IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1890

IN RE: STANDARD JURY
INSTRUCTION IN CRIMINAL CASES
PENALTY PHASE OF CAPITAL CASES
_____/

COMMENTS TO AMENDMENTS TO FLORIDA RULE OF CRIMINAL PROCEDURE

COMES NOW the Office of the Attorney General, by and through undersigned counsel and files its comments in the above-styled case, as follows:

PRELIMINARY COMMENTS

The Office of the Florida Attorney General strongly opposes any changes or revisions to the current Florida Standard Jury Instruction (Crim.) 7.11, - Penalty Proceedings-Capital Cases. As explained in more detail hereinafter, the two proposals currently before the Court published in the December 1, 2005, Florida Bar News, either confuse the state of the law on this subject, distort the role of each critical player in the process, misstate the law or create a new or unwarranted process that will not serve to better the underpinnings of the statute.

To date there has been no explanation as to why either of the two proposals is necessary or mandated by case authority or legislative enactment.

Moreover, the Office of the Attorney General adopts the Comments of the Twenty State Attorneys Acting Together Through the Florida Prosecuting Attorneys Association, filed December 21, 2005, and supports the comments made therein. Undersigned counsel would also join in requesting oral argument in the instant rule proposal.

Proposal One

1. The proposed changes to the standard jury instructions in Proposal One are unnecessary, redundant, misleading and inconsistent with the law as it now stands and, therefore, should be rejected by this Court. Any diminishment or modification as to the role of the players, to–wit: the trial court and the jury, is unwarranted. Continually reinforcing the notion that the jury's "recommendation is given great weight" does not and will not make the statute any more constitutional.

2. Mistatements or confusion in the proposed jury instructions abound. For example, one of the first recommended changes is to the instruction--given after the taking of evidence and argument. The proposal reads as follows:

> <u>The sentence that you recommend to the court must be based upon the facts as you find them from the evidence and the law. If,</u>

> after weighing the aggravating and mitigating circumstances, you determine that the aggravating factors found to exist sufficiently outweigh the mitigating factors; or, in the absence of mitigating factors, if you find that the aggravating factors alone are sufficient, you may exercise your option to recommend that a death sentence be imposed rather than a sentence of life in prison without the possibility of parole. However, regardless of your findings with respect to aggravating and mitigating circumstances you are never required to recommend a sentence of death. ~~You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations.~~
>
> The process of weighing aggravating and mitigating factors to determine the proper punishment is not a mechanical process. The law contemplates that different factors may be given different weight or values by different jurors. In your decision making process, you, and you alone, are to decide what weight is to be given to a particular factor. In these proceedings it is not necessary that the advisory sentence of the jury be unanimous.

The Committee recommends that the jury should be instructed to determine--"whether sufficient aggravating circumstances exist that outweigh any mitigating circumstances found to exist." This instruction is not only contrary to Fla.Stat. §921.141(2)(a), which provides that after hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances

found to exist, but, it is also "inconsistent" with the standard jury instruction given to the jury before taking evidence which instructs the jury to determine whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances. This Committee amendment, like many of the others, can only serve to confuse and mislead the jury with an inaccurate instruction.[1]

Moreover, language proposed that urges "regardless of your findings with respect to aggravating and mitigating circumstances you are never required to recommend a sentence of death," is totally misplaced and promotes non-compliance with the law. Although a jury is "never required to recommend the death penalty" regardless of whether the aggravating factors outweigh the mitigating factors, see, e.g., Brooks v. State, 762 So.2d 879 (Fla. 2000); Franqui v. State, 804 So.2d 1185 (Fla. 2001); Cox v. State, 819 So.2d 705 (Fla. 2002); Floyd v. State, 850 So.2d 383 (Fla. 2002), the Court has also stated that it is proper to refuse to instruct the jury on "mere mercy", or "that life could be

[1] Additionally, portions of the recommended changes in the same paragraph are simply grammatically incorrect. As amended, the sentence reads, *however, the law requires that you render an advisory sentence what punishment should be imposed upon the defendant.* At a minimum, this sentence needs to be corrected to read as follows: ...As you have been told, the final decision as to what punishment shall be imposed is my responsibility; however, the law requires that you render an advisory sentence **as to** what punishment should be imposed upon the defendant. ~~aggravating circumstances found to exist.~~

recommended even though there is no mitigating circumstances", see Mendyk v. State, 545 So.2d 846 (Fla. 1989); Dufour v. State, 495 So.2d 154 (Fla. 1986); Kennedy v. State, 455 So.2d 351 (Fla. 1984); Lemon v. State, 456 So.2d 885 (Fla. 1984), and the trial court is not required to give an instruction on jury's pardon power. Foster v. State, 614 So.2d 455 (Fla. 1993). See also Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190 (1990). Such an institutionalized instruction potentially promotes the arbitrariness in the determination of the death penalty that the United States Supreme Court found was not present in Florida's statute in Proffit v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976). In Dougan v. State, 595 So.2d 1, 4 (Fla. 1992), this Court specifically rejected the giving of such an instruction on the basis that it could lead to arbitrariness in the imposition of the death penalty

3. The committee's recommended changes to the mitigation instruction is also not supported by the law. In addition to the statutory "catch-all" set forth in Fla.Stat. §921.141(6)(h),[2] the committee adds:

> "9. All other evidence presented during the trial or penalty phase proceeding which you find to be mitigating."

[2] The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty. Fla.Stat. §921.141(h).

This instruction invites the jury to consider facts and factors that are not mitigating in that they may be unrelated to the defendant's culpability, having nothing to do with the defendant's character or record or the circumstances of the crime, and thus are irrelevant to sentencing. Lockett v. Ohio, 438 U.S. 586 (1978); Franklin v. Lynaugh, 487 U.S. 164, 174 (U.S. 1988) (Lingering doubts are not over any aspect of petitioner's "character," "record," or a "circumstance of the offense); Campbell v. State, 679 So.2d 720, 725 (Fla. 1996) (The victim's opposition to the death penalty is irrelevant to sentencing); King v. Dugger, 555 So.2d 355, 359 (Fla. 1990) (Finding no error in rejecting proposed mitigating evidence that King would have to serve at least twenty five years of a life sentence as it was irrelevant to his character, prior record, or the circumstances of the crime.)[3]

[3] For example, the jury should not be permitted to consider that neither the victim, Campbell v. State, 679 So.2d 720 (Fla. 1996), nor the victim's family want death, Jackson v. State, 498 So.2d 406 (Fla. 1986); Floyd v. State, 497 So.2d 1211 (Fla. 1986); or defense witnesses' expression of their personal opinions concerning the appropriateness of the death penalty, Thompson v. State, 619 So.2d 261 (Fla. 1993); the deterrent effect of the death penalty, the merits of the cost of the death penalty, or the description of the manner of the defendant's death, Shriner v. State, 386 So.2d 525 (Fla. 1980); Porter v. State, 429 So.2d 293 (Fla. 1983); Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985); Hitchcock v. State, 578 So.2d 685 (Fla. 1990) vacated on other grounds Hitchcock v. Florida, 505 U.S. 1215, 112 S.Ct. 3020 (1992), Hitchcock v. State, 614 So.2d 483 (Fla. 1993); Johnson v. State, 660 So.2d 637 (Fla. 1995); or the State's offer of life imprisonment in return for guilty plea, Hitchcock v. State, supra

4. The committee also recommends the use of special verdict forms and requires the jury to perform functions- -such as making specific findings as to aggravating and mitigating circumstances. Under the present scheme, juries do not make such findings and, absent the legislature's articulation that they must do so, it would be inappropriate and unconstitutional for this Court to alter the jury's function.

5. Further, this Court, in Steele, infra, has recently rejected the requirement of special verdict forms. This portion of the proposal is clearly contrary to the law and should be rejected. See, State v. Steele, 2005 Fla. LEXIS 2043, 30 Fla.L.Weekly S677 (Fla. 2005) (holding that a trial court departs from the essential requirements of law in a death penalty case by using a penalty phase special verdict form that details the jurors' determination concerning aggravating factors found by the jury.)[4]

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or other plea negotiations. Happ v. State, 596 So.2d 991 (Fla. 1992); Donaldson v. State, 722 So.2d 177 (Fla. 1998). Thus to permit this instruction would inject into the jury deliberations evidence that is not legally relevant to their consideration of the appropriate penalty.

[4] The proposal as to the new "verdict form" requires jurors state how many found "premeditation", how many found "felony murder", and, if felony murder, list the felony. These special verdict forms for the penalty phase are unnecessary and serve no purpose other than to "change the process" and "create confusion" among the jurors. The Court, in Steele, and the United States Supreme Court have repeatedly rejected the claim that a special verdict form is necessary. See Brown v. State,

Proposal Two

7. In Proposal Two the committee recommends changing Florida's death penalty scheme. As the proposed changes are dependant on either this Court or the United States Supreme Court finding Florida's statute unconstitutional or the Florida legislature changing our death penalty scheme any suggestions by committee are not only premature, but, are also inappropriately submitted to this Court, rather than the legislature. Sims v. State, 754 So. 2d 657, 668 (Fla. 2000) (No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.)

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473 So.2d 1260, Buford v. State, 492 So.2d 355 (Fla. 1985). In Schad v. Arizona, 501 U.S. 624, 645, 111 S.Ct. 2491 (1991) (the Court held that the Constitution did not require the jury to come to a unanimous decision on the theory of first-degree murder and that separate verdict forms for felony and premeditated murder were not required.) This Court has rejected the claim that the Supreme Court decisions in Ring v. Arizona, 536 U.S. 584, 122 S.Ct 2428 (2002), and Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), have overruled the decision in Schad. Mansfield v. State, 911 So.2d 1160, 1178-1179 (Fla. 2005). There is no purpose in requiring the jury to specify by a number how many found the defendant guilty of first degree murder. Such has absolutely no bearing on whether the death penalty was appropriate. For, in fact, the trial court still must exercise its own independent judgment on sentencing. Although there have been some cases where a trial court has given such a verdict form, discouragement of the practice by individual courts must be enforced, just as the use of "special verdict forms for the penalty phase" was in State v. Steele, supra. Likewise, rejection of the proposal for a special verdict form for first degree murder must also be discouraged.

8. The committee suggests that this Court might not be aware of the legislative actions of other states with regard to satisfying the dictates of Ring. [Committee letter, dated October 5, 2005, page 5]. The committee did not have the benefit of this Court's holding in State v. Steele, 2005 Fla. LEXIS 2043 (Fla. 2005), which clearly demonstrates this Court's familiarity with the law in other states, as well as that emanating from the United States Supreme Court.

9. Although the Court in Steele implicitly recognized that other states have changed their statutes because of possible constitutional issues, it recognized it did not have the power to change the statute to make it "conform" to the schemes which other jurisdictions have adopted, hoping that they might settle upon a formula that will withstand any future challenges.

Since this Court does not have the constitutional power to make substantive changes to the statute, the committee's recommendations in Proposal Two should be rejected.

CONCLUSION

For the foregoing reasons, the undersigned urges this Court reject the proposals as to any changes to jury instructions in capital cases.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Hon. Dedee S. Costello, Committee Chair, Bay County Courthouse, P.O. Box 1089, Panama City, FL 32402-1089; to Hon. O.A. Eaton Jr., Committee Chair, 101 Bush Boulevard, Sanford, FL 32773; to Arthur I. Jacobs, General Counsel, Florida Prosecuting Attorneys Association, 961687 Gateway Boulevard, Ste. 2011, Fernandina Beach, FL 32034-9159, and to Christopher White, 101 Bush Boulevard, Sanford, FL 32773, this 9th day of January, 2006.

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CAROLYN M. SNURKOWSKI
Asst. Deputy Attorney General

Notice of Compliance

This pleading was produced using Courier New 12 point, a font which is not proportionally spaced.

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CAROLYN M. SNURKOWSKI
Assistant Deputy Attorney General