

IN THE
SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES - PENALTY PHASE OF CAPITAL TRIALS	Case No. SC05-1890
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COMMENTS OF
THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The Florida Association of Criminal Defense Lawyers (FACDL), by and through the undersigned counsel, offers the following comments regarding the proposed jury instructions and verdict forms in capital cases. These comments are directed to Proposal One of the Criminal Court Steering Committee.¹

I. Appendix 1

FACDL supports many of the proposed amendments in Appendix 1, especially those which emphasize that aggravating factors must be found beyond a reasonable doubt, advise the jury that it is never required to recommend a sentence of death, and explain the rules for deliberation and time to reach a verdict.

FACDL objects to the instruction regarding victim impact evidence. The proposed

¹FACDL reserves its comments to Proposal Two pending any statutory changes or future court decisions which impact the present statutory scheme.

language regarding victim impact evidence is confusing at best and misleading at worst. In one sentence the jury is told the evidence **A**may be considered by you[@]without any further guidance and in the next sentence, the jury is told not to consider the evidence as an aggravating circumstance. The jury should not be advised that it can consider evidence for one purpose when the sole purpose of the penalty phase is to weigh the aggravating and mitigating evidence and recommend a penalty. FACDL suggests that as long as victim impact evidence is allowed to be presented to the jury, the jury should simply be told that such evidence may not be considered in its decision as to the punishment and proposes the following modification to the instruction:

You have heard testimony from the (family) (friends) (colleagues) of (decedent). This evidence is presented only to show the victim=s uniqueness as an individual and the resultant loss by (decedent=s) death. However, you may not consider this evidence as an aggravating circumstance. Your recommendation to the Court must be based solely on the aggravating circumstances and the mitigating circumstances upon which you have been instructed.

FACDL is also concerned about the amended language in the instruction which reads: **A**It is to the evidence introduced during the guilt phase of the trial and in this proceeding, and to it alone, that you are to look for that proof.[@] While this instruction may be a correct statement of the law in most cases, FACDL questions the propriety of advising the jury to consider evidence introduced during the guilt phase in situations where evidence is properly admitted during the guilt phase but which would not be admissible in the penalty phase. For example, a defendant who testifies in the guilt phase may be impeached with prior convictions for felonies or crimes of dishonesty, which

offenses do not constitute felonies involving the use or threat of violence and thus do not qualify as an aggravating factor. Allowing the jury to consider that evidence from the guilt phase would be tantamount to allowing the jury to consider non-statutory aggravation. The phrase "during the guilt phase of the trial" is inappropriate in cases where evidence is introduced in the guilt phase which would be impermissible in the penalty phase. The instruction should simply read "in this proceeding" so as not to bring unnecessary attention to objectionable evidence from the guilt phase.

II. Appendix 2

FACDL endorses the use of special verdict forms in the guilt phase. The proposed verdict form will facilitate both trial and appellate review of first degree murder cases where the state relies on alternative theories of prosecution. It will guide the trial court in determining the applicable instructions on aggravating factors for the penalty phase and it will aid this Court in its review of evidentiary issues, as well as the sufficiency of the evidence as to either premeditated or felony murder. FACDL urges this Court to adopt the proposed verdict form.

III. Appendix 3

FACDL also believes that the verdict forms in the penalty phase should specify the aggravating circumstances found by the jury and the numerical vote of the jurors as to each aggravating factor. However, making specific findings on the mitigating circumstances is problematic for two reasons. First, mitigation is not limited to the

statutorily enumerated mitigating factors but can encompass a host of factors which are not easily quantified. If the verdict form enumerates mitigating factors, it must include either a "catch-all" provision for non-statutory mitigators or identify each of the non-statutory mitigating circumstances presented in the penalty phase. Listing every non-statutory mitigator, however, is cumbersome and may invite the jury to engage in a counting process, contrary to the instructions that "The process of weighing aggravating and mitigating factors to determine the proper punishment is not a mechanical process." The second problem is that there are different standards the jury must apply in evaluating the existence of mitigating and aggravating factors, and listing both the aggravating and mitigating circumstances and asking for a numerical vote as to each would only confuse the jury in applying the different standards and attributing different weight or values to each factor. Since mitigation is unlimited and the jury need only be reasonably convinced of the existence of a mitigating factor, it is unnecessary and impractical to enumerate the mitigators and require a numerical vote.

It is likewise unnecessary to include a numerical vote for a life recommendation. The state has the burden of proving aggravating circumstances beyond a reasonable doubt, and the number of jurors who find an aggravating factor may be a determinative factor in whether the state has met its heavy burden. The defense does not carry a burden of proof in establishing mitigating circumstances. The jury must only be reasonably convinced that a mitigator exists, and the jury is instructed that regardless of its findings with respect to aggravating and mitigating circumstances, it is never required to

recommend a sentence of death. For these reasons, any numerical vote as to the mitigators and as to a life recommendation is ill-advised.

IV. Appendix 3A

If the Court rejects the proposed verdict form with respect to the numerical vote on the mitigating factors and life recommendation, the first paragraph of the proposed new instructions in Appendix 3A should be amended accordingly. Similarly, the third paragraph of the proposed instruction and the phrase "or mitigating circumstance" in the final paragraph should be deleted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to The Honorable O.H. Eaton, Jr., Criminal Justice Center, 101 Bush Boulevard, Sanford, Florida 32773, by mail delivery this 3rd day of January, 2006.

Respectfully submitted,

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