

**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) knowingly distributed a substance.**
- 2. The substance was [(name of enumerated controlled substance(s))] [or] [a mixture containing ((name of enumerated controlled substance(s)))].**
- 3. The distribution was unlawful.**
- 4. At the time of the distribution, (defendant) was 18 years of age or older.**
- 5. (Victim) is dead.**
- 6. The [(name(s) of enumerated controlled substance(s)) [or] [mixture containing (name(s) of enumerated controlled substance(s))]] that (defendant) distributed caused or was a substantial factor in producing the death of (victim).**

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

§ 782.04, Fla. Stat.

“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

As of January 2025, there are unresolved issues regarding the appropriate interpretation of s. 782.04(1)(a)3., Fla. Stat. For example, it is unclear whether an element of the crime is that 1) the defendant knew the specific nature of the substance that he or she distributed; or, 2) the defendant knew the substance distributed was a controlled substance. If that *mens rea* is not required, it is unclear whether either 1) lack of knowledge that the substance was a controlled substance; or, 2) lack of knowledge of the specific nature of the substance, is an affirmative defense. Moreover, if lack of knowledge of either the illicit nature or the specific nature of the substance is an affirmative defense, it is unclear which party has the burden of persuasion for the affirmative defense and what that burden of persuasion is. Finally, it is unclear whether the § 893.02, Fla. Stat. definitions of “distribute,” “deliver,” “administer,” “dispense,” and “mixture” apply to this crime. In sum, standard instruction 7.3(a) can be used as a beginning template, but trial judges will likely have to litigate all these issues before the jury is sworn.

*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 January 2025, 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, § 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 January 2025, there was no case law that determined whether the State must prove 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, on May 21, 2024, and on February 21, 2025.