

**IN THE
SUPREME COURT OF FLORIDA**

**IN RE: STANDARD JURY INSTRUCTIONS
IN CRIMINAL CASES (NO. 2005-5)**

CASE NO.: SC05-1622

**COMMENTS BY WM. J. SHEPPARD ON PROPOSED AMENDMENTS TO
CRIMINAL JURY INSTRUCTIONS REGARDING INSANITY DEFENSE
IN CRIMINAL CASES**

TO: The Chief Justice and Justices of Supreme Court of Florida:

The Court should not adopt the proposed amendments to jury instructions referenced above regarding the insanity defense. I fully concur with the comments submitted by the Florida Association of Criminal Defense Lawyers, of which I am a member and former director,¹ setting forth proper and appropriate reasons for the Court to decline approval of these proposed instructions. Alternatively, if the Court is inclined to approve any amendment to the insanity instructions, the amendments proposed by the Committee should be rejected in favor of an instruction that is both legally more sound and less confusing for members of juries.

I submit the following comments in the event that the Court decides to adopt any amendments to the insanity instructions rather than following the urging of the FACDL. The proposed instructions regarding the burden of proof by clear and convincing evidence describe that burden improperly and misleadingly as it relates to any burden that might arguably be placed on a criminal defendant. A more appropriate “clear and convincing evidence” instruction has been developed by the federal courts in the specific realm of the defense of insanity in criminal cases.

¹ I also have been a board certified criminal trial lawyer in Florida since 1987, when certification was first recognized in that area.

The federal insanity defense statute was amended in 1983 to place the burden of proof on the defense to establish the insanity defense by clear and convincing evidence. *See* 18 U.S.C. §17. Since that amendment, the federal courts have prepared instructions and decided a number of issues with respect to the description of the clear and convincing evidence standard for the insanity defense. The most widely accepted instruction in those courts utilizes the term “highly probable” to describe the result necessary in the minds of the finders of fact for evidence to be “clear and convincing.”

This Court has previously recognized, in the context of judicial discipline proceedings, that clear and convincing evidence is more than a preponderance but less than proof beyond a reasonable doubt. *See Inquiry Concerning a Judge No. 93-62, Re: P. Kevin Davey*, 645 So.2d 398, 404 (Fla. 1994), *quoting*, *In Re: LaMotte*, 341 So.2d 513, 516 (Fla. 1977). In the specific context of an insanity defense to a criminal charge, the Eleventh Circuit also has noted that “although the ‘clear and convincing’ standard is a fairly high one, ‘clear and convincing’ does not call for the highest levels of proof.” *United States v. Owens*, 854 F.2d 432, 435-36 (11th Cir. 1988). The United States Supreme Court has described the “clear and convincing” standard as an “intermediate standard” lying somewhere between proof by a preponderance of the evidence and proof beyond a reasonable doubt. *Addington v. Texas*, 441 U.S. 418, 432 (1979). Clear and convincing is a lower standard than “unequivocal” or “proof that admits of no doubt.” *Id.*

The “highly probable” jury instruction language is utilized by the leading treatise on federal jury instructions in its model insanity defense instruction. *See O’Malley, Federal Jury Practice and Instructions*, §19.03 (West 2000 and 2005 supp.) (“The defendant must prove [his] [her] insanity at the time of the offense by clear and convincing evidence, that is, the defendant must show that it is highly probable that [he] [she] was insane at that time.”). The United States

Supreme Court has also utilized the term “highly probable” to describe clear and convincing evidence. *Colorado v. New Mexico*, 467 U.S. 310, 316-17 (1984). The federal Sixth Circuit instructions on clear and convincing evidence of insanity tells jurors that the standard “does not require proof beyond a reasonable doubt; what the defendant must prove is that it is highly probable that he was insane.” *Pattern Jury Instructions of the District Judges Association of the Sixth Circuit*, Instruction No. 6.04 (2005). The federal First and Ninth Circuits’ pattern insanity instructions also use the “highly probable” standard for “clear and convincing” evidence. See *Pattern Jury Instructions of the First Circuit, Criminal Cases*, Instruction No. 5.07 (1998); *Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit*, Instruction No. 6.4 (2000). In the context of a civil theft claim, the federal Eleventh Circuit pattern instructions state that such a claim:

must be proved by clear and convincing evidence – not just a preponderance of the evidence.

Clear and convincing evidence is something more than a preponderance of the evidence, it is evidence that leaves you with a firm conviction that the claim is true.

Pattern Jury Instructions (Civil Cases), prepared by the Committee on Pattern Jury Instructions, District Judges Association, 11th Circuit (2000).

All of the foregoing authorities recognize that “clear and convincing” is an intermediate standard of proof that lies somewhere between a preponderance of the evidence and proof beyond a reasonable doubt. The instructions proposed by the Committee in this matter fail to recognize the intermediate nature of the clear and convincing standard and effectively would require juries to find insanity proven beyond a reasonable doubt or even beyond all doubt, which is a standard that not even the Florida Legislature sought to impose. While the Court in *Davey* has described certain considerations held important in determining whether evidence is clear and

convincing, the similar description of the standard of proof that the Committee proposes is unhelpful and even misleading to jurors, particularly in criminal cases. The federal instructions, by using straightforward terms and by informing juries that the clear and convincing standard is greater than a preponderance but less than beyond a reasonable doubt, provide juries with a more informative context that is not so misleading or confusing for lay jurors as the instruction proposed by the Committee in this matter. Accordingly, the Court should decline to adopt the instruction proposed by the Committee for the reasons stated by the Florida Association of Criminal Defense Lawyers or, alternatively, if the Court adopts any proposed instruction, the Court should adopt an instruction on the clear and convincing standard of proof consistent with the above-cited authorities.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a copy of the foregoing has been furnished to **The Honorable Dedee S. Costello, Circuit Judge**, Bay County Courthouse, Post Office Box 1089, Panama City, Florida 32402-1089, by United States Mail, this _____ day of December, 2005.

ATTORNEY