IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PASCO COUNTY
2014CF005586CFAXWS
SECTION 3

STATE OF FLORIDA

vs.

ADAM MATOS

DEFENDANT'S OBJECTIONS AND PROPOSED JURY INSTRUCTIONS - FINAL INSTRUCTIONS

On April 13, 2017, the Florida Supreme Court authorized on an interim basis the publication and use of jury instructions: 3.12 (e)(verdict form), 7.11, 7.11(a) and 7.12 as set forth in the appendix to the opinion in *In Re: Standard Criminal Jury Instructions In Captial Cases,*214 So.3d 1236 (Mem)(Fla. 2017). In that opinion the Court specifically stated as follow:

> "In adopting these interim instructions, we express no opinion on their correctness and further note that this authorization forecloses neither requesting additional or alternative instructions, nor contesting the legal correctness of the instructions." *Id* at 1236

THE JURY'S DECISIONS REGARDING AGGRAVATING FACTORS, SUFFICIENCY, WEIHING, AND LIFE OR DEATH

In pertinent part, interim jury instruction 7.11(a) reads:

> In making your decision, you must unanimously determine whether the aggravating factor(s) alleged by the State [has][have] been proven beyond a reasonable doubt.

Fla.Std.Jury Instr. (Crim.) 7.11(a)

This instruction fails to inform the jurors that if, and only if, an aggravating factor has been found unanimously beyond a reasonable doubt, that the jury must then make a second finding, unanimously and beyond a reasonable doubt: whether the aggravating factor(s) found beyond a reasonable doubt is (are) sufficient to warrant a sentence of

death. The Defendant proposes the following additional instructions to correct this instruction.

> The second step in the process is for the jury to determine whether the State has proven beyond a reasonable doubt that the aggravating factor or factors that you found to exist is or are sufficient to impose a sentence of death. The jury must unanimously find beyond a reasonable doubt that the aggravating ~~facotr~~ or facttors found to exist is or are sufficient to impose a sentence of death.
>
> If the jury does not unanimously find that the State has proven beyond a reasonable doubt that the aggravating factor or factors are sufficient to impose a sentence of death, then your verdict must be for a sentence of life imprisonment without the possibility of parole and your deliberations are complete.

GRANTED ✓

DENIED ----------

The Florida Supreme Court held in State v. Perry, 210 S0.3d 630, 633 (Fla. 2016) that "the findings necessary to increase the penalty from a mandatory life sentence to death must be found beyond a reasonable doubt by a unanimous jury." Furthermore, the Florida Supreme Court held that the reasonable doubt standard must be applied to "all aggravating factors to be considered," the finding that "sufficient aggravating factors exist for the imposition of the death penalty", to the finding that "the aggravating factors outweigh the mitigating circumstances," and to the final jury determination for death. Hurst v. State, 210 So.3d 40, 44-45 (Fla. 2016).

THE JURY'S DECISION REGARDING MITIGATION

The jury is instructed in 7.11(a) that the mitigating circumstances must be established by greater weight of the evidence.

The Defendant proposes the following language:

> The third step in the process is for each juror individually to decide whether mitigating circumstances exist. A mitigating circumstance is anything that tends to support a sentence of life imprisonment without the possibility of parole rather than a death sentence. Mitigating circumstances are not limited to the facts surrounding the crime.

> Mitigating circumstances do not need to be proven beyound a reasonable doubt. Mitigating circumstances need only be found to exist. The mitigating circumstances may be established from any evidence in the case. If you determine that a mitigating circumstance exists, you must consider it established and give that evidence such weight as you determine it should receive in reaching your verdict about the appropriate sentence to be imposed. Any juror persuaded as to the existence of a mitigating circumstance must consider it in this case. In orther words, each juror should make his or her own decision about whether a mitigating circumstance exists.

The notions of imposing a "preponderance of tevidence" or "greater weight" burden of proof on mitigation and of requiring a defendant to prove mitigation are statutory and constitutional anathemas for several reasons.

First, at no point in the statutes does Florida law provide for a burden of proof of a mitigating circumstance. There is no statutory language that can be read to have a plain meaning that there is such a burden. Nor is there statutory language from which one could reasonably infer that such a burden exists. The Florida Supreme Court's creation of this burden of proof of a mitigating circumstance is incongruous with the Court's limited role of interpreting law, as opposed to writing it, and is a violation of Art II, 2 §3, Fla. Const.

Second, these limits and hurdles will preclude the individualized sentencing required by the Eighth Amendment to the U.S. Constitution. The U.S. Supreme Court has noted that ". . . as a requirement of individualized sentencing, a jury must have the opportunity to consider all evidence relevant to mititgation, and that a state statute that permits a jury to consider any mitigating evidence comports with that requirement." Kansas v. Marsh, 548 U.S. 274, 285 (2004).

The interim instructions would limit evidence by inserting a burden of proof on the consideration of mitigation by the jury. That is not necessary, because a trial judge will have already considered whether or not the evidence is relevant. The Defendant's proposal is in accord with the broad standard for mitigation. *See* Tennard v. Dretke, 542 U.S. 274, 285 (2004). "[V]irtually no limits are placed on the relevant mitigating

evidence a capital defendant may introduce concerning his own circumstances" (quoting *Eddings*, supra at 114, 102 S.Ct. 869). Limiting the mitigating evidence by setting an artificial hurdle deprives jurors of relevant mitigation. *See* Hitchcock v. Dugger, 481 U.S. 393, 394 (1987) ("We have held that in capital cases, 'the sentencer' 'may not refuse to consider' or 'be procluded from considering' any relevant mitigating evidence", citations omitted.) *See also* Martin v. State, 107 So.3d 281, 319 (Fla. 2012) (". . . a sentencer may not 'refuse to consider, as a matter of law, any relevant mititgating evidence; internal citations omitted).

In the words of Supreme Court Justice Scalia:

> ...we doubt whether it is even possible to apply a standard of proof to the mitigating-factor determination (the so-called "selection phase" of a capital-sentencing proceeding). It is possible to do so for the aggravating-factor determination (the so-called "eligibility phase"), because that is a purely factual determination. The facts justifying death set forth in the Kansas statute either did or did not exist—and one can require the finding that they did exist to be made beyond a reasonable doubt. Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not. . . . In any event, our case law does not require capital sentencing courts "to affirmatively inform the jury that mitigating circumstances need not be proved beyond a reasonable doubt." *Ibid.* In *Buchanan v. Angelone,* 522 U.S. 269, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998), we upheld a death sentence even though the trial court "failed to provide the jury with express guidance on the concept of mitigation." *Id.,* at 275, 118 S.Ct. 757. Likewise in *Weeks v. Angelone,* 528 U.S. 225, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000), we reaffirmed that the Court has "never held that the State must structure in a particular way the manner in which juries consider mitigating evidence" and rejected the contention that it was constitutionally deficient to instruct jurors to " 'consider a mitigating circumstance if you find there is evidence to support it,' " without additional guidance. *Id.,* at 232–233, 120 S.Ct. 727.

Kansas v. Carr, 136 S. Ct. 633, 642, 193 L. Ed. 2d 535 (2016)

IMPOSING A BURDEN OF PROOF FOR MITIGATION ON THE DEFENDANT

The interim instructions improperly assign a burden of proof for mitigation on the Defendant. The provisions state, in pertinent part, as follows: "It is the defendant's burden to prove that mitigating circumstances exist." Fla. Std. Jury Instr. (Crim.) 7.11(a)(proposed). The Defendatn objects to this assignment of the burden of proof.

First, at no point anywhere in the statutes does Florida law provide for a burden of proving the existence of a mitigating circumstance that falls upon the Defendant. The legisllature crafted a burden of proof requirement for the State with regard to the aggravating circumstances. The legislature did not create such a burden for the Defendant to prove mitigation.

Second, requiring a defendant to prove, not simply proffer, mitigation creates a general presumption in favor of the death penalty that would violate the 8th Amendment to the U.S. Constituiton and Art. I, §14, of the Florida Constitution.

Third , the interim instructions placement of the burden of proving mitigating circumstances on the Defendant is contrary to U.S. Supreme Court case law on this topic. Mitigation may arise from the circumstances of the case rather than the limited list provided by the interim instructions. For example, in Lockett v. Ohio, 438 U.S. 586, 590 (1978), the prosecutor's evidence showed that Lockett never intended to kill anyone nor that anyone be killed during the robbery of a shop.

Consideration of relevant mitigation is unlimited and does not require a particular burden of proof under the Eighth Amendment. Since the trial court would have already limited the mitigation to evidence that is relevant, the interim instruction is misleading and inappropriate. See *Lockett*, 438 U.S. 604 – 605. A ". . . Sentencer may not refuse to consider or 'be precluded from considering' any relevant mitigating evidence" Skipper v. South Carolina, 476 U.S. 1, 4 (1986) (quoting Eddings v. Oklahoma, 455 U.S. 104 114 (1982).

LIFE WITHOUT THE POSSIBLITY OF PAROLE MEANS

For murders committed after May 25, 1994, juries are instructed that "The

punishment for this crime is either life imprisonment without the possibility of parole or death." Because Jurors are sometimes confused, bring in misconceptions, and/or are just wrong about the law, an additional sentence clarifying the issue would resolve the matter, See EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS; *The Florida Death Penalty Assessment Report An Analysis of Florida's Death Penalty Laws, Procedures and Practices,* Chapter 10, American Bar Association 2006, as later relied upon in *In Re Standard Jury Instructions In Criminal Cases-Report No. 2005-2. In Re Standard Jury Instructions In Criminal Cases-Penalty Phase of Capital Trials,* 22 So.3d 17 (Mem)Fla. 2009). See also, Sundby, Scott E. (2005) *A LIFE AND DEATH DECISION,A Jury Weighs The Death Penalty,* New York, Palgrave MacMillan, Print. Based on interviews by the Captial Jury Project and the author of 1,155 capital jurors from 340 trials in 14 states.

The Defendant proposes the following language to better comport overall with the 8th Amendment to the U.S. Constitution and Art. I, §17 of the Florida Constitution:

"A sentence of life without parole means that the defendant will never be released from prison."

GRANTED ✓

DENIED _____

THE WEIGHING PROCESS

The Defendant proposes the following language to guide the jury in the weighing process:

> The fourth step in the process is for each of you to determine whether the aggravating factor or factors that you have unanimously found to exist outweigh(s) the mitigating circumstance(s) that you have individually found to exist. The process of weighing aggravating factors and mitigating circumstances is not a mechanical or mathematical process. In other words, you should not merely total the number of aggravating factors and compare that number to the total number of mitigating circumstances.
>
> The State has the burden to prove to each of you, beyond a reasonable doubt, that the aggravating factor or factors that the jury has unanimously found to exist outweigh(s) the mitigating circumstance(s) that each of you

have individually found to exist.

If the jury does not unanimously find that the State has proven beyound a reasonable doubt that the aggravating factor or factors outweighs the mitigating circumstance(s), then your verdict must be for a sentence of life imprisonment without the possibility of parole and your deliberations are complete. To reflect this verdict, sign and date the Sentencing Verdict Form. If, however, the jury unanimously finds that the State has proven beyound a reasonable doubt that te aggravating factor or factors outweigh(s) the mitigating circumstance(s), you should sign Verdict Form 3 and proceed to the final step.

GRANTED_____

DENIED _____

FINAL STEP IN DETERMINING THE SENTENCE

The Defendan requests the following language for the last step in the decision-making process:

The final step in this phase of the trial is for each of you to determine whether the State proved beyond a reasonable doubt that the defendant should be sentenced to death instead of life imprisonment without the possibility of parole. The Court may not impose a sentence of death unless each juror individually finds that the Defendant should be sentenced to death.

Even when death is a possible sentence, each juror must decide based on his or her own moral assessment whether life imprisonment without the possibility of parole, or death, should be imposed Regardless of your prior finding, the law never compels nor requires any juror to determine that the defendant should be sentenced to death. Every juror has the right to vote for a sentence of life imprisonment without the possibility of parole. You may always consider mercy in making this determination of the appropriate sentence.

If, after deliberating, the jury unanimously agrees that the appropriate sentence is death, then your verdict should be for a sentence of death. If the jury does not unanimously agree that the appropriate sentence is death, then your verdict must be for a sentence of life imprisonment without the possibility of parole.

That fact that a jury can determine a sentence of life imprisonment without the possibility of parole, or death, on a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you vote, you should

carefully weigh, sift, and consider the evidence, realizing that hman life is at stake, and bring your best judgement to bear in reaching your verdict.

GRANTED ----------

DENIED ----------

On the issue of mercy, the Defendant contends that mercy is an appropriate consideration in the final step of deliberations. This is implied in the instruction: Regardless of your findings in this respect, however, you are neither compelled nor required to recommend a sentence of death." Such language clearly advises the jruy that they may exercise their "discretion" - another way of saying mercy. Again from Justice Scalia; "And of course the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained." Kansas v. Carr, 136 S. Ct. 633, 642, 193 L. Ed. 2D 535 (2016)

I CERTIFY that a copy of the foregoing has been furnished to the State Attorney, West Pasco Judicial Center, New Port Richey, Florida, on October 31, 2017.

[redacted]

Dean N. Livermore, Attorney at Law
Fla. Bar Number: 0724556, For
PUBLIC DEFENDER, SIXTH JUDICIAL CIRCUIT
West Pasco Judicial Center
7530 Little Road
New Port Richey, FL 34654 (727)847-8155