IN THE

SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES (No. 2005-5)	Case No. SC05-1622

COMMENTS OF
THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The Florida Association of Criminal Defense Lawyers (AFACDL@) submits the following comments and urges the Court to refrain from adopting the Aburden shifting@ insanity standard jury instruction for the following reasons. The Committee on Standard Jury Instructions in Criminal Cases has drafted the following instruction regarding the defense of insanity and the burden of proof:

> All persons are presumed to be sane. The defendant has the burden of proving the defense of insanity by clear and convincing evidence. Clear and convincing evidence is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue. ~~However, if the evidence causes you to have a reasonable doubt concerning the defendant=s sanity, then the presumption of sanity vanishes and the State must prove beyond a reasonable doubt that the defendant was sane.~~

In its report, the Committee stated that this amendment to the instruction is based on section 775.027, Florida Statutes (2001). Section 775.027, entitled AInsanity defense,@

provides in relevant part:

> **(2) Burden of proof. B** The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

Section 775.027 was enacted by the Legislature in 2000, effective June 19, 2000. Prior to the enactment of section 775.027, a defendant in Florida was only required to Aintroduce[] evidence sufficient to create a reasonable doubt about sanity.@ *Bourriague v. State*, 820 So. 2d 997, 998 (Fla. 1st DCA 2002). Section 775.027 places a much higher burden on a defendant in order to present the insanity defense. To date, no Florida court has addressed the constitutionality of section 775.027.

Insanity was a defense at common law. The common law defense was adopted by the Court in *Davis v. State*, 44 Fla. 32, 48-49, 32 So. 822, 827 (1902):

> Section 2369 of our Revised Statutes provides that Athe common law of England in relation to crime, except so far as the same relates to modes and degrees of punishment, shall be of full force in the state where there is no existing provision by statute on the subject.@ There is no statute defining what degree of irresponsibility shall constitute incapacity to commit a criminal act, and hence the common law rule must govern. The rule announced in M=Naghten=s case is substantially the rule laid down in all the modern English authorities, and the weight of authority in this country supports the English rule.

(Citations omitted.) Florida courts have continued to adhere to the common law defense of insanity[1] and intervening procedural rules relating to the mechanics for raising this

[1] In *State ex rel. Boyd v. Green*, 355 So. 2d 789, 791-92 (Fla. 1978), the Court added the following regarding the development of the insanity defense at common law:

> The concept of insanity as an excuse for conduct which would

defense have not altered its existence. *See Wheeler v. State*, 344 So. 2d 244 (Fla. 1977); *Holston v. State*, 208 So. 2d 98 (Fla. 1968).

In *Yohn v. State*, 476 So. 2d 123, 126 (Fla. 1985), the Court stated the following regarding a criminal defendant=s burden in presenting the insanity defense:

> It is true, as the state argues in a companion case to the instant case, *Reese v. State*, 476 So. 2d 129 (Fla. 1985), that the United States Supreme Court has held in *Patterson v. New York*, 432 U.S. 197 (1977), that it is not unconstitutional to place the burden on a defendant to prove he was insane at the time of the commission of the offense. However, we have chosen not to place this burden of proof on the defendant in the state of Florida, but as we have said, to create a rebuttable presumption of sanity which if overcome, must be proven by the state just like any other element of the offense. We do not reconsider that policy in this decision.FACDL submits that the Legislature did not have the authority to increase the burden of proof of a defendant relying on the insanity defense; pursuant to *Yohn*, only this Court can make such a Apolicy@ decision.[2]

> otherwise be punishable as a crime developed early in the history of English law. While it has been said that originally insanity was not a defense in the courts, the procedure being for the jury to find the accused guilty with a special verdict that he was mad, whereupon he would receive a royal pardon, it was early decided that there could be no crime where at the time of the act charged the accused was so insane as to be unable to form a guilty intention, although the court emphasized that insanity must be clearly shown and that not Aevery frantic and idle humour@ would exempt from punishment. Ability to distinguish between right and wrong at the time of the act charged was soon recognized as the test to be applied, and this test received its classic formulation in the advisory opinion of the judges in M=Naghten=s Case, stating that the test of mental responsibility is whether the accused Awas labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.@

[2] In 1977, the Legislature enacted section 918.017(1), Florida Statutes (1977), which provided for a bifurcated trial procedure whereby a separate trial on the issue of insanity followed a trial on the issue of guilt or innocence. In *State ex rel. Boyd v. Green*,

Florida case law is clear that setting the burden of proof is a procedural matter. In *Shaps v. Provident Life & Accident Insurance Company*, 826 So. 2d 250, 254 (Fla. 2002), the Court held:

> Although no Florida case has squarely addressed this issue, generally in Florida the burden of proof is a procedural issue. *See Walker & LaBerge, Inc. v. Halligan*, 344 So. 2d 239, 243 (Fla. 1977) (ABurden of proof requirements are procedural in nature.@); *Ziccardi v. Strother*, 570 So. 2d 1319, 1321 (Fla. 2d DCA 1990) (modification of the burden of

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355 So. 2d 789 (Fla. 1978), the Court concluded that section 918.017 was unconstitutional. The trial judge in *Boyd* held that the new statute abolished the defense of insanity. The Court reversed and held that trial court=s ruling was erroneous and reiterated that the defense of insanity, as established at common law, still exists in Florida. The Court further held that the bifurcated trial procedure established by the Legislature denied a defendant his right to due process of law. In a concurring opinion, Justice England stated the following:

> Whether the same or different jury considers insanity, however, it seems clear to me that the legislature overstepped constitutional bounds when it elected to shift the presentation of evidence on the insanity issue into a second stage of trial proceedings. It is our constitutional responsibility alone to prescribe the Acourse, form, manner, means, method, mode, order, process or steps@ by which the substantive elements of a crime are presented in a criminal proceeding. *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65, 66 (Fla. 1972) (Adkins, J., concurring). I would hold Section 921.131(1) invalid as an encroachment on this Court=s exclusive power to Aadopt rules for the practice and procedure in all courts.@ Article V, Section 2(a), Florida Constitution.

Boyd, 355 So. 2d at 795 (England, J., concurring). Pursuant to *Boyd*, and specifically Justice England=s concurring opinion, section 775.027 is invalid as an encroachment on the Court=s exclusive power to Aadopt rules for the practice and procedure in all courts.@ Art. V, ' 2(a), Fla. Const. It is the Court=s constitutional responsibility alone to prescribe the Acourse, form, manner, means, method, mode, order, process or steps@ by which the substantive elements of a crime are presented in a criminal proceeding. *Boyd*, 355 So. 2d at 795 (England, J., concurring). The Legislature=s attempt to increase the burden of criminal defendant=s relying on the insanity defense is therefore unconstitutional.

> proof in a statute did not amount to substantive change in the law). This Court has explained, A[S]ubstantive law prescribes duties and rights and procedural law concerns the means and methods to apply and enforce those duties and rights.@ *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994); *see Benyard v. Wainwright*, 322 So. 2d 473, 475 (Fla. 1975). The burden of proof clearly concerns the means and methods to apply and enforce duties and rights under a contract and we find no reason to depart from this general rule for conflict-of-laws purposes.

This principle was recently affirmed by the Court in the context of an affirmative defense in a criminal case. In *Amendments to Florida Rules of Criminal Procedure and Florida Rules of Appellate Procedure*, 875 So. 2d 563 (Fla. 2004), the Court considered a proposed rule regarding the procedure to raise mental retardation as a bar to a death sentence (Florida Rule of Criminal Procedure 3.203). Rule 3.203 was proposed in response to the Legislature=s enactment of section 921.137, Florida Statutes, which bars the imposition of death sentences on mentally retarded persons.[3] Section 921.137 placed the burden of establishing mental retardation on the defendant by Aclear and convincing evidence.@ *See* ' 921.137(4), Fla. Stat. However, in adopting rule 3.203, the Court did not adopt the burden of proof set forth in section 921.137. Chief Justice Pariente explained the reason for the omission:

> Because of concerns about whether the burden of proof is a substantive or procedural requirement and further concerns over whether a Apreponderance of evidence@ burden of proof may be constitutionally required under *Atkins* and *Cooper* [*v. Oklahoma*, 517 U.S. 348 (1996)], it

[3] The rule was also proposed in response to the United States Supreme Court=s decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), in which the Supreme Court held that the execution of the mentally retarded constitutes excessive punishment under the Eighth Amendment.

> is preferable to omit the burden of proof enunciated by the legislature from our rule of procedure regarding mental retardation. In exercising our rulemaking authority, we have on several occasions declined to adopt proposed rule amendments because of doubts over their constitutionality. *See In re Amendments to the Florida Evidence Code*, 782 So. 2d 339, 341-42 (Fla. 2000) (citing Agrave concerns about the constitutionality@ of an amendment to the evidence code); *Amendments to the Florida Rules of Criminal Procedure*, 794 So. 2d 457, 457 (Fla. 2000) (declining to adopt rule that would have removed requirement of attesting witnesses to out-of-court waiver of counsel A[s]ince all waivers of counsel must be voluntary@). Our omission of a burden of proof from the rule we adopt today leaves the trial courts obligated to either apply the clear and convincing evidence standard of section 921.137(4), or find that standard unconstitutional in a particular case. The issue will then come to us in the form of an actual case or controversy rather than a nonadversarial rules proceeding.

Amendments to Florida Rules of Criminal Procedure and Florida Rules of Appellate Procedure, 875 So. 2d at 567 (Pariente, C.J., concurring).

Because no Florida court has considered the propriety of increasing the burden of a defendant relying on the insanity defense, FACDL suggests that it would be appropriate for the Court to refrain from adopting the proposed instruction until the issue is thoroughly addressed in the context of an actual case and controversy, consistent with Chief Justice Pariente=s reasoning set forth above.

Finally, regarding the proposed Asocietal standards@ instruction, FACDL notes that at least one other state (Colorado)[4] that has considered the issue has added the following

[4] The insanity jury instruction in Colorado provides:

> [T]he phrase Aincapable of distinguishing right from wrong@ refers to a cognitive ability, due to a mental disease or defect, to distinguish right from wrong as measured by a societal standard of morality, even though the person may be aware that the conduct in question is criminal.

caveat to a similar instruction:

> [I]n deciding legal insanity, a jury could properly consider evidence that a defendant=s cognitive ability to distinguish right from wrong has been destroyed as a result of a psychotic delusion that God has demanded the conduct. [In *People v. Serravo*, 823 P.2d 128 (Colo. 1992), the Colorado Supreme Court] cited the often used example of a mother who murders the child she loves under a delusion that God appeared to her and ordered the sacrifice. Under such circumstances, such a delusion would Aobscure moral distinctions@ and render the mother incapable of distinguishing right from wrong.

People v. Galimanis, 944 P.2d 626, 630-31 (Colo. Ct. App. 1997). If the Court is inclined to adopt the proposed Asocietal standards@ instruction, FACDL respectfully requests the Court clarify that a jury could properly consider evidence that a defendant=s cognitive ability to distinguish right from wrong has been destroyed as a result of a psychotic delusion that God has demanded the alleged conduct.

> The phrase Aincapable of distinguishing right from wrong@ does not refer to a purely personal and subjective standard of morality.

Col. J.I.-Crim. No. 3:10-A (1993 Supp.).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

The Honorable Dedee S. Costello
Bay County Courthouse
P.O. Box 1089
Panama City, FL 32402-1089

by mail delivery this 15th day of November, 2005.

Respectfully submitted,

/s/ Paula S. Sanders

PAULA S. SAUNDERS
Co-Chair, FACDL Amicus Curiae Committee
Office of the Public Defender
Leon County Courthouse
301 South Monroe Street
Tallahassee, Florida 32301
(850) 488-2458/fax (850) 487-7964
FL Bar No. 308846

/s/ Michael Ufferman

MICHAEL UFFERMAN
Co-Chair, FACDL Amicus Curiae Committee
Michael Ufferman Law Firm, P.A.

660 East Jefferson Street
Tallahassee, Florida 32301
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227

Amicus Counsel for **FACDL**