IN THE SUPREME COURT OF FLORIDA

NO. SC05-960

IN RE: STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES (NO. 2005-2)

COMMENTS OF THE TWENTY STATE ATTORNEYS ACTING TOGETHER THROUGH THE FLORIDA PROSECUTING ATTORNEYS ASSOCIATION

COMES NOW, THE FLORIDA PROSECUTING ATTORNEYS ASSOCIATION [FPAA], representing the elected State Attorneys for the twenty judicial circuits of Florida, and files these comments to the Florida Supreme Court's Committee on Standard Jury Instructions in Criminal Cases' revisions to Florida Standard Jury Instruction (Crim.) 7.11, – Penalty Proceedings - Capital Cases, as published in the December 1, 2005 edition of the Florida Bar News, stating as follows:

1. The Committee has proposed two revisions in the standard jury instructions given in capital cases. The FPAA submits that because this Court has continually upheld the propriety and constitutionality of the present Standard Jury Instructions there is no reason for these changes. Therefore, it is the FPAA's position that any changes in the standard instructions will open a Pandora's box of unnecessary litigation.

2. In particular, the Committee has requested a change to include the

following instruction:

> I must give your recommendation great weight in determining what sentence to impose. It is only under rare circumstances that I would impose a sentence other than the sentence you recommend.

The FPAA submits that the requested instruction dilutes the fact that the statutory scheme in Florida requires the trial court to make an independent determination of what the ultimate sentence should be. Despite the fact that the jury sentence is repeatedly called an "advisory" sentence, this proposal suggests that the judge's evaluation is significantly dependent upon the jury's recommendation. In fact, Florida law has consistently required the opposite as reiterated in this Court's recent opinion in State v. Steele, 30 Fla.L.Weekly S677, 679 (Fla. Oct. 12, 2005), where it was noted that "that the trial court must independently determine the existence of aggravating circumstances, and the weight to be given each." See also Lambrix v. Singletary, 520 U.S. 518, 531-534, 117 S.Ct 1517 (1997), an opinion of the United States Supreme Court citing Eutzy v. State, 458 So.2d 755 (Fla. 1984) and Tedder v. State, 322 So.2d 908 (Fla. 1975). This Court has repeatedly approved of the standard instruction on a juror's role, see Globe v. State, 877So.2d 663 (Fla. 2004); Melendez v. State, 612 So.2d 1366 (Fla. 1992); Grossman v. State, 525 So.2d 833 (Fla. 1988); and specifically rejected a requirement that a trial court must instruct the jury that "only in rare instances can the trial judge impose a

sentence different than the jury recommends." Floyd v. State, 850 So.2d 383 (Fla. 2002). (Fla. 2002). The FPAA submits that in particular the "rare circumstances" language dilutes the trial court's responsibilities and can be found nowhere in the Florida statute. Thus, the FPAA does not feel it is necessary to change the standard instructions in this manner, especially telling the jurors about when a court may override their recommendation.

The FPAA also suggests that the added language in the instruction which discusses the "great weight" to be given the recommendation should not be personalized with the use of "I," and recommends that if this Court were to decide that additional instructions should be given to the jury as to how their recommendation is considered by the court, that instruction should be as follows:

> "Although the recommendation of the jury as to the penalty is advisory in nature and is not binding, the jury recommendation must be given great weight and deference by the Court in determining what punishment to impose".

This instruction would comport with Tedder v. State, supra.

3. The second revision states that the following should be given only if an improper statement of the law is given by counsel:

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

This is an instruction that promotes the jury's pardon or nullification power. Although this Court has stated that a jury is never required to recommend the death penalty regardless of whether the aggravating factors outweigh the mitigating factors, see, e.g., Henyard v. State, 689 So.2d 239 (Fla. 1996); 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), as stated by Justice Wells in his concurring opinion in Franqui v. State, supra, 804 So.2d at 1199 (Wells, J., concurring), such a statement was never intended to be a standard jury instruction. In fact, this Court and the United States Supreme Court have consistently stated that it is proper to refuse to instruct the jury on mere mercy, or that life could be recommended even though there are no mitigating circumstances. See Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190 (1990); 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); and Lemon v. State, 456 So.2d 885 (Fla. 1984). This Court has specifically held that the trial court was not required to give an instruction on a jury's pardon power. Foster v. State, 614 So.2d 455 (Fla. 1992). To give such an instruction as suggested by the Committee, even as a curative instruction, has the potential to promote the type of arbitrariness in the determination of the death penalty that the United States Supreme Court has condemned and found

was not present in our 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. Furthermore, in Franqui v. State, supra, 804 So.2d at 1194, this Court rejected the argument that such a statement needed to be given as a curative instruction where the judge and prosecutor had misstated the law in this regard. Thus this Court should again reject this request for a jury to be instructed on its option to pardon the defendant. This revision is unnecessary.

3. The FPAA does suggest that the Standard Jury Instructions do need to be amended to include the new aggravating factor that was added by the Legislature this past year: "the capital felony was committed by a person designated as a sexual predator or a person previously designated as a sexual predator who had the sexual-predator designation removed."

Wherefore, the State Attorneys of the Twenty Judicial Circuits of Florida, by and through the Florida Prosecuting Attorneys Association, respectfully request that this Court consider and adopt the Comments set forth herein.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forgoing has been served on the Honorable Dedee S. Costello, Committee Chair, Bay County Courthouse, P.O. Box 1089, Panama City, Florida 32402-1089, on this the ___ day of December, 2005 by U.S. Mail.

By: _____

ARTHUR I. JACOBS
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Comment complies with the font requirements of Fla.R.App.P. 9.210(c)(2).

By: _____
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