victim) **used the** (name(s) of enumerated controlled substance(s)) **that (defendant) had distributed.**
6. **The** (name(s) of enumerated controlled substance(s)) **that (defendant) distributed caused or was a substantial factor in producing the death of (victim).**

(Name(s) of enumerated controlled substance(s)) **[is] [are] [a] controlled substance[s]. It is unlawful to distribute** (name(s) of enumerated controlled substance(s)) **unless licensed by the State of Florida to do so.***

“Substantial factor” means that the use of the substance [or mixture] alone was sufficient to cause death, regardless of whether any other substance or mixture used was also sufficient to cause death.

It is not necessary for the State to prove that (defendant) intended that (victim) die.

Lesser Included Offenses**

UNLAWFUL DISTRIBUTION OF (NAME(S) OF ENUMERATED CONTROLLED SUBSTANCE(S)) CAUSING DEATH— 782.04(1)(a)3.			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS.NO.
Manslaughter		782.07	7.7
	Second degree (depraved mind) murder	782.04(2)	7.4

Comments

*A special instruction will be necessary if the defendant was licensed to distribute the enumerated controlled substance but did so in an unlawful manner. Trial judges can review §§ 893.05 and 893.13(8), Fla. Stats. to define an unlawful manner.

“[A] person commits the offense by acting as a distributor in the drug distribution chain, and it is irrelevant that other persons are also involved in the chain.” See *Aumuller v. State*, 944 So. 2d 1137, 1142 (Fla. 2d DCA 2006) (citing *Martin v. State*, 377 So. 2d 706 (Fla. 1979)).

As of April 2024, it was unclear whether the § 893.02, Fla. Stat. definition of “distribute” and whether the affirmative defense of lack of knowledge of illicit nature in § 893.101, Fla. Stat. apply to this crime. If so, judges may look to instruction 25.22 for help in drafting a special instruction.

**As of April 2024, it was unclear whether delivery of a controlled substance (instruction 25.2) is a lesser included offense. A defendant can be convicted of and sentenced for both felony murder and the underlying felony and thus an underlying felony is not a necessarily lesser included offense of felony murder. *State v. Enmund*, 476 So. 2d 165 (Fla. 1985). However, this first degree murder, (§ 782.04(1)(a)3., Fla. Stat.), is listed separately from the first degree felony murders in § 782.04(1)(a)2., Fla. Stat.

The instruction indicates that the State must prove the defendant unlawfully distributed the controlled substance. However, as of April 2024, there was no case law that determined whether the State must prove that the distribution was unlawful, or whether the defendant must provide evidence, as an affirmative defense, that the distribution was lawful. If lawfulness of the distribution (e.g., defendant was licensed in Florida to distribute the controlled substance) is an affirmative defense, the trial judge must determine which party has the burden of persuasion and what that burden is (preponderance of the evidence, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted on August 4, 2020, and amended on October 7, 2022, and on May 21, 2024.