IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES - PENALTY PHASE OF A CAPITAL CASE
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Case No. SC05-1890

RESPONSE OF THE CRIMINAL COURT STEERING COMMITTEE TO THE COMMENTS OF THE ATTORNEY GENERAL THE STATE ATTORNEYS THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS THE COMMITTEE ON STANDARD JURY INSTRUCTIONS (CRIMINAL) AND JOHN K. AGUERO, ESQ.

INTRODUCTION

Some of the comments submitted appear to question the suggestions made by the Criminal Court Steering Committee because they were not submitted through other committees, such as the Jury Instructions Committee. The Criminal Court Steering Committee was created in 2002 for the purpose of developing consistent and expedited recommendations to the Supreme Court regarding changes required by legislative enactments, judicial decisions, or other events or circumstances involving criminal law matters. One of the tasks the Supreme Court specifically gave to the Committee was to "Finalize the committee's recommendations concerning alternate court procedures relating to the penalty phase in capital cases,

as presently addressed in section 921.141, Florida Statutes, in response to recent Supreme Court Rulings." AOSC04-63.

The proposed jury instructions for the penalty phase of a capital case were submitted to the Court with the hope that they would encourage productive discussion resulting in improvements to the standard instructions presently in place.

The proposed changes in the substantive law submitted to the Court were not for the purpose of usurping the authority of the legislature. The proposed changes were submitted under the assumption that Florida's death penalty scheme may not survive close scrutiny by the United States Supreme Court in light of the holdings in *Apprendi v. New Jersey* and *Ring v. Arizona*. The committee believed that suggesting substantive changes would be productive because viable alternatives would be provided to a scheme that many legal scholars believe to be constitutionally defective.

Thus, the committee did not submit the recommendations under consideration as advocates or legislators, but as suggestions from a group of judges who have considerable experience in the trial of capital cases. Accordingly, this response will not address the substantive law matters presented in the comments to Proposal Two but will address the proposed amendment to Rule 3.140 which would require aggravating circumstances to be listed in the indictment.

THE BURDEN OF PROOF

Both the Attorney General and the State Attorneys have pointed out that the proposed instruction on the burden of proof is opposite to the language contained in the statute. They are correct. The language of the statute places the burden of proof on the defendant by requiring the mitigating circumstances to outweigh the aggravating circumstances. This Court has held that giving the standard jury instruction does not result in error. *Kennedy v. State*, 455 So. 2d 351 (Fla. 1984). No authority was cited for that proposition in the opinion. The Criminal Court Steering Committee suggested the proposed language in order to foreclose an argument that trial judges regularly hear. The faculty of the Handling Capital Cases Course has suggested the proposed instruction for several years and one of the reasons this Court does not hear this issue in every death penalty case is because many trial judges use the proposed instruction.

The burden of proof in Florida is a procedural matter. This Court has stated:

> 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) ("Burden of proof requirements are procedural in nature."); *Ziccardi v. Strother*, 570 So.2d 1319, 1321 (Fla. 2d DCA 1990) (modification of the burden of proof in a statute did not amount to substantive change in the law). This Court has explained, "[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.

Thus, the proposed jury instruction does not change substantive law and properly places the burden on the state to sway the jury to recommend a death sentence.

Although in a completely different context, this Court has previously elected to defer addressing the burden of proof issue until an appropriate case is presented. *Amendments to Florida Rules of Criminal Procedure and Florida Rules of Appellate Procedure*, 875 So. 2d 563 (Fla. 2004). The Court may elect to defer addressing this issue again. However, it is an issue that is of concern to trial judges and it will not go away. That is why the committee brought it to the Court's attention.

THE JURY PARDON

The Criminal Court Steering Committee recommended the following language be included in the standard instructions:

> "Regardless of your findings with respect to aggravating and mitigating circumstances, you are never required to recommend a sentence of death."

This instruction is derived from the cases cited in the Steering Committee's October 5, 2005, report and reflects the most recent pronouncements from this

Court. *Franqui v. State*, 804 So. 2d 1185, 1192 (Fla. 2001); *Brooks v. State*, 762 So. 2d 879, 902 (Fla. 2000); *Garron v. State*, 528 So. 2d 353, 359 (Fla. 1988); *Henyard v. State*, 689 So. 2d 239, 249-50 (Fla. 1996). At least one state court of last resort has held this discretion to be mandatory in order for the death penalty to be constitutional. *State v. Dicks*, 615 S.W.2d 126 (Tenn. 1981).

This discretion is not the same thing as a jury pardon. Juries "pardon" defendants in some cases by returning a verdict of guilt to a lesser offense than the offense charged or by finding a defendant not guilty when the evidence is otherwise. Jury pardons have nothing to do with the imposition of a sentence. The Attorney General relies upon the case of *Dougan v. State*, 595 So.2d 1, 4 (Fla. 1992), as precedent to reject this instruction. The *Per Curiam* opinion in that case was joined by a three justice minority and one justice concurring in the result. The opinion was written considering the circumstances of the case and the arguments made. It does not represent the most recent pronouncements from this Court.

The Standard Jury Instructions Committee rejected this proposed instruction except for cases involving prosecutorial misconduct. The Steering Committee suggests that if the instruction is appropriate in cases of misconduct, it is appropriate in all cases, and should be adopted by this Court.

THE "CATCH ALL" MITIGATOR

The Attorney General suggests that the proposed instruction on the "catch-all" mitigator exceeds the language of the statute. It does. This Court has stated,

> A trial court is obligated in a capital prosecution to find and weigh all valid mitigating evidence available in the record at the conclusion of the penalty phase; for these purposes, evidence is "mitigating" if, in fairness or in the totality of the defendant's life or character, it may be considered as extenuating or reducing the degree of moral culpability for the crime committed.

Evans v. State, 808 So. 2d 92 (Fla. 2001), cert. den., 537 U. S. 951, 123 S.Ct. 416, 154 L.Ed.2d 297. The proposed instruction is designed to cover any evidence that is extenuating or reduces the degree of moral culpability for the crime committed.

However, the committee agrees with The Attorney General and The Florida Association of Criminal Defense Lawyers that the proposed instruction may allow the jury to consider matters in evidence during the guilt phase of the trial that are not appropriate and suggests, for now, that the standard jury instruction is sufficient.

THE SPECIAL VERDICT

The Criminal Court Steering Committee recommended the use of a special verdict form requiring the jury to identify aggravating circumstances found beyond a reasonable doubt and show the number of jurors who voted for each aggravating circumstance. This Court, in *State v. Steele*, 30 Fla. L. Weekly S677 (Oct. 12,

2005) (corrected opinion, Oct. 20, 2005), has held this suggestion to be a substantive change and rejected it. The committee hereby withdraws its proposed verdict form.

However, the committee still recommends the use of a special verdict on the issue of whether the jury finds premeditation or felony murder as the basis for the conviction and the vote for each theory. This information is valuable to the trial judge when considering CCP and felony murder as aggravating circumstances. Otherwise, the trial judge has to speculate on the jury's findings when giving the jury recommendation "great weight."

GREAT WEIGHT

The proposed instructions inform the jurors that their recommendation must be given great weight and that a sentence other than that recommended would be imposed only under rare circumstances.

The State Attorneys believe this instruction dilutes the fact that the statutory scheme in Florida requires the trial court to make an independent determination of what ultimate sentence should be imposed. This objection points out one of the obvious flaws in the Florida scheme. If the jury returns a recommendation for a life sentence, a death sentence may only be imposed if the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person

could differ. *Tedder v. State*, 322 So. 2d 908 (Fla. 1975). The opposite is not true. This Court has required trial judges to conduct a separate hearing (*Spencer* hearing) to allow both the state and the defendant to present evidence not considered by the jury. The trial judge may consider this evidence as well as matters of law, or may weigh the evidence differently. But the law requires the trial judge to give "great weight" to the jury's recommendation in most cases and the jury needs to be instructed that the recommendation requires more deliberation than an arbitrary "gut feeling."

In *Floyd v. State*, 850 So. 2d 383 (Fla. 2002), this Court held it was not error to refuse to give this instruction because the standard instruction is sufficient. The committee agrees but suggests that the proposed instruction improves the standard instruction and should be substituted for it.

The two paragraphs following the subheading "Aggravating Circumstances" in the proposed instructions are redundant and the committee suggests the following language be substituted:

> Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision. The aggravating circumstances you may consider are limited to the following: (list)

VICTIM IMPACT

The proposed instruction on victim impact was drafted by the faculty of the

Handling Capital Cases Course and represents an effort to explain victim impact evidence to the jury. The suggested victim impact instruction submitted by The Florida Association of Criminal Defense Lawyers is better than the committee's proposed instruction and the committee would substitute it for the committee proposal. The substituted instruction reads as follows:

> 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.

REASONABLE DOUBT INSTRUCTION

The Florida Association of Criminal Defense Lawyers points out that the proposed instruction on reasonable doubt contains language that may be confusing. The proposed instruction is:

> 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.

The committee agrees the language may be confusing and proposes the following instruction be substituted:

> It is to the evidence (of aggravating circumstances) introduced (in the guilt phase of the trial and) in this proceeding, and to it alone, that you are to look for that proof.

The committee recognizes that there may be cases in which no aggravating circumstances will be presented during the guilt phase and the suggested instruction contemplates that unlikely situation.

PLEADING AGGRAVATING CIRCUMSTANCES IN THE INDICTMENT

JOHN K. AGUERO, ESQ., submitted a letter to this Court in which he objected to the proposal to require aggravating circumstances to be pled in the indictment. His main complaint is the state attorney does not always know the aggravating circumstances that might be available for consideration by the jury and the Court when evidence is submitted to the Grand Jury. He does not explain why the state attorney cannot determine the aggravating circumstances before presenting the case to the Grand Jury and the committee's collective experience does not include a single case where this was a problem. However, if such a case arises, the state attorney can always ask the Grand Jury to amend the indictment. The question the committee considered is whether the aggravating circumstances should be required to be submitted to the Grand Jury and included in the indictment.

This Court authorized trial judges to require the state to disclose aggravating factors in the *Steele* case, but the Court justified the ruling because the legislature increased the number of aggravating factors from six to fifteen, many of which

overlap (doubling), and defendants cannot readily ascertain the aggravating factors upon which the state will rely. The United States Supreme Court has not directly ruled on whether aggravating factors have to be pled in the indictment. However, that Court has identified aggravating factors as the "functional equivalent" of elements of an offense, and current Florida law requires all of the elements of an offense to be pled in the indictment in order to charge a crime. *Apprendi v. New Jersey*, 530 U. S. 466, 494, n.19 (2000); Rule 3.140(d), Fla. R. Crim. P.; *State v. Gray*, 435 So. 2d 816 (Fla. 1983) (the complete failure of an accusatory instrument to charge a crime is a defect that can be raised at any time-before trial, after trial, on appeal, or by habeas corpus). Requiring the aggravating circumstances to be included in the indictment is a relatively simple matter that will foreclose future arguments on the sufficiency of the indictment and the issue of whether the death penalty is a viable penalty in their absence. New Jersey is the latest of a growing number of states that require aggravating factors to be submitted to the Grand Jury and contained in the indictment. *State v. Fortin*, 843 A. 2d 974 (N.J. 2004).

Furthermore, several of the trial judges who are members of the Steering Committee have disclosed a disturbing practice they have personally experienced. That practice is for the prosecutor to make the death penalty an issue when the case has minimal aggravation, death qualify the jury, and then abandon the death

penalty. The practice wastes valuable time and resources by requiring qualified first and second chair attorneys to be appointed, mitigation to be developed for the penalty phase, including the hiring of experts, often at great expense. Additionally, the judge assigned to try the case must be qualified to try death penalty cases. Rule 2.050(b), Fla. R. Jud. Admin. The Steering Committee is hopeful that this practice will cease if the state attorney is required to evaluate the case before submitting it to the Grand Jury.

CERTIFICATE OF FONT SIZE

I herby certify that this brief has been prepared using Times New Roman 14 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing has been furnished by U. S. Mail to Carolyn M. Snurkowski, Esq., Office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050; Hon. Terry D. Terrell, M.C. Blanchard Judicial Center, 190 W. Government St., Pensacola, Florida 32501-5773; Arthur I. Jacobs, Esq., 961687 Gateway Boulevard, Ste. 2011, Fernandina Beach, Florida 32034-9159; Christopher White, Esq., 101 Bush Boulevard, Sanford, Florida 32773; and to John K. Aguero, Esq.,

Drawer S.A.P.O. Box 9000, Bartow, Florida 33831-9000, this 9th day of February, 2006.

Respectfully submitted,

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