

7.3(a) UNLAWFUL DISTRIBUTION OF (NAME(S) OF ENUMERATED CONTROLLED SUBSTANCE(S)) BY A PERSON 18 YEARS OF AGE OR OLDER 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)) by a Person 18 Years of Age or Older 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(s) 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).**

***The Court instructs you that it is unlawful to distribute [(name(s) of enumerated controlled substance(s))] [a mixture containing (name(s) of enumerated controlled substance(s))].**

§ 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.

Give if applicable. Aumuller v. State, 944 So. 2d 1137 (Fla. 2d DCA 2006) (citing Martin v. State, 377 So. 2d 706 (Fla. 1979)).

If the State proves all the elements, a person commits this crime by acting as a distributor in the drug distribution chain, and it is irrelevant that other persons are also involved in the chain.

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)) BY A PERSON 18 YEARS OF AGE OR OLDER 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
Non-homicide lesser**			
Delivery of a Controlled Substance**		893.13(1)	25.2

Comments

As of August 2025, there are many unresolved issues regarding the correct 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 or reasonably should have known the specific nature of the substance that he or she distributed; or, 2) the defendant knew or reasonably should have known 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.

*Also, it is unclear whether the § 893.02, Fla. Stat. definitions of “distribute,” “deliver,” “administer,” “dispense,” and “mixture” apply to this crime. If those definitions apply, “distribute” means to deliver a controlled substance other than by administering or dispensing.

*A special instruction will be necessary if there is evidence the distribution was allowed by Florida law. For example, a person who delivers a medicinal drug from a wholesaler to a pharmacy or hospital in the normal course of business might be lawfully distributing the controlled substance. Furthermore, the instruction indicates the state must prove the defendant unlawfully distributed the controlled substance. However, 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 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).

**It is also unclear whether delivery of a controlled substance is a lesser included crime. A defendant can be convicted of and sentenced for both a felony murder and the underlying felony. Therefore, 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. Also, non-homicide lesser included crimes should not be given in a homicide case if causation is not an issue and there is no dispute that the victim is dead. *Carver v. State*, 348 So. 3d 1214 (Fla. 5th DCA 2022).

In sum, this standard instruction can be used as a beginning template, but trial judges will likely have to litigate all these issues before the jury is sworn.

This instruction was adopted on August 4, 2020, and amended on October 7, 2022, on May 21, 2024, on February 21, 2025, and on September 12, 2025.