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August 3, 2017

Criminal Instructions Committee
c/o Bart Schneider, Office of the General Counsel
500 S. Duval Street
Tallahassee, FL 32399-1925

Re: Criminal Jury Instructions for Death Penalty Cases

Dear Mr. Schneider:

Enclosed is a motion for consideration by the Criminal Instructions Committee that has been filed in Duval County requesting the court instruct the jury to use a secret, written ballot during capital sentencing deliberations. I have included the instructions I proposed, but have not burdened you with the voluminous attachments.

I inadvertently referred in Section I of the motion to the "Florida Bar Jury Instruction Committee." I should have written the "Supreme Court Committee on Standard Instructions in Criminal Cases." That error has been corrected in my soft copy for future filings.

Thank you in advance for your attention to this matter.

Sincerely,

Patrick K. Korody
Attorney
FL Bar # 0107361

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RECEIVED, 08/18/2017 03:48:26 PM, Clerk, Supreme Court

Filing # 59883698 E-Filed 08/03/2017 09:14:36 AM

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO: 16-2004-CF-6675

STATE OF FLORIDA

DIVISION: CR-B

Vs;

JOHN FRANKLIN MOSLEY, JR.

_____/

MOTION FOR SPECIFIC INSTRUCTIONS
ON METHOD OF VOTING DURING CAPITAL SENTENCING DELIBERATIONS

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> ***The United States Supreme Court has repeatedly explained that "death is different" from every other form of punishment. The Supreme Court has also emphasized the "heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate in a particular case." As this Court has pointed out, "[m]any courts and scholars have recognized the value of unanimous verdicts," particularly given that the "reliability" of death sentences "depends on adhering to guided procedures that promote a reasoned judgment by the trier of fact."***
>
> - *Hurst v. State*, 147 So. 3d 435, 452 (Fla. 2014) (Pariente, J. dissenting), *rev'd*, *Hurst v. Florida*, 136 S. Ct. 616 (2016) (internal citations omitted).

Defendant, JOHN FRANKLIN MOSLEY, JR., by and through his undersigned attorney, pursuant Florida Rule of Criminal Procedure 3.390 and the Eighth and Fourteenth Amendments to the United States Constitution, moves this honorable Court to give procedural instructions to the jury during the death penalty phase that they must conduct each vote during their deliberations by secret, written ballot. The grounds for this Motion are that the law demands heightened reliability, consistency, and true unanimity in the determination whether the death penalty is appropriate in a particular case.

Statement of Facts

On July 1, 2004, Defendant was indicted on two counts of first-degree murder in the deaths of Lynda Wilkes and her son Jay-Quan Mosley. The trial of Defendant was held November 7-18, 2005. On November 18, 2005, the jury returned a verdict, finding Defendant guilty of two counts of first-degree murder.

On November 30, 2005, by a vote of 8 to 4, the jury recommended a sentence of death for the First Degree Murder of Jay-Quan Mosley. The jury recommended a life sentence for the First Degree Murder of Lynda Wilkes. Defendant was subsequently sentenced by the court according to the jury recommendations on June 30, 2006.

On December 22, 2016, the Supreme Court of Florida granted Defendant a new penalty phase based on the United States Supreme Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016) and its decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

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Memorandum of Law and Argument

I. THE UNIQUENESS OF THE DEATH PENALTY DEMANDS GUIDED PROCEDURES THAT ENSURE RELIABILITY AND CONSISTENCY.

There are currently no Standard Jury Instructions for Capital (death penalty) Cases. The Supreme Court of Florida issued proposed instructions. The Florida Bar Jury Instruction Committee has issued a different set of instructions. Comments have been filed on both proposed sets of instructions. Neither set of instructions provides any guidance to the jury on how to conduct the votes for the required findings that must be made to impose the death penalty under Florida law.[1]

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[1] Florida law requires that the jury in a capital penalty phase conduct numerous votes before recommending a sentence of death. The Supreme Court of Florida reiterated in the *Hurst* remand "that before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly 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 factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." 202 So. 3d at 58. The Supreme Court of Florida's proposed instructions provide that the jury must make a finding for each mitigating circumstance. *See In Re: Standard Criminal Jury Instructions In Capital Cases*, No. SC17-583 (April 13, 2017).

Florida jury instructions historically provide no guidance to criminal juries on how to vote during deliberations. Standard Jury Instruction 3.13, *Submitting Case to Jury*, provides:

> In just a few moments you will be taken to the jury room by the [court deputy] [bailiff]. The first thing you should do is choose a foreperson who will preside over your deliberations. The foreperson should see to it that your discussions are carried on in an organized way and that everyone has a fair chance to be heard. It is also the foreperson's job to sign and date the verdict form when all of you have agreed on a verdict and to bring the verdict form back to the courtroom when you return.

In short, the jury is told to go to the jury room, choose a foreperson, consider the evidence, and reach a unanimous verdict.

The Supreme Court of Florida proposed instructions for capital cases instruct the jury that they must "unanimously find" that an aggravating factor was proven beyond a reasonable doubt; that aggravating factors are sufficient to impose death; and, that the aggravating factors found to exist outweigh the established mitigating circumstances. The jury is also told that its "decision if to impose a sentence of death must be unanimous." The instructions repeatedly reference that the jury is to "vote" but provide no procedural guidance on how to conduct a vote. The instructions do not address "straw polls" or "straw votes." Such guidance is similarly absent from the Bar Committee's proposed instructions.

The lack of procedural guidance given to a capital jury charged with determining whether the death penalty is appropriate in a particular case undermines the reliability of and the consistency in the imposition of the death penalty. Under the current standardless jury instruction scheme, one jury could reach a death sentence through voting procedures that significantly vary from those employed by a jury that reaches a life sentence. A single jury could use a different voting method for each of the required votes. Such procedural inconsistency between juries, and possibly within a single jury, undermines the reliability and consistency of death sentences.

The uniqueness of the death penalty demands guided procedures that ensure reliability and consistency. The United States Supreme Court has recognized that "death is different in kind from any other punishment imposed under our system of criminal justice." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). Moreover, when a defendant's life is at stake, a court must

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be particularly sensitive to ensure that every safeguard is observed. *Powell v. Alabama*, 287 U.S. 45, 71 (1932). Sentencing procedures that create a substantial risk that the death penalty will be inflicted in an inconsistent, arbitrary and capricious manner are unconstitutional. *Gregg*, 428 U.S. at 188. And, "where discretion is afforded to a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Id.*

One way to further the reliability and consistency and avoid arbitrary and capricious death sentences is to carefully and adequately instruct the jury on how to conduct its voting during deliberations. The Court in *Gregg*, a 1976 decision, reviewed Georgia's bifurcated death penalty scheme and concluded that it did not violate the Eighth and Fourteenth Amendments as "cruel and unusual punishment." In reaching its holding, the Court considered that the jury heard evidence during a sentencing hearing and was given instructions. The Court stated that the idea that a jury should be given guidance in its decisionmaking is "hardly a novel proposition . . .. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." *Id.* at 192-93. This principle has proved enduring in capital litigation, and Justice Pariente aptly foreshadowed the United States Supreme Court's decision in *Hurst v. Florida* finding Florida's death penalty law unconstitutional when she wrote, in her dissent for that case, that "the 'reliability' of death sentences 'depends on adhering to guided procedures that promote a reasoned judgment by the trier of fact.'" *Hurst*, 147 So. 3d at 452.

To carefully and adequately guide a jury during death penalty deliberations, the jury needs to be given procedural guidance on the method by which to conduct their vote. Without such guidance, every jury is susceptible to inventing and implementing its own voting procedure. Most importantly, because voting procedures do impact outcomes, a defendant's sentence – life or death – could ultimately rest on the voting procedure used by the jury. Such variance in capital sentencing between defendants based solely on a procedure employed by the jury undoubtedly creates the potential for inconsistent, arbitrary and capricious sentences and violations of equal protection under the law.

Procedural guidance on the method of voting will enhance the reliability and consistency of death sentences and avoid arbitrary and capricious death sentences, and this Court should provide procedural guidance to the jury on the method by which to conduct their vote.

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Specifically, the Court should instruct the jury that, after engaging in a full and free discussion, the jury should vote by secret, written ballot.

II. PROCEDURES THAT PERMIT OPEN VOTING RESULT IN CONFORMITY AND ACQUIESCENCE AND UNDERMINE THE RELIABILITY OF A UNANIMOUS VERDICT.

The typical jury charge, by not providing any procedural guidance on how to conduct a vote to reach a finding or verdict, permits the jury to adopt any procedure for voting that emerges during deliberations. Most often, the jury defaults to "open voting," which is the casting of votes by a hand-raise, a nod, or any other physical affirmation of agreement or dissent. If the jury cannot reach unanimity through open voting, the result in a criminal trial is often a hung jury. It is estimated that approximately 6 percent of criminal juries in state courts and between 2 percent and 3 percent in federal courts nationwide are unable to reach a final verdict. Hannaford-Agor, Hans & Munsterman, "How Much Justice Hangs in the Balance? A New Look at Hung Jury Rates," 83 Judicature 59 (1999). Hung juries leave the prosecution with three options: retrial, dismissal, or offering an extremely favorable plea agreement in the hope the defendant will take the plea. Retrials use judicial and prosecutorial resources – there is great expense for a retrial.

Jury studies show that open voting procedures prevent hung juries, which, in turn, saves judicial and prosecutorial resources. Dissenting individual jurors subject to open voting procedures may acquiesce and vote with their peers despite misgivings for many reasons: because they want to be liked; they want to go home; they are tired of debating other jurors and being brow-beaten by the majority; they may not want to engage in any debate at all for fear of confrontation; they may be intimidated by outspoken advocates of the opposite position; they don't want to disappoint the judge, especially after receiving a jury deadlock instruction, or "*Allen* charge;" or, they don't want to openly support an unpopular position, especially without knowledge of whether they have any allies in the room. See, e.g., Schwartz and Schwartz, "And So Say Some of Us: What to do When Jurors Disagree," 9 S. Cal. Interdis. L.J. 429 (2000). The exact reason why any particular dissenter casts a dishonest vote is not as important as the illusion of unanimity when no unanimity actually exists.

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Open voting "puts enormous psychological pressure on each juror to conform to the majority sentiment and . . . jeopardizes the bona fide nature of the verdict as the considered consensus of all twelve jurors." Holland, "Improving Criminal Jury Verdicts: Learning from the Court-Martial," 97 J. Crim. L. & Criminology 101, 141 (2006-2007). Open voting leaves "the individual juror no privacy of position, no confidential sanctuary . . . and no safeguard against the peer pressure likely to be inflicted upon a lone dissenter or those in the minority block . . .." Id. at 141-42. Professor Holland aptly describes how an open vote without any guidance from the judge is commonly carried out in a deliberation room:

> In all likelihood, once the jury has engaged in some amount of discussion of the evidence and the issues presented, a consensus position (representing the view of some considerable bloc of jurors) is likely to emerge. When that occurs, the foreman or some other juror will ask the obvious question, "Do we all agree with X position?" or "How many of us agree with that position?" or some variant of that query. The proposed verdict may be guilt, innocence, or acquittal based on doubt, but in any case, as soon as the majority viewpoint is manifested (whether by show of hands, head nod, or verbal response), any dissenter from that position is immediately in the spotlight, and on the defensive.

Id. at 142. These types of open voting practices perpetuate a fraud on the society by shoehorning jurors into unanimous verdicts despite sincere disagreement with the position of the majority bloc. This is not a matter of anecdote or conjecture, but based on concrete and reliable research.

A 2009 study published by Cornell Law School found that 38 percent of juries contained at least one jury who disagreed with the general outcome of the criminal case but voted for it anyway – conviction or acquittal. Waters and Hans, "A Jury of One: Opinion Formation, Conformity, and Dissent on Juries," Cornell Law Faculty Publications, Paper 114 at 522-23 (2009). That number skyrocketed in cases with multiple charges – 54% of juries contained at least one juror who disagreed with the jury's verdict on at least one charge. Id. That is, more than half of the juries had at least one juror who voted insincerely. According to the study of 4000 jurors across four states, only 82 of 351 dissenting jurors ultimately hung their juries, and the average number of dissenters to hang a jury was just over three, indicating that the larger the minority was in the jury room, the less likely there was to be acquiescence and conformity with the majority. Id.

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The Waters and Hans study demonstrates that conformity and acquiescence occur during deliberations. The researchers noted that the study revealed that the "expectation placed on all jurors from the very beginning of their jury service is that they will listen to the evidence presented at trial, apply the law as described in the jury instructions, and, after discussing the evidence and the law, arrive at group consensus about the verdict. The role expectations combine with typical conformity pressures in groups to encourage jurors to accede to the majority view even if they are not privately as fully persuaded as others." Id. at 539.

Procedures that permit open voting – or instructions that specifically direct a jury to use open voting procedures – subject a defendant to the real possibility that a juror will not vote his or her sincere position based on his or her own evaluation of the evidence and the law but succumb to improper and unlawful pressures. Even one juror voting insincerely during deliberations in a capital case undermines the reliability of a death sentence and violates the unanimity requirements of the law.[2]

III. DEATH PENALTY VOTING PROCEDURES MUST PROMOTE TRUE UNANIMITY.

A jury can only recommend a sentence of death through true unanimity, tested by each required unanimous vote during sentencing phase deliberations. A single dissenting juror at any of the required unanimous votes[3] during capital sentencing deliberations results in a life sentence

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[2] Open voting procedures, and the dangers of conformity and acquiescence, may have a legitimate purpose when a unanimous verdict is required. It prevents inefficiency in the system by decreasing the possibility of a hung jury, especially one based on a single holdout juror. And, after all, even if a few dissenters acquiesce and conform, the Constitution of the United States does not require a unanimous verdict in non-capital cases. *See Johnson v. Louisiana*, 406 U.S. 356 (1972); *Apodaca v. Oregon*, 406 U.S. 404 (1972). However, the efficiency and public policy goals that may support open voting in non-capital cases fail in capital cases, which require heightened reliability, consistency, and additional safeguards. Moreover, as discussed *infra*, there is no potential for a hung jury in a capital penalty phase.

[3] If there is more than one aggravating factor, then a single dissenting juror to a single aggravating factor does not result in a life sentence for the defendant. Section 921.141, Florida Statutes provides, "(a) After hearing all of the evidence presented regarding aggravating factors and mitigating circumstances, the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor . . .. (b) The jury shall return findings identifying each aggravating factor found to exist. A finding that an aggravating

for the defendant. See Section 921.141, Florida Statutes (2017). There is no potential for a hung jury. This is the law of Florida, and its highest court has repeatedly stressed the requirement of true unanimity among individual jurors to reach a sentence of death.

The Supreme Court of Florida has recognized that deliberations on a sentence of death is different from normal criminal jury deliberations. In its proposed Standard Criminal Jury Instructions for Capital Cases, the court provides "each juror" must weigh the proven aggravating factors and "he or she must determine the appropriate punishment for the defendant." This wording is in stark contrast to the collective "you" used throughout the Standard Criminal Jury Instructions that speak to the jury as a collective whole and not as individual jurors. The choice to speak directly to each juror is a recognition that reaching a decision to recommend a sentence of death is an individual decision by each juror and not a collective decision by the jury as a whole. The true unanimity required by the law exists when each individual juror reaches the same conclusion to recommend a sentence of death.

The Supreme Court of Florida has specifically rejected the proposition that majority findings are acceptable in capital cases and stressed the true unanimity for a sentence of death:

> Hurst v. Florida mandates that all the findings necessary for imposition of a death sentence are "elements" that must be found by a jury, and Florida law has long required that jury verdicts must be unanimous. Accordingly, we reiterate our holding that before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly 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 factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.

Hurst, 202 So. 3d at 58. This unanimity requirement must also be viewed in light of the heightened reliability requirements for capital cases. *See, e.g.*, *Powell*, 287 U.S. at 71 ("when a defendant's life is at stake, a court must be particularly sensitive to ensure that every safeguard is observed"); *Gregg*, 428 U.S. at 188 ("*Furman* mandates that where discretion is afforded to a sentencing body on a matter so grave as the determination of whether a human life should be

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factor exists must be unanimous. If the jury 1. Does not find at least one aggravating factor, the defendant is ineligible for a sentence of death."

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taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."). The fusion of historic principles of heightened reliability, consistency, and safeguards in capital cases with the Supreme Court of Florida's recent application of the law leaves little doubt that the law demands, and the courts expect, true unanimity for a sentence of death.

A capital penalty phase jury without any procedural guidance on the method of voting may utilize open voting that results in conformity and acquiescence – a clear violation of the true unanimity required for a death sentence. For example, consider a jury whose votes are publicly cast during a straw poll proposed by the foreman; prior to casting her vote as the vote winds around the table in the deliberation room, a dissenter may realize that she holds an unpopular position without any allies thus far, opposite to an outspoken member of the jury; in a split second, that juror may simply acquiesce and conform to the majority based solely on fears of having to defend an unpopular opinion in a small room for hours against outspoken, and possibly aggressive, fellow jurors. The foreman declares that the open straw poll, because it became unanimous, is the official vote. Had that been the final vote during capital deliberations, the defendant just received a recommendation of death without true unanimity.

The fear of a hung jury is absent in a capital sentencing phase; a sentence recommendation will be made. Yet, the pressures that yield conformity and acquiescence can still permeate deliberations and undermine the legal requirement for true unanimity for a sentence of death. To promote true unanimity, this Court should instruct the jury that it must vote by secret, written ballot.

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IV. A SECRET, WRITTEN BALLOT ENSURES TRUE UNANIMITY AND ENHANCES THE RELIABILITY AND CONSISTENCY OF A DEATH SENTENCE.

A capital sentencing verdict reached through secret, written ballot, which provides, as dictated by the law, for a default of life, ensures true unanimity among individual jurors and is the most reliable method of jury voting to determine whether the death penalty is appropriate in a particular case. A secret, written ballot is not a radical proposition. To the contrary, it has been used in military courts-martial – tens of thousands of military jury trials, including death penalty sentencing phases – for more than 65 years.

In Article 51 of the Uniform Code of Military Justice (UCMJ), codified at 10 U.S.C. § 851, the United States Congress mandated that military juries (also called "members") vote by secret, written ballot during deliberations. Article 51 provides:

> Voting by members of a general or special court-martial on the findings and on the sentence, and by members of a court-martial without a military judge upon questions of challenge, shall be by secret written ballot. The junior member of the court shall count the votes. The count shall be checked by the president, who shall forthwith announce the results of the ballot to the members of the court.

Military law has emphasized voting by secret, written ballot during both the guilt and innocence phase and the sentencing phase of its criminal trials since at least 1950, when the UCMJ replaced the Articles of War. In courts-martial, members, similar to a capital case under Florida law, determine the appropriate sentence following the presentation of evidence in aggravation by the prosecution and evidence in extenuation and mitigation by the defense and arguments on sentencing by counsel. See Rule for Courts-Martial 1001. The military judge provides specific instructions to the jury on how to conduct voting in accordance with Article 51. This procedure and the method of voting instructions are also used in military capital cases, which, similar to Florida's capital sentencing scheme, require several unanimous votes for a death sentence to be adjudged, with a default mandatory life sentence should unanimity not occur at any one of those votes.

The standard military jury instructions provide, for example:

> First, a death sentence may not be adjudged unless all of the court members find, beyond a reasonable doubt, that one or more aggravating factor(s) existed. The alleged aggravating factor(s) are as follows: [read the aggravating factors . . . .]. These alleged aggravating factors(s) are also set out on Appellate Exhibit ___, the Sentence Worksheet, which I will discuss in a moment.
>
> All of the members of the court must agree, beyond a reasonable doubt, that one or more of the aggravating factor(s) existed at the time of the offense(s) or resulted from the offense(s).
>
> It is not sufficient that some members find that one aggravating factor existed, while the remaining members find that a different aggravating factor existed; rather, all of you must find, beyond a

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> reasonable doubt, that the same aggravating factor or factors existed before a sentence of death may be adjudged.
>
> [Definition of reasonable doubt]
>
> Members, in making the determination of whether or not the aggravating factor(s) existed, you may consider all of the evidence in the case, including the evidence presented prior to the findings of guilty, as well as any evidence presented during the sentencing hearing. Your deliberations on the aggravating factor(s) should properly include a full and free discussion on all of the evidence that has been presented.
>
> After you have completed your discussion, then voting on each aggravating factor must be accomplished separately by secret, written ballot, and all of the members are required to vote. The junior member will collect and count the ballots. The count will be checked by the President, who will immediately announce the results of the ballot to the other members of the court. If you fail to find unanimously that at least one of the aggravating factor existed, then you may not adjudge a sentence of death.

Chapter 8, Trial Procedure and Instructions for a Capital Case, Military Judge's Benchbook, DA PAM 27-9 at 1187-88 (Sept. 2014). Similar instructions are provided for votes on whether the evidence of extenuation and mitigation is substantially outweighed by the aggravating factors and whether the sentence should be death. Id at 1187-94.

Military appellate courts have recognized that voting by secret written ballot is a "proven preservative of the independence of military members as fact-finders and sentencing bodies. Secrecy insulates military members from pressures . . .." *United States v. Chaplin*, 8 M.J. 621, 627 (NCMR 1979). Secret written ballots permit a juror "to vote his conscience, even if he agreed to a contrary position during the oral deliberative process." *United States v. Martinez*, 17 M.J. 916, 919 (NMCCMR 1984). While the secret ballot procedure employed in courts-martial "was devised to protect military juries from the pressure of officers senior to them in rank . . ., a concern without direct parallel in civilian life, our common experience suggests that peer pressure, especially inflicted by a group, is a frequent and universal phenomena." Holland at 142.

In fact, one of the factors that increased the reliability of verdicts in the Cornell study was whether the jury did, without any instruction from the judge, employ a secret written ballot voting scheme. Waters and Hans at 531. In contrast to open voting, a secret written ballot

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"increases the likelihood that, having listened to the viewpoint of all members of the jury, each juror will finally vote based on her own conscientious evaluation of the merits, and not simply respond to pressure to go along with others." Holland at 142. A secret written ballot ensures each juror that the "final expression of position that decides the verdict is a private expression of the conscience of each juror, made without risk of ridicule or pressure from other jurors, and this confidentiality reduces the likelihood that any juror will be stampeded by pressure from others on the jury." Id. at 143.

The very choice to employ citizen jurors in capital sentencing proceedings and require that those citizens reach true unanimity in a deliberation room to recommend a sentence of death is recognition that the law mandates diversity of perspectives reach the same conclusion on how to exercise discretion of such significant magnitude. *See Hurst*, 136 S. Ct. at 619 (reaffirming the Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death). The secret, written ballot voting procedure recognizes this principle and ensures that the "he or she" wording chosen by the Supreme Court of Florida will have meaning in a deliberation room. Each individual juror will anonymously cast his or her vote based on a personal evaluation of the law and the evidence presented.

The uniqueness of the death penalty demands guided procedures that ensure reliability and consistency. The law requires true unanimity by the jury to recommend a sentence of death. A secret, written ballot is a procedural safeguard that eliminates the threat of conformity and acquiescence from the deliberation room and adds consistency to the voting procedures employed by the jury. A sentence reach through a secret, written ballot voting procedure – whether life or death – will be a reliable expression of each individual juror's own evaluation of the law and evidence.

WHEREFORE, the Defendant respectfully requests this Court instruct the jury during the penalty phase that they must conduct each vote during their deliberations by secret, written ballot.

STRICKEN

Respectfully submitted,

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EXHIBITS ATTACHED

A – Proposed Final Instructions (Hurst Penalty Phase)

B – In Re: Standard Criminal Jury Instructions, No. SC17-583 (April 13, 2017)

C – Proposed Instructions in Penalty Proceedings – Capital Cases, Committee on Standard Jury Instructions in Criminal Cases, E-Filed June 21, 2017.

D – Schwartz and Schwartz, "And So Say Some of Us: What to do When Jurors Disagree," 9 S. Cal. Interdis. L.J. 429 (2000)

E – Waters and Hans, "A Jury of One: Opinion Formation, Conformity, and Dissent on Juries," Cornell Law Faculty Publications, Paper 114 (2009)

F – Holland, "Improving Criminal Jury Verdicts: Learning from the Court-Martial," 97 J. Crim. L. & Criminology 101 (2006-2007)

G – Sentencing Instructions, Chapter 8, Military Judge's Benchbook, DA PAM 27-9 (Sept. 2014)

H – Article 51, UCMJ (1949)
Article 51, UCMJ (2016)

I – Section 921.141, Florida Statutes (2017).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to the Office of the State Attorney via the Florida Courts E-Filing Portal on this 3rd day of August, 2017.

KORODY LAW, P.A.

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STRICKEN

EXHIBIT A

STRICKEN

PROPOSED FINAL INSTRUCTIONS

Hurst Penalty Phase

Members of the jury, you have heard all the evidence and the argument of counsel. It is now your duty to make a decision as to the appropriate sentence that should be imposed upon the defendant for the crime of First Degree Murder. There are two possible punishments: (1) life imprisonment without the possibility of parole, or (2) death.

Prior to beginning your discussions, you should vote a foreman of the jury. The foreman should then identify another juror who will be responsible for collecting and counting the jury's votes. I will explain the specific voting process you must employ in a few minutes.

There is a strict process for conducting deliberations and voting in capital cases. You must pay close attention to my instructions and follow them during your deliberations.

Aggravating factors

In making your decision, you must first unanimously determine whether the aggravating factor(s) alleged by the State [has] [have] been proven beyond a reasonable doubt. An aggravating factor is a circumstance that increases the gravity of a crime or the harm to a victim. No facts other than proven aggravating factors may be considered in support of a death sentence.

The aggravating factor(s) alleged by the State [is] [are]:
[Insert those aggravating factors noticed by the State which are supported by the evidence.]

As explained before the presentation of evidence, the State has the burden to prove an aggravating factor beyond a reasonable doubt. A reasonable doubt is not a mere possible doubt, a speculative, imaginary, or forced doubt. Such a doubt must not influence you to disregard an aggravating factor if you have an abiding conviction that it exists. On the other hand, if, after carefully considering, comparing, and weighing all the evidence, you do not have an abiding conviction that the aggravating factor exists, or if, having a conviction, it is one which is not stable but one which waivers and vacillates, then the aggravating factor has not been proved beyond every reasonable doubt and you must not consider it in reaching a sentence.

A reasonable doubt as to the existence of an aggravating factor may arise from the evidence, a conflict in the evidence, or the lack of evidence. If you have a reasonable doubt as to the existence of an aggravating factor, you must find that it does not exist. However, if you have no reasonable doubt, you should find the aggravating factor does exist.

A finding that any single aggravating factor exists must be unanimous, that is, all of you must agree that specific aggravating factor exists. In making the determination of whether or not each aggravating factor exists, you may consider all of the evidence presented to you, with the exception of victim impact statements, which I will address shortly. Your deliberations on the aggravating factor(s) should properly include a full and free discussion on all of the evidence that has been presented on those factors.

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After you have completed your discussion, voting on each aggravating factor must be accomplished separately by secret, written ballot, and all of the jurors are required to vote. The juror responsible for collecting and counting the votes will do so. The count will be checked by the foreman, who will immediately announce the results of the ballot to the other jurors. Once a vote has been completed, it is final. It cannot be reconsidered.

You will be provided a form to record your finding [as to each alleged aggravating factor] and you should indicate whether or not you find [the] [each] aggravating factor has been proven beyond a reasonable doubt.

If you do not unanimously find that at least one aggravating factor was proven by the State, then the defendant is not eligible for the death penalty, and your sentence must be for a sentence of life imprisonment without the possibility for parole. At such point, your deliberations would be complete. You would record your finding and inform the court that you have completed your deliberations.

If, however, you unanimously find that [one or more] [the] aggravating factor(s) [has] [have] been proven beyond a reasonable doubt, then the defendant is eligible for the death penalty, and you must make additional findings to determine whether the appropriate sentence to be imposed is life imprisonment without the possibility of parole or death.

Aggravating factors sufficient to impose death

If you do unanimously find the existence of at least one aggravating factor, you must determine whether the aggravating factor(s) [is] [are] sufficient to impose a sentence of death beyond a reasonable doubt. This finding must be unanimous, that is, all of you must agree that the aggravating factor(s) [is] [are] sufficient to impose a sentence of death beyond a reasonable doubt. Your deliberations on this finding should properly include a full and free discussion on all of the evidence that has been presented on those aggravating factors that were found to exist by unanimous vote.

The State has the burden to prove the aggravating factor(s) [is] [are] sufficient to impose a sentence of death beyond a reasonable doubt. A reasonable doubt is not a mere possible doubt, a speculative, imaginary, or forced doubt. Such a doubt must not influence you to disregard the sufficiency of the aggravating factor if you have an abiding conviction that it exists. On the other hand, if, after carefully considering, comparing, and weighing all the evidence, you do not have an abiding conviction that the aggravating factor(s) [is] [are] sufficient to impose a sentence of death, or if, having a conviction, it is one which is not stable but one which waivers and vacillates, then the State has not proven beyond a reasonable doubt that the aggravating factor(s) [is] [are] sufficient to impose a sentence of death.

A reasonable doubt as to the sufficiency of the aggravating factor(s) to impose a sentence of death may arise from the evidence, a conflict in the evidence, or the lack of evidence. If you have a reasonable doubt as to the sufficiency of the aggravating factor(s) to impose a sentence of death, you must vote that the aggravating factor(s) are not sufficient to impose a sentence of

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death. However, if you have no reasonable doubt, you should vote that the aggravating factor(s) are sufficient to impose a sentence of death.

Again, your deliberations should begin with a full and free discussion of the aggravating factor(s) found to exist. After you have completed a full and free discussion on the aggravating factor(s), you will conduct a single vote by secret, written ballot, and all of the jurors are required to vote, to determine if the aggravating factor(s) are sufficient to impose a sentence of death beyond a reasonable doubt. The juror responsible for collecting and counting the votes will do so. The count will be checked by the foreman, who will immediately announce the results of the ballot to the other jurors. Once a vote has been completed, it is final. It cannot be reconsidered.

You will be provided a form to record your finding and should indicate whether you found the aggravating factor(s) are sufficient to impose a sentence of death. If you do not unanimously find that the aggravating factor(s) are sufficient to impose a sentence of death beyond a reasonable doubt, then the defendant is not eligible for the death penalty, and your sentence must be for a sentence of life imprisonment without the possibility for parole. At such point, your deliberations would be complete. You would record your finding(s) and sentence, and inform the court that you have completed your deliberations.

Mitigating circumstances

If you do unanimously find the existence of at least one aggravating factor and that the aggravating factor(s) [is] [are] sufficient to impose a sentence of death, the next step in the process is for you to determine whether any mitigating circumstances exist. A mitigating circumstance may include any aspect of the defendant's character, background, or life or any circumstance of the offense that may reasonably indicate that the death penalty is not an appropriate sentence in this case. A mitigating circumstance can be anything in the life of the defendant which might indicate that the death penalty is not appropriate. Mitigating circumstances are not limited to the facts surrounding the crime.

Among the mitigating circumstances you may consider are:
[Insert those mitigating circumstances for which evidence has been presented]

There may be additional mitigating circumstances that I have not specified. If you, during your deliberations, identify additional mitigating circumstances presented by the evidence, there will be additional space on the form to record those circumstances.

It is the defendant's burden to prove that mitigating circumstances exist. The defendant need only establish a mitigating circumstance by the greater weight of the evidence, which means evidence that more likely than not tends to establish the existence of a mitigating circumstance. This is a significantly lower standard of proof than proof beyond a reasonable doubt.

Again, your deliberations should begin with a full and free discussion on the mitigating circumstances. After you have completed a full and free discussion on the mitigating circumstances, voting for each mitigating circumstance should be accomplished separately by secret, written ballot, and all of the jurors are required to vote. The juror responsible for

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collecting and counting the votes will do so. The count will be checked by the foreman, who will immediately announce the results of the ballot to the other jurors. Once a vote has been completed, it is final. It cannot be reconsidered. Unlike prior votes, these votes need not be unanimous.

You will be provided a form to record your finding as to each alleged mitigating circumstance and you should indicate how many jurors, if any, found the mitigating circumstance exists by the greater weight of the evidence.

If you determine by the greater weight of the evidence 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 finding about the appropriate sentence to be imposed. Any juror persuaded as to the existence of a mitigating circumstance must consider it in this case. Further, any juror may later consider a mitigating circumstance found by another juror, even if he or she did not vote that the mitigating circumstance exists. Thus, if a single juror voted for a mitigating circumstance, that mitigating circumstance exists and can be used by any juror in subsequent deliberations.

Weighing Process

Your decision regarding the appropriate sentence should be based upon proven aggravating factors and mitigating circumstances found to exist during your deliberations. You will now engage in a weighing process to determine whether the proven aggravating factors outweigh the mitigating circumstances found to exist. The aggravating factors must outweigh the mitigating circumstances beyond a reasonable doubt.

Your deliberations should begin with a full and free discussion of the following:

a. Whether the aggravating factor(s) found to exist [is] [are] sufficient to justify the death penalty,

b. Whether the aggravating factor(s) outweigh(s) any mitigating circumstance(s) found to exist, and

c. Based on all of the considerations pursuant to these instructions, whether the defendant should be sentenced to life imprisonment without the possibility of parole or death.

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 law contemplates that different factors or circumstances may be given different weight or values by different jurors. Therefore, in your decision-making process, each individual juror must decide what weight is to be given to a particular factor or circumstance.

The State has the burden to prove the aggravating factor(s) outweigh(s) any mitigating circumstance(s) found to exist beyond a reasonable doubt. A reasonable doubt is not a mere

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possible doubt, a speculative, imaginary, or forced doubt. Such a doubt must not influence you to disregard an aggravating factor if you have an abiding conviction that it exists. On the other hand, if, after carefully considering, comparing, and weighing all the evidence, you do not have an abiding conviction that the aggravating factor(s) outweigh(s) any mitigating circumstance(s) found to exist, or if, having a conviction, it is one which is not stable but one which waivers and vacillates, then the State has not proven beyond a reasonable doubt that the aggravating factor(s) outweigh(s) any mitigating circumstance(s) found to exist.

A reasonable doubt as to whether the aggravating factor(s) outweigh(s) any mitigating circumstance(s) found to exist may arise from the evidence, a conflict in the evidence, or the lack of evidence. If you have a reasonable doubt as to whether the aggravating factor(s) outweigh(s) any mitigating circumstance(s) found to exist, you must vote that the aggravating factor(s) [do] [does] not outweigh the mitigating circumstance. However, if you have no reasonable doubt, you should vote that the aggravating factor(s) [do] [does] outweigh the mitigating circumstances.

After you have completed a full and free discussion weighing aggravating factors and mitigating circumstances, you will conduct a single vote by secret, written ballot, and all of the jurors are required to vote, to determine if the proven aggravating factors outweigh the mitigating circumstances. The juror responsible for collecting and counting the votes will do so. The count will be checked by the foreman, who will immediately announce the results of the ballot to the other jurors. Once a vote has been completed, it is final. It cannot be reconsidered.

Again, you will be provided a form to record your finding and should indicate whether you found the aggravating factor(s) outweigh the mitigating circumstances found to exist beyond a reasonable doubt. If you do not unanimously find that the aggravating factor(s) outweigh the mitigating circumstances, then the defendant is not eligible for the death penalty, and your sentence must be for a sentence of life imprisonment without the possibility for parole. At such point, your deliberations would be complete. You would record your finding and sentence, and inform the court that you have completed your deliberations.

Recommendation of life or death sentence

I have previously instructed you that the defendant is only eligible for the death penalty if you unanimously find that the aggravating factor(s) outweigh the mitigating circumstances by beyond a reasonable doubt. The other possible sentence is life imprisonment without the possibility of parole.

Even if you, through your individual weighing process, find that the proven aggravators outweigh the mitigation circumstances found to exist, the law neither compels nor requires you to recommend that the defendant be sentenced to death. 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 any of your prior findings, the law never compels nor requires any juror to determine the defendant be sentenced to death. Every juror has the right to vote for a sentence of life imprisonment without the possibility of parole.

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Each juror must determine the appropriate punishment for the defendant. The jury's decision regarding the appropriate sentence must be unanimous if death is to be recommended.

The State has the burden to prove the appropriate sentence is death beyond a reasonable doubt. A reasonable doubt is not a mere possible doubt, a speculative, imaginary, or forced doubt. Such a doubt must not influence you to disregard death as an appropriate sentence if you have an abiding conviction that it exists. On the other hand, if, after carefully considering, comparing, and weighing all the evidence, you do not have an abiding conviction that death is the appropriate sentence, or if, having a conviction, it is one which is not stable but one which waivers and vacillates, then the State has not proven beyond a reasonable doubt that death is the appropriate sentence.

A reasonable doubt as to whether death is the appropriate sentence may arise from the evidence, a conflict in the evidence, or the lack of evidence. If you have a reasonable doubt as to whether death is the appropriate sentence, you must vote that death is not the appropriate sentence.

Again, your deliberations should begin with a full and free discussion about the appropriate sentence for the defendant. After you have completed a full and free discussion on the appropriate sentence, you will conduct a single vote by secret, written ballot, and all of the jurors are required to vote, regarding whether to recommend a sentence of death. The juror responsible for collecting and counting the votes will do so. The count will be checked by the foreman, who will immediately announce the results of the ballot to the other jurors. Once a vote has been completed, it is final. It cannot be reconsidered.

You will be provided a form to record your finding and should indicate if the jury unanimously recommends a sentence of death. If you do not unanimously recommend a sentence of death, then the defendant is not eligible for the death penalty, and your sentence must be for a sentence of life imprisonment without the possibility for parole. At such point, your deliberations would be complete. You would record your finding and sentence, and inform the court that you have completed your deliberations.

To repeat what I have said, if your sentence is that the defendant should be sentenced to death, your finding that each aggravating factor exists must be unanimous, your finding that the aggravating factors are sufficient to impose death must be unanimous, your finding that the aggravating factor(s) outweigh the mitigating circumstances must be unanimous, and your decision to recommend a sentence of death must be unanimous.

Straw polling and ballots

You are advised that you must not conduct any straw polling or straw ballots during your deliberations. That is, all of your votes must be by secret, written ballot and must be the official vote. This process preserves the independence of each of you. During your full and free discussions, each of you should carefully listen to and respectfully consider the viewpoints of all the members of the jury. However, when those collective discussions are completed, your vote must be based on your own conscientious evaluation of the evidence and the law.

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Sentencing form

As I have mentioned, you will be provided a form to reflect your findings and decision regarding the appropriate sentence. The form will be organized in the order in which you must conduct your votes. That is, you must first vote on aggravating factors. If you find any aggravator factor has been proven, you must vote on whether the aggravating factor(s) [is] [are] sufficient to impose a sentence of death. If the you find that that the aggravating factors are sufficient to impose death, you must then vote on mitigating circumstances. You must then conduct the weighing process. If you find the aggravating factors outweigh the mitigating circumstances, you must then vote on whether to recommend a sentence of death. Your votes must be conducted in this order.

The fact that the jury will record its votes on a single form should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you vote, you should carefully consider and weigh the evidence, realizing that a human life is at stake, and bring your best judgment to bear in reaching your sentence.

[Evidentiary instructions]
[Submitting case to jurors]

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