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

FILED IN OPEN COURT
THIS 20 DAY OF November, 2017
PAULA S. O'NEIL, CLERK & COMPTROLLER
PASCO COUNTY, FLORIDA
BY [redacted] D.C.

DEFENDANT'S OBJECTIONS AND PROPOSED JURY INSTRUCTIONS - PRELIMINARY 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*

THE JURY'S DECISIONS REGARDING AGGRAVATING FACTORS WEIGHING, & LIFE OR DEATH

In pertinent part, jury instruction 7.11 reads:

> You are instructed that this evidence is presented in order for you to determine, as you will be instructed, (1) whether each aggravating factor is proved beyond a reasonable doubt; (2) whether one or more aggravating factors exist beyond a reasonable doubt; (3) whether the aggravating factors found to exist beyond a reasonable doubt are sufficient to justify imposition of the death penalty;. . . (5) whether the aggravating factors outweigh the mitigating circumstances; and (6) whether the defendant should be sentenced to life imprisonment without the possibility of parole or death.

Fla.Std.Jury Instr. (Crim) 7.11. This instruction fails to inform the jurors that steps

(1),(2),(3),(5) and (6) must be found unanimously. Further , this instruction fails to adequately inform the jury that steps (5) and (6) must meet the "beyond a reasonable doubt" burden of proof. The Defendant proposes the foloowing additional instructions, underlined, as alternatives to correct the lapses noted.

> You are instructed that this evidence is presented in order for you to determine, as you will be instructed, (1) whether each aggravating factor is proved unanimously beyond a reasonable doubt; (2) whether one or more aggravating factors exist unanimously beyond a reasonable doubt; (3) whether you have determined that the aggravating factors found to exist beyond a reasonable doubt are sufficient to justify imposition of the death penalty unanimously;. . . (5) whether the aggravating factors outweigh the mitigating circumstances beyond a reasonable doubt and unanimously; and (6) whether the defendant should be sentenced to life imprisonment without the possibility of parole or death beyond a reasonable doubt and unanimously.

Granted _____

Denied ✓

The Florida Supreme Court's ruling in Hurst v. State, 210 So.3d 40 (Fla. 2016), made clear that each of the steps requires unanimous findings by the jurors. "[T]he Supreme Court's decision in *Hurst v. Florida* requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury". Hurst v. State, 210 So. 3D 40, 44 (Fla. 2016). On the same day that *Hurst* was issued, the Florida Supreme Court held in *Perry v. State,* that

> . . . the United States Supreme Court's decision in *Hurst v. Florida* and Florida's right to a jury trial provided under article 1, section 22 of the Florida Constitution require the jury's findings of the aggravating factors that there are sufficient aggravating factors to impose death, that those aggravating factors outweigh the mitigation, and that death is the appropriate sentence are all required to be found unanimously by the jury for the defendant to be sentenced to death. . . we

> also held that, based on Florida's requirement for unanimity in jury verdicts and on the Eighth Amendment to the United States Constitution, a jury's ultimate recommendation of the death sentence must be unanimous.

Perry v. State, 210 So.3d 630, 639 (Fla. 2016) (emphasis supplied)(internal citations omitted).

The Florida Supreme Court's ruling in *Hurst* emphasized the importance of the connection between unanimity and the reasonable doubt burden of proof. "[T]he jury in a capital case must unanimously find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating facors outweigh the mitigating circumstances, and unanimously recommend a sentence of death". Hurst v. State at 58 *quoting* United States v. Gipson, 553 F.2d 453, 457 (5th Cir. 1977)

As has been stated repeatedly by the Florida Supreme Court and others, death is different. Without ensuring the certitude that unanimity and proof beyond a reasonable doubt provide, this Court risks a slide back into pre-*Furman v. Georgia*, 408 U.S. 238 (1972), arbitrariness in violation of the 8th Amendment to the U.S. Constitution and Art. I, §17 of the Florida Constitution.

THE JURY'S DECISIONS REGARDING MITIGATION

In pertinent part, the jury instruction 7.11 reads:

> You are instructed that this evidence is presented in order for you to determine, as you will be instructed . . .(4) whether mitigating circumstances are proven by the greater weight of the evidence . . .

The Defendant suggests the following language as a proper substitution:

> You are instructed that this evidence is presented in order for you to determine, as you will be instructed . . .(4) whether mitigating circumstances exist

Granted _____

Denied ✓

The interim instructions also state as follows:

> A mitigating circumstance need not be proved beyond a reasonable doubt by the Defendant. A mitigating circumstance need only be proven by the greater weight of the evidence, which means evidence that more likely than not tends to prove the existence of a mitigating circumstance. If you determine by the greater weight of the evidence that a mitigating circumstance exists, you may doncisder it established and give the evidence such weight as you determine it should receive in reaching your conclusion as to the sentence to be imposed.

Fla. Stdd. Jury Instr. (Crim) 7.11

The Defendant proposes the following language insteas:

> A mitigating circumstance need not be proved beyond a reasonable doubt by the Defendant. A mitigating circumstance need only be shown to exist. If you determine by the greater weight of the evidence that a mitigating circumstance exists, you may consider it established and give the evidence such weight as you determine it should receive in reaching your conclusion as to the sentence to be imposed.

In Florida, the list of aggravating factors the State may choose from are limited to those provided in §921.141(6), Fla. Stat. Florida law does not permit the use of non-statutory aggravating factors. *See* Knight v. State, 746 So.2d 423, 440, footnote 10 (Fla. 1998); Kormondy v. State, 703 So.2d 454, 462-463 (Fla. 1997).

The burden of proving the existence of an aggravating factor beyond a a reasonable doubt is on the State as provided in §921.141(2)(a), Fla. Stat. That section provides *inter alia* ". . . the jury shall. . . determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor. . . "

The interim instructions and verdict form contain a list of aggravating factors, a burden of proving those aggravating vactors, and note that the assignment of that burden of proving the aggravating factors is on the State. *See generally* Fla. Std. Jury Instr. (Crim) 7.11 While the interim instructions regarding aggravating factors have a clear authority from the Florida statutes, the proposed instructions on the limiting definithion

for mititgation, the burden of proof, and placing the burden of proof on the defendant, do not.

The list of mitigating circumstances that a jury may consider are provided in §921.141(7), Fla. Stat. That list includes what has come to be known as a catchall instruction in §921.141(7)(h), Fla. Stat. That subsection provides for the consideration of any other mitigating ". . . factors in the defendant's background that would mitigate against imposition of the death penalty."

The notion of imposing a "preponderance of evidence" or "greater weight" burden of proof on mitigation and of requiring a defendant to prove mitigation are statutory and constitutional anathemas for the reasons listed below.

First, at no point anywhere in the statutes does Florida law provide for a burden of proof of a mitigating circumstance, or that the burden of proving the existence of a mitigating circumstance, or that the burden of proving the existence of a mitigating circumstance falls upon the defendant. 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 once 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. The legislature 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, these limits and hurdles will preclude the individualized sentencing required by the Eighth Amendment to the U.S. Constitution. Recently the U.S. Supreme Court noted that ". . . as a requirement of individualized sentencing, a jury must have the opportunity to consider all evidence relevant to mitigation, and that a state statute that permits a jury to consider any mitigating evidence comports with that requirement." Kansas v. Marsh, 548 U.S. 163, 171 (2016).

Third, the interim instructions would limit evidence by inserting the burden of

proof consideration of mitigation by the jury.. That is not necessary, because a trial judge will have already considred whether or not evidence is relevant. The defendant's proposed language 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 precluded 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 mitigating evidence;)(internal citations omitted).

Fourth, 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. Constitution and Art. I §14, of the Florida Constitution.

Fifth, 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 thee Court. For example, in Lockett v. Ohio, 438 U.S. 486, 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.

Finally, 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 Court's proposal is misleading and inappropriate. *See Lockett*, 438 U.S. At 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).

DIMINISHING EACH JUROR'S SENSE OF RESPONSIBILITY

Under the interim instructions, the jury would be instructed twice that their determinations would amount to mere recommendations.

First, in the definition of aggravating factors, jurors would be instructed that "An aggravating factor is a standard to guide the jury in making the choice between **recommending** life imprisonment without the possibility of parole or death." Fla. Std. Jury Instr. (Crim.) 7.11 (emphasis added). This is not the law. As the Florida Supreme Court noted in *Perry v. State*, ". . . law expressly eliminates the ability of the court to override a jury's recommendation for a life sentence with the imposition of a sentence of death, while expressly allowing the court to impose a life sentence even where the jury recommends death." *Perry* at 638. And Fla. Stat. §921.141(3)(a)(1) clearly states that a trial judge must impose a sentence of life imprisonment without the possibility of parole if the jury so votes.

Second, in the introduction to mitigating circumstances jurors would be instructed that: "Should you find sufficient aggravating factors do exist to justify **recommending** the imposition of the death penalty, it will then be your duty to determine whether the aggravating factors that you unanimously find to have been proven beyond a reasonable doubt outweigh the mitigating circumstances that you find to have been established" Fla. Std. Jury Instr. (Crim) 7.11 (emphasis added). Despite the statute's use of the word, this Court should not encourage any undertaking that would tend to reduce or eliminate the jur's sense of responsibility for determining a sentence of death because that would be inconsistent with Eighth Amendment's heightened need for reliability as the U.S. Supreme Court held in Caldwell v. Mississippi, 472 U.S. 320 (1985) To encourage such irresponsible language would be a violation of the 8th Amendment to the U.S. Constitution and Ar. I. §17 of the Florida Constitution.

To remedy this error the Defendant requests that this Court eliminate the words "recommend or recommending" from each portion of the instructions.

GRANTED ✓

DENIED _____

LIFE WITHOUT THE POSSIBILITY OF PAROLE

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, and believe that a sentence of life includes the possibility of being released. 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 that an additional sentence be added following the indication of the possibility of a sentence of life without parole ; A sentence of life without parole means that the defendant will never be released from prison. This language will help the instructions better comport overall with the 8th Amendment to the U.S. Constitution and Ar. I. §17 of the Florida Constitution.

GRANTED _____

DENIED ✓

NOTICE OF HEARING

YOU ARE NOTIFIED that the above will be heard before the , West Pasco Judicial

Center, 7530 Little Road, New Port Richey, FL 34654, on .

I CERTIFY that a copy of the foregoing has been furnished to the State Attorney, West Pasco Judicial Center, New Port Richey, Florida, on, 20006.

[redacted]

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Center, 7530 Little Road, New Port Richey, FL 34654, on .

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]

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