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IN THE SUPREME COURT OF FLORIDA

In Re: Standard Jury Instructions	:	
	:	**Case No. SC17-583**
Capital Cases	:	

Comments of the Florida Public Defender Association on In Re: Standard Jury Instructions Capital Cases, No. SC17-583

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The Florida Public Defender Association (FPDA) offers the following comments regarding the following proposed jury instructions:

- 7.11 Preliminary Instructions In Penalty Proceedings — Capital Cases
- 7.11(a) Final Instructions In Penalty Proceedings — Capital Cases
- 3.12(e) Jury Verdict Form—Death Penalty

Please, note the following. First, the FPDA requests the opportunity to be heard at oral argument regarding these proposed instructions. Second, for the purpose of brevity, if comment is made regarding an idea, issue, and/or instruction in one area, that comment applies to each occurrence of the issue throughout the proposed instructions and the proposed verdict forms. Third, the FPDA's comments are followed by specific proposals for modifications in Appendix 1. If the FPDA proposes alternative language to an instruction, it will be noted with green highlighting. If an objection or objections are posed to specific language, they will

be noted with yellow highlighting. Fourth, the FPDA filed comments regarding the proposed revisions to Standard Jury Instructions 7.11 and 7.11(a) as produced by the Florida Supreme Court Committee on Standard Jury Instructions (the Committee) that were published in The Florida Bar News on April 15, 2017. Those comments and the introductory letter are attached to these comments as Appendix 2. Finally, the FPDA and its members believe additional work and objections will likely be necessary before a final set of jury instructions are complete, meet constitutional muster, and provide the State of Florida with the best efforts of our legal community.

7.11 Preliminary Instructions In Penalty Proceedings — Capital Cases

Waiving Credit for Time Served and/or Parole

The Court's proposed preliminary instruction comment directs judges that

> *For murders committed before May 25, 1994, the following paragraph should be modified to comply with the statute in effect at the time the crime was committed. If the jury inquires whether the defendant will receive credit for time served against a sentence of life without possibility of parole for 25 years, the court should instruct that the defendant will receive credit for all time served but that there is no guarantee the defendant will be granted parole either upon serving 25 years or subsequently. See Green v. State, 907 So. 2d 489, 496 (Fla. 2005).*

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

This Court knows that jurors consider credit for time served and parole issues during penalty phase deliberations. *See Armstong v. State*, 73 So. 3d 155, 173 (Fla. 2011); *Gore v. State*, 706 So.2d 1328, 1333 (Fla. 1997); *Downs v. State*, 572 So. 2d 895, 901 (Fla. 1990).

The law is well established that a defendant may waive his or her rights, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). This ability to waive rights has included but not been limited to periodic consideration for parole and credit for time served. *See Peri v. State*, 426 So.2d 1021, 1026 (Fla. 3d DCA 1983); *Troutman v. State*, 985 So.2d 1167 (Fla. 3d DCA 2008); *Hines v. State*, 906 So.2d 1137 (Fla. 3d DCA 2005); Op. Att'y Gen. Fla. 78–29, at 3 (1978).

This comment to the trial judges and the subsequent jury instruction should address those issues as well. That is to say, if a defendant has a case with a crime from prior to May 25, 1994, and he or she makes a knowing and intelligent waiver of credit for time served and/or the right to parole review, the jury should be instructed appropriately. To do so otherwise would mislead the jurors and encourage the jurors to recommend death based on unwarranted fear that a defendant might someday be

released, perhaps in the near future, which would be a violation of the 8th Amendment to the U.S. Constitution and Art. I, § 17, of the Florida Constitution.

The 8th Amendment requires "heightened reliability" in capital sentencing. See, e.g., *Sumner v. Shuman*, 483 U.S. 66, 72 (1987). The New Jersey Supreme Court acknowledged and explained the obvious in *Fortin, a* juror's knowledge of whether a life sentence does or does not include the possibility of parole can be crucial to the decision to vote for life or death. *State v. Fortin*, 843 A. 2d 974, 1011 (NJ 2004). However, the Florida Supreme Court in *Bates v. State*, 750 So.2d 6 (Fla. 1999), a 4-3 split opinion, concluded that a capital defendant whose crime was committed before the May 25, 1994, effective date of the amendment making life imprisonment without possibility of parole the alternative punishment to a death sentence for the crime of first-degree murder may waive his right to parole eligibility. But the State of Florida has negotiated for a waiver of the right to parole in exchange for a life without parole sentence. Carlos Bello was sentenced to death for a first-degree murder committed in 1981, but on appeal the sentence was reversed for a new penalty phase. *Bello v. State*, 547 So.2d 914 (Fla. 1989).

Additionally, the Court should permit such waivers and instruct the jurors accordingly because "[a] mitigating circumstance can be defined broadly as "any

aspect of a defendant's character or record and any of the circumstances of the offense" that reasonably may serve as a basis for imposing a sentence less than death." *Campbell v. State,* 571 So.2d 415 (Fla. 1990) (quoting *Lockett v. Ohio*, 438 U.S 586, 604 (1978)). "[W]hether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review." *Douglas v. State*, 878 So.2d 1246, 1258-1259 (Fla. 2004). That a defendant wants a life sentence without the possibility of parole is truly mitigating.

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 proven 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 the 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 (proposed). 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 ~~be~~ meet the "beyond a reasonable doubt" burden of proof.[1]

This Court's recent 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 v. State*, was issued, this Court held in *Perry v. State*, this Court held

> "…the United States Supreme Court's decision in *Hurst v. Florida* and Florida's right to a jury trial provided under article I, 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 <u>are all required to be found unanimously by the jury</u> for the defendant to be sentenced to death…<u>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</u>.

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

This Court's ruling in *Hurst v. State*, emphasized the importance of the connection between unanimity and the reasonable doubt burden of proof. "[T]he jury in a

[1] This also occurs in the proposed Fla. Std. Jury Verdict Form (Crim.) 3.12(e).

capital case must unanimously ~~and~~ 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 v. State*, at 57. Shortly after that the Court referenced the Fifth Circuit Court of Appeals' comparison of the unanimity requirement to the reasonable doubt standard as impressing "'on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.'" *Hurst v. State*, at 58 *quoting United States v. Gipson,* 553 F.2d 453, 457 (5th Cir.1977).

As has been stated over and over by this Court and others, death is different. Without ensuring the certitude that unanimity <u>and</u> proof beyond a reasonable doubt provide, this Court risks a slide back into pre-*Furman v. Georgia*, 408 U.S. 238 (1972), arbitrariness.

The Jury's Decisions Regarding Mitigation

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, (4) whether mitigating circumstances are proven by the greater weight of the evidence;

Fla. Std. Jury Instr. (Crim.) 7.11 (proposed). The FPDA's objections and proposals with regard to this portion of the instruction will be addressed below in the final instruction section.

Diminishing Each Juror's Sense of Responsibility

Under the currently proposed preliminary jury instructions the jury would be instructed twice that 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 (proposed) (emphasis added). This is not the law. This is a misstatement of the law. In fact, as this Court noted in *Perry v. State*, the "…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 (proposed) (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 jury'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).

In at least one of the capital death penalty trials that occurred since this Court issued the proposed jury instructions, a prosecutor harangued a jury repeatedly about their efforts being merely advisory since the judge would still have the final say in whether or not the defendant would live or die. *See State v. Smiley*, 2015CF004903A000XX / 2015CF005388A000XX (Fla. 10th Cir. Ct. April 28, 2017) (account based upon trial counsels' memories with a transcript request pending).

The Court makes use of other "decision" words or their variants repeatedly throughout the instructions and verdict form: determine – 18 times; verdict – 14 times; vote – 7 times.

The fix for these issues is simple. Eliminate the words "recommending" from each portion of the instructions. They invite error and do not add any benefit.

7.11(A) Final Instructions In Penalty Proceedings — Capital Cases & 3.12(E) Jury Verdict Form—Death Penalty

Prior Violent Felony Aggravating Factor

The "prior violent felony" aggravating factor jury instruction violates the 6th, 8th, and 14th Amendments to the U.S. Constitution as well as the corresponding provisions in the Florida Constitution in Art. I §§ 9, 16, 14, and 22. On its face and in its application this aggravating factor eliminates jury fact finding, effectively directs the jury to find the existence of an aggravator automatically, and deprives defendants of those safeguards that would prevent the arbitrary taking of life.

The aggravating factor is found in §921.141(6)(a), Fla. Stat. and reads as follows: "The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." The jury instruction for that aggravating factor reads as follows

> 2. (Defendant) was previously convicted of [another capital felony] [a felony involving the [use] [threat] of violence to another person].
>
> *Give 2a or 2b as applicable.*
>
> a. <u>The crime of (previous crime) is a capital felony</u>.
>
> b. <u>The crime of (previous crime) is a felony involving the [use] [threat] of violence to another person</u>.

Fla. Std. Jury Instr. (Crim.) 7.11 (current and proposed). (Emphasis supplied). By instructing a jury that a defendant's prior and/or contemporaneous conviction(s) for a crime is/are capital and/or involve the use or threat of violence, the trial court effectively directs the jury to find the existence of an aggravator and make the defendant eligible for the death penalty.

The subsections of this instruction, as highlighted above, violate the prohibitions regarding an automatic death sentence as announced in *Woodson v. North Carolina,* 428 U.S. 280 (1976).

> [O]ne of the most significant developments in our society's treatment of capital punishment has been the rejection of the common-law practice of inexorably imposing a death sentence upon every person convicted of a specified offense.

Woodson, 428 U.S. 280, 301.

The Eighth Amendment draws its meaning from "the evolving standards of decency that mark the progress of a maturing society," as noted in *Trop v. Dulles*, 356 U.S. 86, 101 (1958). The use of an aggravating factor that automatically, mechanically causes a defendant to face eligibility for the death penalty, does not represent an evolution of decency but instead a retrograde of that notion.

The jury instructions as written for the "prior violent felony" aggravating factor found in §921.141(6)(a), Fla. Stat., are, on their face, a violation of the 8th Amendment to the U.S. Constitution, Art. I, § 14 of the Florida Constitution, and our county's evolving standards of decency.

There is also a 6th Amendment problem with this instruction because it takes away the jury's fact finding power on the question of whether the crime was in fact one involving the use or threat of violence. The prior instruction had a note indicating

that this was permitted because the issue was simply a matter of law. As the Florida Supreme Court has noted

> [W]hether a crime constitutes a prior violent felony is determined by the surrounding facts and circumstances of the prior crime. See Rose v. State, 787 So. 2d 786, 800 (Fla. 2001). The existence of violence as an "inherent element" is not the test.

Williams v. State, 967 So. 2d 735, 762 (Fla. 2007), *as revised on denial of reh'g* (Oct. 18, 2007). If there is a determination to be made about the facts and circumstances, then it is fact finding. This is and should remain in the province of the jury.

Mitigation

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 nonstatutory aggravating factors. *See Knight v. State*, 746 So.2d 423, 440, footnote 10; *Kormondy v. State*, 703 So.2d 454, 462-463, (Fla. 1997).

The burden of proving the existence of an aggravating factor beyond a reasonable doubt falls on the shoulders of the State as provided in § 921.141(2)(a), Fla. Stat. That section provides, in pertinent part, that "…the jury shall… determine if the state

has proven, beyond a reasonable doubt, the existence of at least one aggravating factor…"

The current instructions and verdict form in the Court's proposal contain a list of aggravating factors, a burden of proving those aggravating factors, 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 (current and proposed). While the current and proposed instructions regarding aggravating factors have clear authority from the Florida statutes, the proposed instructions on the limiting definition for mitigation, 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. In pertinent part, 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 notions 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.

Limiting the Definition of & Creating a Burden of Proof for Mitigation

The use of a limiting definition for mitigating circumstances and the imposition of an artificial burden of proof for mitigation is inappropriate for several reasons.

First, at no point anywhere in the statutes does Florida law provide for a burden of proof of a mitigating circumstance. There is no statutory language that can be read to have a plain meaning that there is such a burden. Nor is there statutory language from which one could reasonably infer that such a burden exists.

The Court's creation of this burden of proof of a mitigating circumstance is incongruous with the Court's limited role of interpreting law, as opposed to writing it, and is a violation of Art II, 2 § 3, Fla. Const.

Second, these limits and hurdles will preclude the individualized sentencing required by the Eighth Amendment to the U.S. Constitution. 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).

The Court's proposal would limit evidence by inserting a burden of proof on the consideration of mitigation by the jury. That is not necessary, because a trial judge will have already considered whether or not the evidence is relevant. The FPDA proposal is in accord with the broad standard for mitigation. *See Tennard v. Dretke*, 542 U.S. 274, 285 (2004) (" '[V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances' (quoting *Eddings*, supra at 114, 102 S.Ct. 869"). Limiting the mitigating evidence by setting an artificial hurdle deprives jurors of relevant mitigation. *See Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987) ("We have held that in capital cases, '"the sentence" '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).

Imposing a Burden of Proof for Mitigation

The Court's proposal includes a provision requiring the Defendant to prove mitigation. That provision states, in pertinent part, as follows

> The defendant does not need to prove mitigating circumstances beyond a reasonable doubt. <u>The defendant need only prove</u> a mitigating circumstance by the greater weight of the evidence…

Fla. Std. Jury Instr. (Crim.) 7.11 (proposed). (Emphasis supplied).

The Court's former instruction included no such provision. That instruction provided the following

> A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. A mitigating circumstance need only be proved by the greater weight of the evidence.

Fla. Std. Jury Instr. (Crim.) 7.11 (former). One might argue that an inference could be drawn from the former instruction that the burden was on the defendant. However, there is no doubt from the Court's proposal that the defendant bears the burden of proving up mitigating circumstances. Further, the consideration at this point is on the Court's pending proposal.

First, at no point anywhere in the statutes does Florida law provide for a burden of proving the existence of a mitigating circumstance that falls upon the defendant. The 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, 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.

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

Consideration of relevant mitigation is unlimited and does not require a particular burden of proof under the Eighth Amendment – since the trial court would have already limited the mitigation to evidence that is relevant, the Court's proposal is misleading and inappropriate. *See Lockett*, 438 U.S. 604-605. A "…sentencer may not refuse to consider or 'be precluded from considering' any relevant mitigating

evidence." *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (*quoting Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982)).

Fourth, the Court's proposed instructions include a provision that would mislead jurors about the weighing process. It states, in pertinent part, "You must weigh the following: … b. Whether the aggravating factor[s] outweigh[s] <u>any</u> mitigating circumstance[s] found to exist…" Fla. Std. Jury Instr. (Crim.) 7.11 (proposed) (emphasis supplied). The language is misleading because a juror might reasonably conclude that consideration could be for any one mitigating circumstance rather than all of those found to exist. And, as this Court recently held, "It has always been that death can be imposed only when the aggravating factors outweigh the mitigating circumstances..", *Perry at* 637, which effectively implies all of the mitigation and not merely some of it.

Finally, the Court's proposed verdict form will clearly have a limiting impact on the consideration of mitigation. The jury will effectively be instructed not to consider evidence of nonstatutory mitigating circumstances in violation of Hitchcock v. Dugger, 481 U.S. 393, 398-399 (1987) and the 8th Amendment of the U.S. Constitution as well as Art. I, § 17 of the Florida Constitution.

Sympathy

With regard to Fla. Std. Jury Instr. (Crim.) 3.10(8) as used in Fla. Std. Jury Instr. (Crim.) 7.11(a), the FPDA believes the word "sympathy" should be removed, if requested by the defense, because it may reasonably be equated with mercy, which is a permissible consideration for jurors in a penalty phase deciding whether to take the life of another human being.

Victim Impact

The victim impact evidence instruction should be, as recommended by the Committee proposal, given at the time victim impact evidence is admitted, if requested. This would be akin to a *Williams Rule* instruction being given at the time such evidence is offered during a trial.

Juror Research and Investigation

Jurors are instructed not to conduct research or any sort of investigation at the beginning of a trial. Fla. Std. Jury Instr. (Crim.) 1.1 (Introduction). The Court has seen fit to reinstruct the jurors with admonitions and law that they would have received at the end of the first phase – possibly a day or two earlier. The instruction prohibiting research and investigation given, presumably, on the first day of voir dire

and possibly weeks earlier might be forgotten by some jurors. Re-instructing the jurors with this reminder makes good sense and might help avoid needless litigation.

Foreperson Signature Block

The Foreperson's signature block should also include the Foreperson's juror identification number to aid in clarity.

Appendix 1

FPDA proposed additions

~~FPDA proposed deletions~~

7.11 PRELIMINARY INSTRUCTIONS IN PENALTY PROCEEDINGS — CAPITAL CASES

§ 921.141, Fla. Stat.

This instruction is to be given immediately before the opening statements in the penalty phase of a death penalty case.

Give 1a at the beginning of penalty proceedings before a jury that did not try the issue of guilt. Give bracketed language if the case has been remanded for a new penalty proceeding. See Hitchcock v. State, 673 So. 2d 859 (Fla. 1996). In addition, give the jury other appropriate general instructions.

1. a. **Members of the jury, the defendant has been found guilty of ____ count[s] of Murder in the First Degree in a previous proceeding. The only issue before you is to determine the appropriate sentence.**

Give 1b at the beginning of penalty proceedings before the jury that found the defendant guilty.

b. **Members of the jury, you have found the defendant guilty of ____ count[s] of Murder in the First Degree.**

For murders committed before May 25, 1994, the following paragraph should be modified to comply with the statute in effect at the time the crime was committed. If the jury inquires whether the defendant will receive credit for time served against a sentence of life without possibility of parole for 25 years, the court should instruct that the defendant will receive credit for all time served but that there is no guarantee the defendant will be granted parole either upon serving 25 years or subsequently. See Green v. State, 907 So. 2d 489, 496 (Fla. 2005). If the defendant knowingly and intelligently waives the right to parole and/or credit for all time served, the jury shall be instructed as such, if requested.

2. **The punishment for this crime is either life imprisonment without the possibility of parole or death.**

Give this instruction in all cases.

The attorneys will now have an opportunity, if they wish, to make an opening statement. The opening statement gives the attorneys a chance to tell you what evidence they believe will be presented during the penalty phase of this trial. What the lawyers say during opening statements is not evidence, and

you are not to consider it as such. After the attorneys have had the opportunity to present their opening statements, the State and the defendant may present evidence relative to the nature of the crime and the defendant's character, background, or life. 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 proven beyond a reasonable doubt and found by the jury unanimously; (2) whether one or more aggravating factors exist beyond a reasonable doubt and is/are found by the jury unanimously; (3) whether the aggravating factors found to exist beyond a reasonable doubt are sufficient to justify the imposition of the death penalty and found by the jury unanimously; (4) whether mitigating circumstances are present ~~proven by the greater weight of the evidence~~; (5) whether the aggravating factors outweigh the mitigating circumstances beyond a reasonable doubt and determined by the jury unanimously; and (6) whether you determine beyond a reasonable doubt and unanimously that the defendant should be sentenced to life imprisonment without the possibility of parole or death. At the conclusion of the evidence and after argument of counsel, you will be instructed on the law that will guide your deliberations.

Aggravating Factors:

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. It is a statutorily enumerated circumstance that increases the gravity of a crime or the harm to a victim.

You must unanimously agree that each aggravating factor was proven beyond a reasonable doubt before it may be considered by you in arriving at your final verdict. In order to consider the death penalty as a possible penalty, you must determine that at least one aggravating factor has been proven beyond a reasonable doubt.

The State has the burden to prove each 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 wavers and vacillates, then the aggravating factor has not been proved beyond every reasonable doubt and you must not consider it in providing your verdict on the appropriate sentence to the court.

A reasonable doubt as to the existence of an aggravating factor may arise from the evidence, conflicts 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 that the aggravating factor does exist.

Before moving on to the mitigating circumstances, you must determine that the aggravating factors are sufficient to impose a sentence of death. If you do not unanimously agree that the aggravating factors are sufficient to impose death beyond a reasonable doubt, do not move on to consider the mitigating circumstances.

Mitigating Circumstances:

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. Unlike aggravating factors, you do not need to unanimously agree that a mitigating circumstance has been established.

A mitigating circumstance is not limited to the facts surrounding the crime. It can be anything ~~in the life of the defendant which~~ that might indicate that the death penalty is not appropriate for the defendant. In other words, a mitigating circumstance may include any aspect of the defendant's character, background, ~~or~~ life, ~~or~~ any circumstance ~~of the offense~~ that reasonably may indicate that the death penalty is not an appropriate sentence in this case. A mitigating circumstance is evidence of any reason a juror believes may tend to support a sentence of life in prison without the possibility of parole.

~~A mitigating circumstance need not be proven beyond a reasonable doubt by the defendant.~~ Unlike aggravating factors, which must be found unanimously and beyond a reasonable doubt, mitigating circumstances do not require unanimous agreement. A mitigating circumstance may be found by one or more individual jurors. ~~The defendant need only prove a mitigating circumstance by the greater weight of the evidence, which means evidence that more likely than not tends to prove the existence of the mitigating circumstance. If you determine by the greater weight of the evidence that a mitigating circumstance exists, you must consider it proven.~~ Additionally, the jury need not be unanimous regarding a finding that a mitigating circumstance exists.

Each juror should make his or her own decision about whether a mitigating circumstance exists.

There are no limits to the mitigating circumstances you may consider. ~~**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 consider it established and**~~ **And you should give that evidence such weight as you determine it should receive in reaching your conclusion as to the sentence to be imposed.**

Comment

This instruction was adopted in 1981 and amended in 1985 [477 So. 2d 985], 1989 [543 So. 2d 1205], 1991 [579 So. 2d 75], 1992 [603 So. 2d 1175], 1994 [639 So. 2d 602], 1995 [665 So. 2d 212], 1996 [678 So. 2d 1224], 1997 [690 So. 2d 1263], 1998 [723 So. 2d 123], 2009 [22 So. 3d 17], 2014 [146 So. 3d 1110], and 2017.

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

§ 921.141, Fla. Stat.

This instruction should be given after the closing arguments in the penalty phase of a death penalty trial.

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.

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.

Aggravating factors. § 921.141(6), Fla. Stat.
The aggravating factor[s] alleged by the State [is] [are]:

Give only those aggravating factors noticed by the State which are supported by the evidence.

1. (Defendant) **was previously convicted of a felony and [under sentence of imprisonment] [on community control] [on felony probation].**

2. (Defendant) **was previously convicted of [another capital felony] [a felony involving the [use] [threat] of violence to another person].**

~~*Give 2a or 2b as applicable.*~~
~~**a. The crime of** (previous crime) **is a capital felony.**~~

~~**b. The crime of** (previous crime) **is a felony involving the [use] [threat] of violence to another person.**~~

3. (Defendant) **knowingly created a great risk of death to many persons.**

4. The First Degree Murder was committed while (defendant) **was**

[engaged] [an accomplice] in [the commission of] [an attempt to commit] [flight after committing or attempting to commit]

any

[robbery].
[sexual battery].
[aggravated child abuse].
[abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement].
[arson].
[burglary].
[kidnapping].
[aircraft piracy].
[unlawful throwing, placing or discharging of a destructive device or bomb].

Check § 921.141(6)(d), Fla. Stat., for any change in list of offenses.

5. The First Degree Murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

6. The First Degree Murder was committed for financial gain.

7. The First Degree Murder was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

8. The First Degree Murder was especially heinous, atrocious or cruel.

"Heinous" means extremely wicked or shockingly evil.

"Atrocious" means outrageously wicked and vile.

"Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

The kind of crime intended to be included as especially heinous, atrocious, or cruel is one accompanied by additional acts that show

that the crime was conscienceless or pitiless and was unnecessarily torturous to (decedent).

9. The First Degree Murder was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification.

"Cold" means the murder was the product of calm and cool reflection.

"Calculated" means having a careful plan or prearranged design to commit murder.

A killing is "premeditated" if it occurs after the defendant consciously decides to kill. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.

However, in order for this aggravating factor to apply, a heightened level of premeditation, demonstrated by a substantial period of reflection, is required.

A "pretense of moral or legal justification" is any claim of justification or excuse that, though insufficient to reduce the degree of murder, nevertheless rebuts the otherwise cold, calculated, or premeditated nature of the murder.

10. (Decedent) **was a law enforcement officer engaged in the performance of [his] [her] official duties.**

11. (Decedent) **was an elected or appointed public official engaged in the performance of [his] [her] official duties, if the motive for the First Degree Murder was related, in whole or in part, to** (decedent's) **official capacity.**

12. (Decedent) **was a person less than 12 years of age.**

13. (Decedent) **was particularly vulnerable due to advanced age or disability, or because** (defendant) **stood in a position of familial or custodial authority over** (decedent)**.**

With the following aggravating factor, definitions as appropriate from § 874.03, Fla. Stat., must be given.

14. The First Degree Murder was committed by a criminal street gang member.

15. The First Degree Murder was committed by a person designated as a sexual predator or a person previously designated as a sexual predator who had the sexual predator designation removed.

16. The First Degree Murder was committed by a person subject to

[a domestic violence injunction issued by a Florida judge],
[a [repeat] [sexual] [dating] violence injunction issued by a Florida judge],
[a protection order issued from [another state] [the District of Columbia] [an Indian tribe] [a commonwealth, territory, or possession of the United States]],

and

the victim of the First Degree Murder was [the person] [a [spouse] [child] [sibling] [parent] of the person] who obtained the [injunction] [protective order].

Give in all cases.

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 providing a verdict.

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 an aggravating factor exists must be unanimous, that is, all of you must agree that each presented aggravating factor exists. You will be provided a form to make this 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 verdict must be for a sentence of life imprisonment without the possibility for parole. At such point, your deliberations are complete.

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.

Mitigating circumstances. § 921.141(7), Fla. Stat.

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 beyond a reasonable doubt, the next step in the process is for you to determine whether any mitigating circumstances exist. A mitigating circumstance can be ~~anything in the life of the defendant which~~ that might indicate that the death penalty is not appropriate. It is not limited to the facts surrounding the crime. A mitigating circumstance may include any aspect of the defendant's character, background, ~~or~~ life, ~~or~~ any circumstance ~~of the offense~~ that reasonably may indicate that the death penalty is not an appropriate sentence in this case. A mitigating circumstance is evidence of any reason a juror believes may tend to support a sentence of life in prison without the possibility of parole.

Unlike aggravating factors, which must be found unanimously and beyond a reasonable doubt, mitigating circumstances do not require unanimous agreement. A mitigating circumstance may be found by one or more individual jurors.

Among the mitigating circumstances you may consider but are not limited to are:

Give only those mitigating circumstances for which evidence has been presented.

1. (Defendant) **has no significant history of prior criminal activity.**

If the defendant offers evidence on this circumstance and the State, in rebuttal, offers evidence of other crimes, also give the following:

Conviction of (previous crime) **is not an aggravating factor to be considered in determining the penalty to be imposed on the defendant, but a conviction of that crime may be considered by the jury in determining whether the defendant has a significant history of prior criminal activity.**

2. The First Degree Murder was committed while (defendant) **was under the influence of extreme mental or emotional disturbance.**

3. (Decedent) **was a participant in (**defendant's**) conduct or consented to the act.**

4. (Defendant) **was an accomplice in the First Degree Murder committed by another person and [his] [her] participation was relatively minor.**

5. (Defendant) **acted under extreme duress or under the substantial domination of another person.**

6. The capacity of (defendant) **to appreciate the criminality of [his] [her] conduct or to conform [his] [her] conduct to the requirements of law was substantially impaired.**

7. (Defendant's) **age at the time of the crime.**

The judge should also instruct on any additional mitigating circumstances as requested.

8. The existence of any other factors in (defendant's) **character, background, or life or the circumstances of the offense that would mitigate against the imposition of the death penalty.**

~~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.

Your decision regarding the appropriate sentence should be based upon proven aggravating factors and established mitigating circumstances that have been presented to you during these proceedings. You will now engage in a weighing process.

Merging aggravating factors. Give the following paragraph if applicable. For example, the aggravating circumstances that 1) the murder was committed during the course of a robbery and 2) the murder was committed for financial gain, relate to the same aspect of the offense and may be considered as only a single aggravating circumstance. Castro v. State, 597 So. 2d 259 (Fla. 1992).

Pursuant to Florida law, the aggravating factors of *(insert aggravating factor)* **and** *(insert aggravating factor)* **are considered to merge because they are considered to be a single aspect of the offense. If you unanimously determine that the aggravating factors of** *(insert aggravating factor)* **and** *(insert aggravating factor)* **have both been proven beyond a reasonable doubt, your findings should indicate that both aggravating factors exist, but you must consider them as only one aggravating factor during the weighing process that I am about to explain to you.**

You must weigh all 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~~ all 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. Regardless of the results of each juror's individual weighing process—even if you find that the sufficient aggravators outweigh the mitigators—the law neither compels nor requires you to determine that the defendant should be sentenced to death.

No aggravating factor may be considered unless the State proves it beyond a reasonable doubt. Further, if one or more jurors conclude that an aggravating factor was not proved beyond reasonable doubt, then no juror may consider that aggravating factors.

Once each juror has weighed the proven factors, he or she must determine the appropriate punishment for the defendant. The jury's decision regarding the appropriate sentence must be unanimous if death is to be imposed. To repeat what I have said, if your verdict is that the defendant should be sentenced to death, your finding that each aggravating factor exists beyond a reasonable doubt must be unanimous, your finding that the aggravating factors are sufficient to impose death beyond a reasonable doubt must be unanimous, and your finding that the aggravating factor(s) found to exist outweigh the established mitigating circumstances beyond a reasonable doubt must be unanimous, and your decision if to impose a sentence of death must be unanimous also.

You will be provided a form to reflect your findings and decision regarding the appropriate sentence. If your vote on the appropriate sentence is less than unanimous, the defendant will be sentenced to life in prison without the possibility of parole.

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

Weighing the evidence.

When considering aggravating factors and mitigating circumstances, it is up to you to decide which evidence is reliable. You should use your common sense in deciding which is the best evidence and which evidence should not be relied upon in making your decision as to what sentence should be imposed. You may find some of the evidence not reliable, or less reliable than other evidence.

You should consider how the witnesses acted, as well as what they said. Some things you should consider are:

1. Did the witness seem to have an opportunity to see and know the things about which the witness testified?

2. Did the witness seem to have an accurate memory?

3. Was the witness honest and straightforward in answering the attorneys' questions?

4. Did the witness have some interest in how the case should be decided?

5. Did the witness's testimony agree with the other testimony and other evidence in the case?

Give as applicable.

6. Had the witness been offered or received any money, preferred treatment or other benefit in order to get the witness to testify?

7. Had any pressure or threat been used against the witness that affected the truth of the witness's testimony?

8. Did the witness at some other time make a statement that is inconsistent with the testimony he or she gave in court?

9. Has the witness been convicted of a felony or of a misdemeanor involving [dishonesty] [false statement]?

10. Does the witness have a general reputation for [dishonesty] [truthfulness]?

Law enforcement witness.

The fact that a witness is employed in law enforcement does not mean that [his] [her] testimony deserves more or less consideration than that of any other witness.

Expert witnesses.

Expert witnesses are like other witnesses with one exception—the law permits an expert witness to give an opinion. However, an expert's opinion is only reliable when given on a subject about which you believe that person to be an expert. Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.

Accomplices and Informants.

You must consider the testimony of some witnesses with more caution than others. For example, a witness who [claims to have helped the defendant commit a crime] [has been promised immunity from prosecution] [hopes to gain more favorable treatment in his or her own case] may have a reason to make a false statement in order to strike a good bargain with the State. This is particularly true when there is no other evidence tending to agree with what the witness says about the defendant. So, while a witness of that kind may be entirely truthful when testifying, you should consider [his] [her] testimony with more caution than the testimony of other witnesses.

Child witness.

You have heard the testimony of a child. No witness is disqualified just because of age. There is no precise age that determines whether a witness may testify. The critical consideration is not the witness's age, but whether the witness understands the difference between what is true and what is not true, and understands the duty to tell the truth.

Give only if the defendant testified.

The defendant in this case has become a witness. You should apply the same rules to consideration of [his] [her] testimony that you apply to the testimony of the other witnesses.

Witness talked to lawyer.

It is entirely proper for a lawyer to talk to a witness about what testimony the witness would give if called to the courtroom. The witness should not be discredited by talking to a lawyer about [his] [her] testimony.

Give in all cases.

You may rely upon your own conclusion about the credibility of any witness. A juror may believe or disbelieve all or any part of the evidence or the testimony of any witness.

Give only if the defendant did not testify.

The defendant exercised a fundamental right by choosing not to be a witness in this case. You must not be influenced in any way by [his] [her] decision. No juror should ever be concerned that the defendant did or did not take the witness stand to give testimony in the case.

Rules for deliberation.

These are some general rules that apply to your discussions. You must follow these rules in order to make a lawful decision.

1. You must follow the law as it is set out in these instructions. If you fail to follow the law, your decisions will be a miscarriage of justice. There is no reason for failing to follow the law in this case. All of us are depending upon you to make wise and legal decisions in this matter.

2. Your decisions must be based only upon the evidence that you have heard from the testimony of the witnesses, [have seen in the form of the exhibits in evidence,] and these instructions.

3. Your decisions must not be based upon the fact that you feel sorry for anyone or are angry at anyone.

4. Remember, the lawyers are not on trial. Your feelings about them should not influence your decisions.

Give #5 if applicable.

5. The jury is not to discuss any question[s] that [a juror] [jurors] wrote that [was] [were] not asked by the Court, and must not hold that against either party.

6. Your decisions should not be influenced by feelings of prejudice, racial bias, or ethnic bias.~~, or sympathy~~. Your decisions must be based on the evidence and the law contained in these instructions.

Victim impact evidence. Give if applicable. Also, give at the time victim impact evidence is admitted, if requested.

You have heard evidence about the impact of this murder on the [family] [friends] [community] of (decedent)**. This evidence was presented to show the victim's uniqueness as an individual and the resultant loss by** (decedent's) **death. However, you may not consider this evidence as an aggravating factor. Your decisions must be based on the aggravating factor[s], the mitigating circumstance[s], and the weighing process upon which you have been instructed.**

Submitting case to jurors.

In just a few moments you will be taken to the jury room by the [court deputy] [bailiff]. When you have reached decisions in conformity with these instructions, the appropriate form[s] should be signed and dated by your foreperson.

You must not do any research or look up words, names, [maps], or anything else that may have anything to do with this case. This includes reading newspapers, watching television or using a computer, cell phone, the Internet, any electronic device, or any other means at all, to get information related to this case or the people and places involved in this case. This applies whether you are in the courthouse, at home, or anywhere else.

During deliberations, jurors must communicate about the case only with one another and only when all jurors are present in the jury room. You are not to communicate with any person outside the jury about this case, and you must not talk about this case in person or through the telephone, writing, or electronic communication, such as a blog, Twitter, e-mail, text message, or any other means.

Give if judge has allowed jurors to keep their electronic devices during the penalty phase.

Many of you may have cell phones, tablets, laptops, or other electronic devices here in the courtroom. The rules do not allow you to bring your phones or any of those types of electronic devices into the jury room. Kindly leave those devices on your seats where they will be guarded by the [court deputy] [bailiff] while you deliberate.

Do not contact anyone to assist you during deliberations. These communications rules apply until I discharge you at the end of the case. If you

become aware of any violation of these instructions or any other instruction I have given in this case, you must tell me by giving a note to the [court deputy] [bailiff].

Give if applicable.

During this trial, [an item] [items] [was] [were] received into evidence as [an] exhibit[s]. You may examine whatever exhibit[s] you think will help you in your deliberations.

Give a or b as appropriate.

a. The[se] exhibit[s] will be sent into the jury room with you when you begin to deliberate.

b. If you wish to see an[y] exhibit[s], please request that in writing.

I cannot participate in your deliberations in any way. Please disregard anything I may have said or done that made you think I preferred one decision over another. If you need to communicate with me, send a note through the [court deputy] [bailiff], signed by the foreperson. If you have questions, I will talk with the attorneys before I answer, so it may take some time. You may continue your deliberations while you wait for my answer. I will answer any questions, if I can, in writing or orally here in open court.

In closing, let me remind you that it is important that you follow the law spelled out in these instructions. There are no other laws that apply to this case. Even if you do not like the laws that must be applied, you must use them. For more than two centuries we have lived by the constitution and the law. No juror has the right to violate rules we all share.

Comment

This instruction was adopted in 2017.

7.12 DIALOGUE FOR POLLING THE JURY (DEATH PENALTY CASE)

Members of the jury, we are going to ask each of you individually about the verdict[s] that you have just heard. The question[s] pertain to whether the verdict[s], as read by the clerk, [was] [were] correctly stated.

The following question is to be asked of each juror if the verdict is for the death penalty:

Do you, (*name of juror)***)] [juror number** *(number of juror)***), agree that each of the findings in the verdict form is yours?**

The following question is to be asked of each juror if the verdict is for a life sentence:

Do you, (*name of juror)***)] [juror number** *(number of juror)***), agree that at least one member of the jury voted for a sentence of life imprisonment without the possibility of parole?**

Comment

This instruction was adopted in 1981 and was amended in 1997 and 2017.

3.12(e) JURY VERDICT FORM—DEATH PENALTY

We the jury find as follows as to (Defendant) in this case:

A. Aggravating Factors as to Count ___:

We the jury unanimously find that the State has established beyond a reasonable doubt the existence of (aggravating factor).

YES _____
NO _____

Repeat this step for each statutory aggravating factor submitted to the jury.

If you answer YES to at least one of the aggravating factors listed, please proceed to Section B. If you answered NO to every aggravating factor listed, do not proceed to Section B; (Defendant) **is not eligible for the death sentence and will be sentenced to life in prison without the possibility of parole.**

B. Sufficiency of the Aggravating Factors as to Count ___:

Reviewing the aggravating factors that we unanimously found to be established beyond a reasonable doubt (Section A), we the jury unanimously find that the aggravating factors are sufficient to warrant a possible sentence of death.

YES _____
NO _____

If you answer YES to Section B, please proceed to Section C. If you answer NO to Section B, do not proceed to Section C; (Defendant) **will be sentenced to life in prison without the possibility of parole.**

~~**C. Statutory Mitigating Circumstances:**~~

~~We the jury find that (statutory mitigating circumstance) was established by the greater weight of the evidence.~~

~~YES _____~~
~~NO _____~~

~~If you answered YES above, please provide the jury vote as to the existence of (statutory mitigating circumstance).~~
~~VOTE OF ____ TO ____.~~

~~*Repeat for each statutory mitigating circumstance.*~~

Please proceed to Section D, regardless of your findings in Section C.

D. Eligibility for the Death Penalty for Count ___.

We the jury unanimously find that the aggravating factors that were proven beyond a reasonable doubt (Section A) outweigh the mitigating circumstances established (Section C above) as to Count ___.

YES _____
NO _____

If you answered YES to Section D, please proceed to Section E. If you answered NO to Section D, do not proceed; (Defendant) **will be sentenced to life in prison without the possibility of parole.**

E. Jury Verdict as to Death Penalty

Having unanimously found that at least one aggravating factor has been established beyond a reasonable doubt (Section A), that the aggravating factors are sufficient to warrant a sentence of death (Section B), and the aggravating factors outweigh the mitigating circumstances (Section D), we the jury unanimously find that (Defendant) should be sentenced to death.

YES _____
NO _____

If NO, our vote to impose a sentence of life is _____ to _____.

If your vote to impose death is less than unanimous, the trial court shall impose a sentence of life without the possibility of parole.

Dated this _____ day of _____, 20__, in _____ County, Florida.

_____
(Signature of foreperson) / Juror #

Appendix 2

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PETER MILLS
ASSISTANT

TRIAL

10th Judicial Circuit

May 12, 2017

Standard Jury Instructions Committee in Criminal Cases
C/O Bart Schneider, General Counsel's Office
Office of the State Courts Administrator
500 S. Duval Street
Tallahassee, FL 32399-1900

RE: Comments of the FPDA on proposed revisions to Standard Jury Instructions 7.11, 7.11(a), and 7.12

Dear Mr. Schneider,

Please find attached to this letter the comments of the Florida Public Defender Association on the proposed revisions to Standard Jury Instructions 7.11, 7.11(a), and 7.12.

The Florida Public Defender Association (FPDA) greatly appreciates the work of the Florida Supreme Court Committee on Standard Jury Instructions (the Committee) with regard to the work on the capital jury instructions that were published in The Florida Bar News on April 15, 2017. While the FPDA has objections and proposals regarding the Committee's proposed capital jury instructions, the judges, prosecutors, and members of the defense bar researched, debated, and endeavored in an effort that resulted in a respectable final product. The Committee's final product significantly comports with Florida and U.S. constitutional mandates and the Florida Statutes and would likely greatly reduce litigation in this area.

A summary of the FPDA's comments are contained below, which are followed by proposals for modifications in the attached appendix. The FPDA and its members believe additional work and objections will likely be necessary before a final set of jury instructions are complete, meet constitutional muster, and provide the State of Florida with the best efforts of our legal community.

The FPDA's comments and proposals focus primarily on:

1. the prior violent felony aggravator;
2. mitigation: the limiting definition of mitigation, the burden of proof for mitigation, and imposing the burden of proof for mitigation on the defendant;
3. including standard instructions regarding weighing the evidence, beyond a reasonable doubt, etc. (the FPDA believes these should be <u>required</u> in the penalty phase instructions as has been done in the recent past and in the proposed jury instructions issued by the Florida Supreme Court on April 13th in No. SC17-583. However the FPDA did not include them in full format in this comments/proposals so that the more contentious proposals would be more apparent);
4. and several other issues that are directly addressed within the instructions.

Respectfully submitted,

Peter Mills
Assistant Public Defender
FPDA Death Penalty Steering Committee, Chair

Comments

Prior Violent Felony Aggravating Factor

The "prior violent felony" aggravating factor violates the 6th, 8th, and 14th amendments to the U.S. Constitution as well as the corresponding provisions in the Florida Constitution in Art. I §§ 9, 16, 14, and 22. On its face an in its application this aggravating factor eliminates jury fact finding, effectively directs the jury to find the existence of an aggravator automatically, and deprives defendants of those safeguards that would prevent the arbitrary taking of life.

The aggravating factor is found in §921.141(6)(a), Fla. Stat. and reads as follows: "The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." The jury instruction for that aggravating factor reads as follows

> 2. (Defendant) was previously convicted of [another capital felony] [a felony involving the [use] [threat] of violence to another person].
>
> *Give 2a or 2b as applicable.*

a. The crime of (previous crime) is a capital felony.

b. The crime of (previous crime) is a felony involving the [use] [threat] of violence to another person.

Fla. Std. Jury Instr. (Crim.) 7.11 (current and proposed). (Emphasis supplied). By instructing a jury that a defendant's prior and/or contemporaneous conviction(s) for a crime is/are capital and/or involve the use or threat of violence, the trial court effectively directs the jury to find the existence of an aggravator and make the defendant eligible for the death penalty.

There is a 6th amendment problem with this instruction because it takes away the jury's fact finding power on the question of whether the crime was in fact one involving the use or threat of violence. The prior instruction had a note indicating that this was permitted because the issue was simply a matter of law. As the Florida Supreme Court has noted

> [W]hether a crime constitutes a prior violent felony is determined by the surrounding facts and circumstances of the prior crime. See Rose v. State, 787 So. 2d 786, 800 (Fla. 2001). The existence of violence as an "inherent element" is not the test.

Williams v. State, 967 So. 2d 735, 762 (Fla. 2007), *as revised on denial of reh'g* (Oct. 18, 2007). If there is a determination to be made about the facts and circumstances, then it is fact finding. This is and should remain in the province of the jury.

Further, the subsections of this instruction, as highlighted above, violate the prohibitions regarding an automatic death sentence as announced in *Woodson v. North Carolina,* 428 U.S. 280 (1976).

> [O]ne of the most significant developments in our society's treatment of capital punishment has been the rejection of the common-law practice of inexorably imposing a death sentence upon every person convicted of a specified offense.

Woodson, 428 U.S. 280, 301.

The Eighth Amendment draws its meaning from "the evolving standards of decency that mark the progress of a maturing society," as noted in *Trop v. Dulles*, 356 U.S. 86, 101 (1958). The use of an aggravating factor that automatically, mechanically causes a defendant to face eligibility for the death penalty does not represent an evolution of decency but instead a retrograde of that notion.

The jury instructions as written for the "prior violent felony" aggravating factor found in §921.141(6)(a), Fla. Stat., are, on their face, a violation of the 8th Amendment to the U.S. Constitution, Art. I, § 14 of the Florida Constitution, and our county's evolving standards of decency.

Mitigation

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 nonstatutory aggravating factors. *See Knight v. State*, 746 So.2d 423, 440, footnote 10; *Kormondy v. State*, 703 So.2d 454, 462-463, (Fla. 1997).

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

The current instructions and the Committee's proposal contain a list of aggravating factors, a burden of proving those aggravating factors, 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 (current and proposed). While the current and proposed instructions regarding aggravating factors have clear authority from the Florida

statutes, the proposed instructions on the limiting definition for mitigation, 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. In pertinent part, 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 notions 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.

Limiting the Definition of & Creating a Burden of Proof for Mitigation

The use of a limiting definition for mitigating circumstances and the imposition of an artificial burden of proof for mitigation is inappropriate for several reasons.

First, at no point anywhere in the statutes does Florida law provide for a burden of proof of a mitigating circumstance. There is no statutory language that can be read to have a plain meaning there is such a burden. Nor is there statutory language from which one could reasonably infer that such a burden exists.

For the Court to insert itself into the role of the legislature is incongruous with its role of interpreting laws, and not writing them, in an apparent violation of Art. II, § 3, of the Florida Constitution. The Court's creation of this burden of proof of a mitigating circumstance is incongruous with the Court's limited role of interpreting law, as opposed to writing it, and is a violation of Art II, 2 § 3, Fla. Const.

Second, these limits and hurdles will preclude the individualized sentencing required by the Eighth Amendment to the U.S. Constitution. 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).

The Committee's proposal would limit evidence by inserting a burden of proof on the consideration of mitigation by the jury. That is not necessary, because a trial

judge will have already considered whether or not the evidence is relevant. The FPDA proposal is in accord with the broad standard for mitigation. *See Tennard v. Dretke*, 542 U.S. 274, 285 (2004) (" '[V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances' (quoting *Eddings*, supra at 114, 102 S.Ct. 869"). Limiting the mitigating evidence by setting an artificial hurdle deprives jurors of relevant mitigation. *See Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987) ("We have held that in capital cases, '"the sentence" '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).

Imposing a Burden of Proof for Mitigation

The Committee's proposal includes a provision requiring the Defendant to prove mitigation. That provision states, in pertinent part, as follows

> The defendant does not need to prove mitigating circumstances beyond a reasonable doubt. <u>The defendant need only prove</u> a mitigating circumstance by the greater weight of the evidence…

Fla. Std. Jury Instr. (Crim.) 7.11 (proposed). (Emphasis supplied).

The Court's former instruction included no such provision. That instruction provided the following

> A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. A mitigating circumstance need only be proved by the greater weight of the evidence.

Fla. Std. Jury Instr. (Crim.) 7.11 (former). One might argue that an inference could be drawn from the former instruction that the burden was on the defendant. However, there is no doubt from the Committee's proposal that the defendant bears the burden of proving up mitigating circumstances. Further, the consideration at this point is on the Committee's pending proposal

First, at no point anywhere in the statutes does Florida law provide for a burden of proving the existence of a mitigating circumstance that falls upon the defendant. The 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, 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.

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

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

APPENDIX

FPDA proposed additions

~~FPDA proposed deletions~~

7.10 PRELIMINARY INSTRUCTIONS IN PENALTY PROCEEDINGS — CAPITAL CASES

§ 921.141, Fla. Stat.

The instruction is designed for first degree murders committed after May 24, 1994, when the legislature omitted the possibility of parole for anyone convicted of First Degree Murder. For first degree murders committed before May 25, 1994, this instruction will have to be modified.

This instruction is to be given immediately before the opening statements in the penalty phase of a death penalty case.

Give 1a at the beginning of penalty proceedings before a jury that did not try the issue of guilt.

1. **a. Members of the jury, the defendant has been found guilty of First Degree Murder in a previous proceeding. Consequently, you will not concern yourselves with the question of guilt. You must accept the fact that the defendant is guilty of First Degree Murder.**-

Give 1b at beginning of penalty proceedings before the jury that found the defendant guilty.

b. Members of the jury, you have found the defendant guilty of First Degree Murder.

Give in all cases.

Your deliberations in this penalty phase will determine the appropriate sentence for the crime of First Degree Murder. There are only two options: Life imprisonment without the possibility of parole, or death.

At the conclusion of this penalty phase trial, the jury will determine whether one or more aggravating factors exist; whether any aggravating factors found to exist are sufficient to warrant a sentence of death; whether any mitigating circumstances exist; whether the aggravating factors outweigh the mitigating circumstances; and whether the defendant should be sentenced to life imprisonment without the possibility of parole, or death.

The attorneys will now have an opportunity, if they wish, to make an opening statement. The opening statement gives the attorneys a chance to tell you what evidence they believe will be presented during this penalty phase. What the lawyers say is not evidence, and you are not to consider it as such.

After the attorneys have had the opportunity to present their opening statements, the State and the defendant may present evidence relative to the nature of the crime and mitigating evidence., ~~the character, background, or life of the defendant.~~ Mitigating evidence is any reason a juror believes may tend to support a sentence of life in prison without the possibility of parole.

Comments

The trial judge may want to include other standard instructions in this preliminary instruction, including but not limited to 3.7 – Reasonable Doubt and 3.9 – Weighing the Evidence.

This instruction was adopted in 2017.

7.11 FINAL INSTRUCTIONS IN PENALTY PROCEEDINGS — CAPITAL CASES

§ 921.141, Fla. Stat.

[Delete existing instruction 7.11 and replace with the following:]

This instruction is designed to be given after the closing arguments in the penalty phase of a death penalty case. It may be modified for those judges who will give part of it before closing arguments. Additionally, the instruction is designed for first degree murders committed after May 24, 1994, when the legislature omitted the possibility of parole for anyone convicted of First Degree Murder. For first degree murders committed before May 25, 1994, this instruction will have to be modified.

Members of the jury, you have heard the evidence and the arguments of counsel. It is now your duty to determine the appropriate sentence that should be imposed upon (defendant)**. There are two possible punishments: Life imprisonment without the possibility of parole, or death.**

However, before a sentence of death may be imposed, the State must prove the following three elements beyond a reasonable doubt:

1. **One or more aggravating factors alleged by the State exist;**
2. **The aggravating factor, or factors, found to exist are sufficient to warrant a sentence of death; and,**
3. **The aggravating factor, or factors, found to exist outweigh the mitigating circumstances found to exist.**

The terms aggravating factor and mitigating circumstance will be explained to you.

Determining the appropriate sentence involves a multi-step process.

The first step is for you to determine whether the aggravating factor[s] alleged by the State [has] [have] been proven beyond a reasonable doubt.

An aggravating factor is a fact specified by law that the jury may find increases the seriousness of a First Degree Murder.

Aggravating factors. § 921.141(6), Fla. Stat.

The aggravating factor[s] alleged by the State [is] [are]:

Give only those aggravating factors noticed by the State which are supported by the evidence.

1. (Defendant) **was previously convicted of a felony and [under sentence of imprisonment] [on community control] [on felony probation].**

2. (Defendant) **was previously convicted of [another capital felony] [a felony involving the [use] [threat] of violence to another person].**

~~*Give 2a or 2b as applicable.*~~

~~**a. The crime of** (previous crime) **is a capital felony.**~~

~~**b. The crime of** (previous crime) **is a felony involving the [use] [threat] of violence to another person.**~~

3. (Defendant) **knowingly created a great risk of death to many persons.**

4. The First Degree Murder was committed while (defendant) **was [engaged] [an accomplice] in [the commission of] [an attempt to commit] [flight after committing or attempting to commit]**

any

Check § 921.141(6)(d), Fla. Stat., for any change in list of offenses.

[robbery].
[sexual battery].
[aggravated child abuse].
[abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement].
[arson].
[burglary].
[kidnapping].
[aircraft piracy].
[unlawful throwing, placing or discharging of a destructive device or bomb].

5. The First Degree Murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

6. The First Degree Murder was committed for financial gain.

7. The First Degree Murder was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

8. The First Degree Murder was especially heinous, atrocious or cruel.

"Heinous" means extremely wicked or shockingly evil.

"Atrocious" means outrageously wicked and vile.

"Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

The kind of crime intended to be included as especially heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to (decedent).

9. The First Degree Murder was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification.

"Cold" means the murder was the product of calm and cool reflection.

"Calculated" means having a careful plan or prearranged design to commit murder before the fatal incident.

A killing is "premeditated" if it occurs after the defendant consciously decides to kill. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long

enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.

However, in order for this aggravating factor to apply, a heightened level of premeditation, demonstrated by a substantial period of reflection, is required.

A "pretense of moral or legal justification" is any claim of justification or excuse that, though insufficient to reduce the degree of murder, nevertheless rebuts the otherwise cold, calculated, or premeditated nature of the murder.

10. (Decedent) **was a law enforcement officer engaged in the performance of [his] [her] official duties.**

11. (Decedent) **was an elected or appointed public official engaged in the performance of [his] [her] official duties, if the motive for the First Degree Murder was related, in whole or in part, to** (decedent's) **official capacity.**

12. (Decedent) **was a person less than 12 years of age.**

13. (Decedent) **was particularly vulnerable due to advanced age or disability, or because** (defendant) **stood in a position of familial or custodial authority over** (decedent)**.**

With the following aggravating factor, definitions as appropriate from § 874.03, Fla. Stat., must be given.

14. The First Degree Murder was committed by a criminal street gang member.

15. The First Degree Murder was committed by a person designated as a sexual predator or a person previously designated as a sexual predator who had the sexual predator designation removed.

16. The First Degree Murder was committed by a person subject to

[a domestic violence injunction issued by a Florida judge],
[a [repeat] [sexual] [dating] violence injunction issued by a Florida judge],

[a protection order issued from [another state] [the District of Columbia] [an Indian tribe] [a commonwealth, territory, or possession of the United States]],

and

the victim of the First Degree Murder was [the person] [a [spouse] [child] [sibling] [parent] of the person] who obtained the [injunction] [protective order].

Victim impact evidence. Give if applicable. Also, give at the time victim impact evidence is admitted, if requested.

You have heard evidence about the impact of this murder on the [family] [friends] [community] of (decedent)**. This evidence was presented to show the victim's uniqueness as an individual and the resultant loss by** (decedent's) **death. However, you must not consider this evidence as an aggravating factor.**

Give in all cases.

In order to find that an aggravating factor exists, the jury must be unanimous, that is, each of you must agree. If the jury does not unanimously find that the State has proven beyond a reasonable doubt that one or more aggravating factors exists, then your verdict must be for a sentence of life imprisonment without the possibility of parole and your deliberations are complete. To reflect this verdict, sign and date the Sentencing Verdict Form.

If, however, the jury unanimously finds that one or more aggravating factors have been proven beyond a reasonable doubt, you should sign Verdict Form 1 (Existence of Aggravating Factor(s)) for each aggravating factor found proven and then proceed to step two.

Verdict Form 1 (Existence of Aggravating Factor(s)) reads as follows:

We, the jury, find as follows, as to the aggravating factor of (*repeat for each aggravating factor disclosed in the Notice to Seek Death Penalty filed pursuant to Fla. R. Crim. P. 3.181*)**:**

_____ The State proved this aggravating factor beyond a reasonable doubt.

_____ The State did not prove this aggravating factor beyond a reasonable doubt.

If you proceed to step two, then during the rest of your deliberations you must disregard any aggravating factor[s] that [was] [were] alleged by the State, but not unanimously found to be proven beyond a reasonable doubt. No individual juror is permitted to consider any aggravating factors other than those the jury unanimously found to exist.

Merging aggravating factors. Give the following paragraph if applicable. For example, the aggravating circumstances that 1) the murder was committed during the course of a robbery and 2) the murder was committed for financial gain, relate to the same aspect of the offense and may be considered as only a single aggravating factor. Castro v. State, 597 So. 2d 259 (Fla. 1992).

Pursuant to Florida law, the aggravating factors of (*insert aggravating factor*) and (*insert aggravating factor*) **are considered to merge because they are considered to be a single aspect of the offense. If you determine that the aggravating factors of** (*insert aggravating factor*) and (*insert aggravating factor*) **have both been proven beyond a reasonable doubt, your findings should indicate that both aggravating factors exist, but you must consider them as only one aggravating factor for the rest of your deliberations.**

The second step in the process is for the jury to determine whether the State has proven beyond a reasonable doubt that the aggravating factor or factors that you found to exist is or are sufficient to impose a sentence of death. The jury must unanimously find that the aggravating factor or factors found to exist is or are sufficient to impose a sentence of death.

If the jury does not unanimously find that the State has proven beyond a reasonable doubt that the aggravating factor or factors are sufficient to impose a sentence of death, then your verdict must be for a sentence of life imprisonment without the possibility of parole and your deliberations are complete. To reflect this verdict, sign and date the Sentencing Verdict Form.

If, however, the jury unanimously finds that the aggravating factor is/ or factors are sufficient to impose a sentence of death, you should sign Verdict Form 2 (Sufficiency of Aggravator(s)) and then proceed to step three.

Verdict Form 2 (Sufficiency of Aggravator(s)) reads as follows:

We, the jury, find as follows, as to the sufficiency of aggravator(s):

_____ The State proved the aggravating factor or factors is or are sufficient to warrant a sentence of death beyond a reasonable doubt.

_____ The State did not prove the aggravating factor or factors is or are sufficient to warrant a sentence of death beyond a reasonable doubt.

Mitigating circumstances. § 921.141(7), Fla. Stat.

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

The defendant does not need to prove mitigating circumstances beyond a reasonable doubt. Unlike aggravating factors, which must be found unanimously and beyond a reasonable doubt, mitigating circumstances do not require unanimous agreement. A mitigating circumstance may be found by one or more individual jurors. ~~The defendant need only prove a mitigating circumstance by the greater weight of the evidence, which means evidence that more likely than not tends to prove the existence of the mitigating circumstance. If you determine by the greater weight of the evidence that a mitigating circumstance exists, you must consider it proven.~~ Additionally, the jury need not be unanimous regarding a finding that a mitigating circumstance exists. Each juror should make his or her own decision about whether a mitigating circumstance exists.

There are no limits to the mitigating circumstances you may consider. However, a~~A~~~~mong~~ the mitigating circumstances you may consider are:

Give only those mitigating circumstances for which evidence has been presented.

1. (Defendant) **has no significant history of prior criminal activity.**

If the defendant offers evidence on this circumstance and the State, in rebuttal, offers evidence of other crimes, also give the following:

Conviction of (previous crime) **is not an aggravating circumstance to be considered in determining the penalty to be imposed on the defendant, but a conviction of that crime may be considered by the jury in determining whether the defendant has a significant history of prior criminal activity.**

2. The First Degree Murder was committed while (defendant) **was under the influence of extreme mental or emotional disturbance.**

3. (Decedent) **was a participant in (**defendant's**) conduct or consented to the act.**

4. (Defendant) **was an accomplice in the First Degree Murder committed by another person and [his] [her] participation was relatively minor.**

5. (Defendant) **acted under extreme duress or under the substantial domination of another person.**

6. The capacity of (defendant) **to appreciate the criminality of [his] [her] conduct or to conform [his] [her] conduct to the requirements of law was substantially impaired.**

7. (Defendant's) **age at the time of the crime.**

The judge should also instruct on any additional mitigating circumstances as requested.

8. The existence of any other factors in (defendant's) **character, background or life, ~~or~~ the circumstances of the offense that would, or any other any other reason you believe may tend to mitigate against the imposition of the death penalty.**

Give in all cases.

Unlike the other steps in this process, there is no verdict form to complete regarding the existence of mitigating circumstances. Instead, each of you must consider the mitigating circumstances that you have individually found to exist in the next two steps of the process.

The fourth step in the process is for each of you to determine whether the aggravating factor or factors that you have unanimously found to exist outweigh(s) the mitigating circumstances that you have individually found to exist. The process of weighing aggravating factors and mitigating circumstances is not a mechanical or mathematical process. In other words, you should not

merely total the number of aggravating factors and compare that number to the total number of mitigating circumstances.

The State has the burden to prove to each of you, beyond a reasonable doubt, that the aggravating factor or factors that the jury has unanimously found to exist outweigh(s) the mitigating circumstance(s) that each of you have individually found to exist.

If the jury does not unanimously find that the State has proven beyond a reasonable doubt that the aggravating factor or factors outweigh(s) the mitigating circumstance(s), then your verdict must be for a sentence of life imprisonment without the possibility of parole and your deliberations are complete. To reflect this verdict, sign and date the Sentencing Verdict Form.

If, however, the jury unanimously finds that the aggravating factor or factors outweigh(s) the mitigating circumstance(s), you should sign Verdict Form 3 (Weighing Aggravating Factor(s) and Mitigating Circumstance(s)) and then proceed to the final step.

Verdict Form 3 (Weighing Aggravating Factor(s) and Mitigating Circumstance(s)) reads as follows:

We, the jury, find as follows, as to the weighing of aggravating factor(s) and mitigating circumstance(s):

_____ The State proved the aggravating factor(s) outweigh(s) the mitigating circumstance(s) beyond a reasonable doubt.

_____ The State did not prove the aggravating factor(s) outweigh(s) the mitigating circumstance(s) beyond a reasonable doubt.

Give bracketed language if the penalty phase jury was also the guilt phase jury.

The final step in this phase of the trial is for each of you to determine whether the defendant should be sentenced to life imprisonment without the possibility of parole, or death. The court may not impose a sentence of death unless each juror individually finds the defendant should be sentenced to death.

Even when death is a possible sentence, each juror must decide based on his or her own moral assessment whether life imprisonment without the

possibility of parole, or death, should be imposed. Regardless of your prior findings, the law never compels nor requires any juror to determine the defendant should be sentenced to death. Any single juror has the right to vote for a sentence of life imprisonment without the possibility of parole.

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

The fact that a jury can recommend a sentence of life imprisonment without the possibility of parole, or death, on a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully, weigh, sift, and consider the evidence, realizing that human life is at stake, and bring your best judgment to bear in reaching your verdict.

The Sentencing Verdict Form reads as follows:

_____ We the jury find the appropriate sentence is life imprisonment without the possibility of parole.

_____ We the jury unanimously find the appropriate sentence is death.

The Court ~~should~~ shall then insert and read pertinent instructions, modified for a penalty phase if necessary, including but not limited to 3.7 – Reasonable Doubt; 3.9 – Weighing the Evidence; 3.9(a) – Defendant not Testifying; 3.9(b) – Defendant's Statements; 3.10 – Rules for Deliberation; 3.11- Cautionary Instruction; and 3.13- Submitting Case to Jury.

With regard to Fla. Std. Jury Instr. (Crim.) 3.10(8), the FPDA believes the word sympathy should be removed because it may reasonably be equated with mercy, which is a permissible consideration for jurors in a penalty phase deciding whether to take the life of another human being.

8. Your verdict should not be influenced by feelings of prejudice, or bias.~~,~~ ~~or sympathy~~. Your verdict must be based on the evidence, and on the law contained in these instructions.

Comment

This instruction was adopted in 1981 and amended in 1985 [477 So. 2d 985], 1989 [543 So. 2d 1205], 1991 [579 So. 2d 75], 1992 [603 So. 2d 1175], 1994 [639 So. 2d 602], 1995 [665 So. 2d 212], 1996 [678 So. 2d 1224], 1997 [690 So. 2d 1263], 1998 [723 So. 2d 123], ~~and~~ 2009 [22 So. 3d 17], and 2017.

7.11(a) VERDICT FORMS FOR DEATH PENALTY CASES

Verdict Form 1 (Existence of Aggravating Factor(s))

We, the jury, find as follows, as to the aggravating factor of (*repeat for each aggravating factor disclosed in the Notice to Seek Death Penalty filed pursuant to Fla. R. Crim. P. 3.181*)**:**

_____ The State proved this aggravating factor beyond a reasonable doubt.

_____ The State did not prove this aggravating factor beyond a reasonable doubt.

Read if applicable.

Pursuant to Florida law, the aggravating factors of (*insert aggravating factor*) and (*insert aggravating factor*) **are considered to merge because they are considered to be a single aspect of the offense. If you determine that the aggravating factors of** (*insert aggravating factor*) and (*insert aggravating factor*) **have both been proven beyond a reasonable doubt, your findings should indicate that both aggravating factors exist, but you must consider them as only one aggravating factor for the rest of your deliberations.**

Verdict Form 2 (Sufficiency of Aggravator(s))

We, the jury, find as follows, as to the sufficiency of aggravator(s):

_____ The State proved the aggravating factor or factors is or are sufficient to warrant a sentence of death beyond a reasonable doubt.

_____ The State did not prove the aggravating factor or factors is or are sufficient to warrant a sentence of death beyond a reasonable doubt.

Verdict Form 3 (Weighing Aggravating Factor(s) and Mitigating Circumstance(s))

We, the jury, find as follows, as to the weighing of aggravating factor(s) and mitigating circumstance(s):

_____ The State proved the aggravating factor(s) outweigh(s) the mitigating circumstance(s) beyond a reasonable doubt.

_____The State did not prove the aggravating factor(s) outweigh(s) the mitigating circumstance(s) beyond a reasonable doubt.

Sentencing Verdict Form

_____ We the jury find the appropriate sentence is life imprisonment without the possibility of parole.

_____ We the jury unanimously find the appropriate sentence is death.

Dated this _____ day of _____, 20 __, in _____, County, Florida.

_____ #_____

Signature of foreperson Juror Number

Comment

This verdict form was adopted in 2017.

7.12 ~~DIALOGUE FOR~~ POLLING THE JURY (DEATH PENALTY CASE)

~~**Ladies and gentlemen of the jury, we are going to ask each of you individually concerning the advisory sentence. It is not necessary that you state how you personally voted, or how any other person voted, but only if the advisory sentence, as read, was correctly stated.**~~

~~*The following question is to be asked each juror if the recommendation is for the death penalty:*~~
~~**Do you, [Mr.] [Ms.]_____, agree and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?**~~

~~*The following question is to be asked each juror if the recommendation is for a life sentence:*~~
~~**Do you, [Mr.] [Ms.]_____, agree and confirm that at least six or more of the jury join in the advisory sentence that you have just heard read by the clerk?**~~

Members of the jury, we are going to ask each of you about the verdicts that you have just heard. Do you, [(*name of juror*)**] [juror number** (*number of juror*)**], agree that this reflects your individual verdicts and the verdicts of the jury as a whole?**

Comment

This instruction was adopted in 1981 and amended in 1997 and 2017.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to The Criminal Jury Instructions Committee Chair, The Honorable F. Rand Wallis, c/o Bart Schneider, Office of the General Counsel, at 500 S. Duval Street, Tallahassee, Florida 32399-1925, schneidb@flcourts.org, this 26th day of May, 2017.

Peter Mills /s/

_____
PETER MILLS
FLORIDA BAR #0998771
Assistant Public Defender
Florida Public Defender Association
Death Penalty Steering Committee, Chair