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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-583

IN RE: STANDARD CRIMINAL JURY INSTRUCTIONS IN CRIMINAL CASES

MOTION OF FLORIDA PROSECUTING ATTORNEYS ASSOCIATION FOR LEAVE TO FILE OUT OF TIME COMMENTS OF THE TWENTY STATE ATTORNEYS ACTING TOGETHER THROUGH THE FLORIDA PROSECUTING ATTORNEYS ASSOCIATION

Pursuant to Florida Rule of Appellate Procedure 9.300, the Florida Prosecuting Attorneys Association ("FPAA") moves this Court for leave to file out of time Comments of the Twenty State Attorneys Acting Together Through The Florida Prosecuting Attorneys Association ("Comments") regarding the Court's interim criminal jury instructions pertaining to the death penalty, issued on its own motion, as published in its opinion rendered on April 13, 2017 *In Re: Standard Criminal Jury Instructions in Capital Cases,* 42 Fla.L.Weekly S449 (Fla. April 13, 2017), and published in the April 15, 2017 edition of the Florida Bar News (the "Opinion"). The FPAA asks that the attached Comments be accepted as filed with the Supreme Court of Florida. To support this motion, the FPAA states the following:

1. The FPAA is a nonprofit corporation whose members are the 20 elected State Attorneys, as well as over 2000 Assistant State Attorneys, and was

created to serve the needs of prosecutors and the administration of justice as prescribed by the constitution and laws of Florida.

2. The FPAA is governed by a Board comprised of the 20 elected State Attorneys.

3. The issue at hand is the use on an interim basis new jury instructions to address this Court's opinion in *Hurst v. State,* 202 So.3d 40 (Fla. 2016) which includes this Court's interpretation of *Hurst v. Florida,* 136 S.Ct. 616 (2016) as well as the newly enacted legislation, Ch, 2017-1, Laws of Florida, effective March 13, 2017.

4. The untimely filing of the Comments is due to an inadvertent delay.

5. The FPAA, if permitted to file its comments, would provide the Court useful insight regarding the potential issues that may arise out of the adoption of the interim criminal jury instructions as set forth in this Court's April 13, 2017 Opinion and offers recommendations in the form of changes to the interim criminal jury instructions as currently written.

WHEREFORE, the Florida Prosecuting Attorneys Association prays that the Court grant it leave to file out of time the *Comments of the Twenty State Attorneys Acting Together Through the Florida Prosecuting Attorneys Association*.

Respectfully submitted,

/s/ Arthur I. Jacobs

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of June, 2017, a true copy of the foregoing motion was sent by U.S. mail to the following counsel and was electronically filed with the Florida E-File Portal for e-service on all parties of record.

The Honorable F. Rand Wallis
Criminal Jury Instructions Committee Chair
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/s/ Arthur I. Jacobs

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IN THE SUPREME COURT OF FLORIDA

NO. SC17-583

IN RE: STANDARD CRIMINAL JURY INSTRUCTIONS IN CRIMINAL CASES

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 this Court's interim criminal jury instructions pertaining to the death penalty, issued on its own motion, as published in its opinion rendered on April 13, 2017. *In re: Standard Criminal Jury Instructions in Capital Cases*, 42 Fla.L.Weekly S449 (Fla. April 13, 2017), and published in the April 15, 2017 edition of the Florida Bar News, stating as follows:

INTRODUCTION

As set forth in its opinion, this Court on its own motion authorized the use on an interim basis new jury instructions[1] to address this Court's opinion in *Hurst v. State,* 202 So. 3d 40 (Fla. 2016) which included this Court's

[1] As noted by this Court these new jury instructions are based on proposals that were published by the Supreme Court Committee on Standard Jury Instructions in Criminal Cases, although they were not filed with this Court. These proposals were published in the April 15, 2017 edition of the Florida Bar News.

interpretation of *Hurst v. Florida*, 136 S.Ct. 616 (2016) and as well as the newly enacted legislation, Ch. 2017-1, Laws of Florida, effective March 13, 2017, requiring the jury to return a unanimous recommendation of death, before the trial court could sentence a defendant to death. The prior 2016 statute, required a vote of at least 10 jurors to recommend the death penalty. The legislation made no other changes to the procedure for the imposition of the death penalty. As noted in its opinion the State has petitioned the United States Supreme Court for review of this Court's opinion in *Hurst*, on the grounds that this Court has misinterpreted the holding in *Hurst v. Florida* as to what are the "facts" necessary for a jury to unanimously find in order for the trial court to impose a sentence of death, as well as its determination of whether the error of the lack of jury findings was harmless. The FPAA agrees that there needs to be changes to the standard jury instructions, as well as a verdict form, that comports with the 2017 statute. The purpose of the FPAA's Comment is not to relitigate the State's positions regarding this Court's interpretation of *Hurst v. Florida*, but to address the interim jury instructions based on that interpretation.

3.12(e) JURY VERDICT FORM – DEATH PENALTY

1. In its interim jury instructions, this Court has included a new verdict form. The most confusing part of this interim verdict form, is this Court's requirement that the jury answer in an interrogatory what "statutory

mitigation circumstances" it has found, and furthermore to include the vote as to the existence of the statutory mitigation circumstance. As noted by Justice Lawson in his specially concurring opinion, there is no need to have special interrogatories or verdicts for each statutory mitigation circumstance or as to the weighing process. 42 Fla.L.Weekly at S449 (Lawson, J., specially concurring). In fact the Supreme Court Committee on Standard Jury Instructions in Criminal Cases in their proposals specifically stated in its instructions that "Unlike other steps in this process, there is no verdict form to complete regarding the existence of mitigating circumstances."

2. This is significant because in *Kansas v. Carr*, 136 S.Ct. 633, 642 (2016), an opinion rendered shortly after *Hurst v. Florida*, the United States Supreme Court discussed the distinct determinations of eligibility and selection under a capital sentencing scheme. In doing so, the Court stated that an eligibility determination was limited to findings related to aggravating circumstances. Determinations regarding whether mitigating circumstances existed and the weighing process were selection determinations. In fact, the Court stated that such selection determinations were not factual findings at all. Instead, the Court termed the selection determination regarding the existence of mitigating circumstances as "judgment call[s]" and weighing determinations as "question[s] of mercy." *Id*. Specifically, the Court stated:

> Approaching the question in the abstract, and without reference to our capital-sentencing case law, 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. 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. It would mean nothing, we think, to tell the jury that the defendants must deserve mercy beyond a reasonable doubt; or must more-likely-than-not deserve it. It would be possible, of course, to instruct the jury that the facts establishing mitigating circumstances need only be proved by a preponderance, leaving the judgment whether those facts are indeed mitigating, and whether they outweigh the aggravators, to the jury's discretion without a standard of proof. If we were to hold that the Constitution requires the mitigating-factor determination to be divided into its factual component and its judgmental component, and the former to be accorded a burden-of-proof instruction, we doubt whether that would produce anything but jury confusion. In the last analysis, jurors will accord mercy if they deem it appropriate, and withhold mercy if they do not, which is what our case law is designed to achieve.

136 S.Ct. at 642 (emphasis added).

3. By including the interrogatories regarding the mitigation, this Court has failed to recognize the distinction made in *Carr* that the "eligibility phase" is separate and distinct from the "selection phase." Under the 2017

statute, a jury will be required to find unanimously each aggravating factor listed by the State in the verdict form before the jury can consider that aggravating factor in making its recommendation. The trial court cannot find or consider any aggravating factor that the jury did not find. As such, a jury is now required to unanimously find "each fact necessary to impose a sentence of death." The jury will also now have to unanimously recommend that the sentence be death. Thus, when the jury "considers" whether there are sufficient aggravating factors that warrant the death penalty, and that those aggravating factors outweigh any mitigating factors found to warrant a sentence of death, the jury is making a subjective determination concerning the proportionality of the punishment, not a finding of fact. However, as stated *supra,* even if those are "facts" required to be found by the jury, it is clear that after being properly instructed, by unanimously finding that death is the appropriate sentence, the jury has made those additional findings of "fact."

4. Regardless of the lack of a legal requirement for the jury to find in a verdict or interrogatory the mitigating factors it has found, or perhaps not found, there are practical problems that arise with this requirement. First, as this Court is aware, what was previously termed "non-statutory" mitigating circumstances was codified by the Legislature as a catchall eighth statutory mitigating circumstance, effective May 30, 1996. Even before the addition,

defendants had taken numerous of these mitigating circumstances encompassing the same aspect of the defendant's life or circumstance of the crime and broken them up into separate mitigating circumstances. Often these lists of mitigating circumstances could become twenty or more. *See e.g.,* Davis v. State, SC15-1794, slip opinion at p. 14, fn. 9, May 11, 2017 (forty), *Bradley v. State*, 42 Fla.L.Weekly S391 (Fla. Mar. 30, 2017) (twenty). As a result, this Court has not required the trial court to instruct the jury on every listed catchall mitigating circumstance. *See Jones v. State, 612 So. 2d 1370* (Fla. 1992); *Robinson v. State*, 574 So. 2d 108 (Fla. 1991); *Randolph v. State,* 562 So. 2d 331 *(Fla. 1990); Jackson v. State*, 530 So. 2d 269 (Fla. 1988). Courts could consolidate them into categories. *See, e.g.*, *Mullins v. State*, 197 So. 3d 16 (Fla. 2016).

5. Requiring the trial courts to now instruct the jury on each of these catchall statutory mitigating circumstances and then require the jury to indicate on the verdict form whether they found the mitigating circumstance to exist, and what the vote was, is confusing and will not assist the trial court on what weight it should give to the jury's recommendation of death, when it makes its independent decision as to whether to sentence the defendant to death. As noted by Justice Lawson in his specially concurring opinion, 42 Fla.L.Weekly at S450 n. 4, would the judge be "bound by a jury's assessment of mitigating circumstance?" Other questions that would arise include whether it prevents the

trial court from finding a circumstance to be mitigating when the jury did not so find, would it allow a judge to reject a circumstance that the jury did find? What would be the appellate consequences of the failure of the jury to find a mitigating circumstance that it should have or the failure to include in the verdict form something a juror may have found to be mitigating, but not specifically listed or overlooked by the parties? These issues would inevitably lead to a challenge of the defendant's sentence based on that preclusion of consideration of relevant mitigating circumstances under the statute and case law.

6. Furthermore, will the jury understand the difference between finding the existence of a mitigating circumstance and what weight to give it? That is something judges, including this Court, have struggled with. For example personality disorders or other emotional disorders such as post traumatic stress disorder must be found by the trial courts where they are undisputed. *See Masterson v. State*, 516 So. 2d 256 (Fla. 1987), *Sireci v. State*, 399 So. 2d 964 (Fla. 1981). That also includes antisocial personality disorders, *Morton v. State*, 789 So. 2d 324 (Fla. 2001) and pedophilia. *Ault v. State*, 53 So. 3d 175 (Fla. 2010). Any emotional disturbance must be weighed by the sentencer. *Cheshire v. State*, 568 So. 2d 908 (Fla. 1990). Even the lack of emotional or personality disorders such as antisocial, psychotic or sociopathic tendencies has been found to be mitigating. *See Ford v. State*, 802 So. 2d 1121 (Fla. 2001). Being employed can be mitigation, *Nibert v. State*, 574 So. 2d 1059 (Fla. 1990),

as can being unemployed. *Perry v. State*, 522 So. 2d 817 (Fla. 1988). This Court has also been inconsistent at times in its determination of when a circumstance is mitigating. For example, this Court held in *Burns v. State,* 699 So. 2d 646 (Fla. 1997), that the impact of the defendant's execution on a defendant's family is not mitigating, but then in *Lugo v. State*, 845 So. 2d 74 (Fla. 2003), this Court recognized that it was. The point is that unlike the aggravating factors which are clearly defined by statute, the jury instructions, and case law, mitigating circumstances are in the eye of the beholder, and to require the jury to make specific findings regarding them is ripe with error.

7. In addition, in this interim verdict form this Court is requiring the jury to determine what aggravating factors it has unanimously found, as well as whether it has unanimously found that there are sufficient aggravating factors to warrant a possible death sentence, whether it has unanimously found that the aggravating factors outweighed the mitigating circumstances established, and then in a repetition of the other findings, whether the jury unanimously found that the defendant should be sentenced to death. In his specially concurring opinion, Justice Lawson has invited comment as to "whether it would be preferable to ask a jury that unanimously finds an aggravating factor to simply return a general verdict reflecting its sentencing recommendation, consistent with the statute." 42 Fla.L.Weekly at S449.

8. In response to that invitation, the FPAA agrees that the verdict form must include interrogatories as to which aggravating factors the jury has unanimously found. That requirement would comport with *Hurst v. Florida*.[2] The verdict form must also reflect that the jury has unanimously recommended the death penalty. That requirement would comport with the 2017 statute, as well as *Hurst v. State*.

9. The FPAA, however, believes that despite this Court's holding in *Hurst v. State* and *Perry v. State*, 210 So. 3d 630 (Fla. 2016*),* that the jury also has to unanimously find that there were sufficient aggravating factors to warrant the death penalty and that those aggravating factors outweighed the mitigating circumstances, there is no legal reason why these specific findings must be in the verdict form. In *Evans v. State,* 42 Fla.L.Weekly S200 (Fla. Feb. 20, 2017), this Court found that the only unconstitutional provision in the 2016 statute and the jury instructions was that they required only a vote of 10 jurors to recommend the death penalty. This Court concluded that that problem could be remedied through jury instructions and a verdict form.

10. The FPAA submits it is not necessary for the jury to separately answer interrogatories or verdict forms that they have found that there are

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[2] Although it has been the State's position that *Hurst v. Florida* only requires that a finding that the jury has found an aggravator –not that they have found all the aggravating factors, since this Court in *Hurst v. State* and the new statute requires those findings we agree the instruction should require it.

sufficient aggravating factors to warrant the death penalty and that the aggravating factors outweigh the mitigating factors. The jury will be instructed that they have to go through this process of making those findings in order to determine what the appropriate penalty will be. The answers to those interrogatories are inherent in the verdict that the jury either unanimously recommended the death penalty or did not. This is just like the verdict form for any crime that a defendant is convicted of. The jury is not asked to answer in an interrogatory whether it has unanimously found every element of the crime. Rather the jury's general verdict regarding guilt answers that question. These interim jury verdict forms may result in confusion by the jury.

7.11(a) (FINAL INSTRUCTIONS IN PENALTY PROCEEDINGS – CAPITAL CASES)

11. In conjunction with the problems as set forth above in requiring the jury to find mitigating circumstances in the verdict form, is the requirement that the judge instruct on any additional mitigating circumstances as requested. This instruction is at the Slip opinion at p. 31. This instruction is exacerbated by the emphasized portion of the instruction that follows on p. 32 and reads as follows:

> It is the defendant's burden to prove that mitigating circumstances exist. As explained before these proceedings, 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. 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 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. **Further, any juror may consider a mitigating circumstance found by another juror, even if he or she did not find that factor to be mitigating.** (Emphasis added).

It should be noted that the above emphasized portion was not included in the proposals by the Supreme Court Committee on Standard Jury Instructions in Criminal Cases. In fact those proposals when discussing the process, stated "[e]ach of you must consider the mitigating circumstances that you have individually found to exist in the next two steps of the process." Even this

language was not required under prior opinions from this Court. *See e.g., Waterhouse v. State*, 596 So. 2d 1008 (Fla. 1992).

12. Furthermore, this portion is confusing at best. What does this emphasized portion of the jury instruction tell the juror? Each juror is obligated to make an independent judgment on whether a mitigating circumstance exists and has been proven, and if it does, then the juror gives it the weight the juror believes it deserves. If the juror has not found a particular factor or circumstance to exist or be mitigating, why is that juror now instructed that he or she should now consider it just because another juror found that circumstance to be mitigation? Again, the problem is what is a mitigating circumstance? As instructed "a mitigating circumstance can be anything in the life the defendant which might indicate that the death penalty is not appropriate." Jurors come from all walks of life. Some may find that certain circumstances occurred in the defendant's life which indicates that death is not appropriate, but others might feel otherwise. As set forth in *Kansas v. Carr*, 136 S. Ct. at 642: "Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not." Thus, this portion of the instruction is confusing, and not necessary, and when added to the problems with the verdict form, gives no guidance to the trial court when it is making its

independent determination as to whether to sentence the defendant to death. This Court should amend the instruction and remove the emphasized portion.

Wherefore, based on the foregoing, 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 and amend the proposed jury instructions and verdict form as set forth herein.

Respectfully submitted,

By: /s/ *Arthur I. Jacobs*

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By: */s/ Penny H. Brill*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forgoing has been served on The Honorable F. Rand Wallis, Criminal Jury Instructions Committee Chair, c/o Bart Schneider, Office of the General Counsel, 500 Duval Street, Tallahasse, FL 32399-1925, schneidb@flcourts.org, on this the 1st day of June, 2017.

By: /s/ *Arthur I. Jacobs*

ARTHUR I. JACOBS
General Counsel

CERTIFICATE OF COMPLIANCE

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

By: */s/ Arthur I. Jacobs*

ARTHUR I. JACOBS
General Counsel