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STATE OF FLORIDA
TWELFTH JUDICIAL CIRCUIT
JUDGE LYNN N. SILVERTOOTH JUDICIAL CENTER
2002 RINGLING BOULEVARD
P. O. BOX 48927
SARASOTA, FLORIDA 34230
TELEPHONE (941) 861-7941
FACSIMILE (941) 861-7914

DEBRA JOHNES RIVA
CIRCUIT JUDGE

LAURIE CHERRY
JUDICIAL ASSISTANT

RECEIVED, 05/29/2017 12:18:25 PM, Clerk, Supreme Court

May 29, 2017

Dear Justices:

I am the department head of the faculty for the Handling Capital Cases ("HCC") course, and on behalf of the HCC faculty,[1] we are respectfully offering the following amended[2] comments on the interim jury instructions in capital cases published in the Supreme Court of Florida Opinion No. SC17-583. I have consulted with the other judges on the HCC faculty prior to comprising this letter. We agree with the majority of the language, but we wanted to share some of our concerns regarding certain areas of the instructions.

Interim Instruction 7.11
p. 12 of the opinion (middle of page)

Our concern: As an initial matter, we would add bracketed language to the sentence starting with "You are instructed that this evidence . . ." in order to make it clear that the jury that found the defendant guilty may consider guilt phase evidence during the penalty phase.

[1] In addition to the undersigned, the HCC faculty is comprised of the following six judges: the Honorable Michael Andrews (6th Circuit), the Honorable Joseph Bulone (6th Circuit), the Honorable James Colaw (8th Circuit), the Honorable James Hankinson (2nd Circuit), the Honorable James Nilon (8th Circuit), and the Honorable Samantha Ward (13th Circuit).

[2] Our initial comments referred to "non-statutory mitigation." Because of the catch-all provision within § 921.141(7)(h), Florida Statutes, it is technically incorrect to refer to non-statutory mitigation. Our recommendations to the Court's interim instructions, which are within Appendix A, have not changed.

Separately, we do not see the need to include both (1) and (2) below as they seem repetitive. Additionally, the use of the word "each" in (1) implies that the jury must find all of the alleged aggravating factors exist in order to vote for a death sentence. Finally, use of the word "each" presupposes that the State has alleged more than one aggravating factor. If (1) is eliminated, the remaining language is an accurate statement of the law and may help avoid jury confusion.

The attorneys will now have an opportunity, if they wish, to make an opening statement. . . . You are instructed that this evidence [, along with the evidence that you heard during the guilt phase of this trial,] 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~~ 1) whether one or more aggravating factors exist beyond a reasonable doubt; (~~3~~ 2) whether the aggravating factor(s) found to exist beyond a reasonable doubt are sufficient to justify the imposition of the death penalty; (~~4~~ 3) whether any mitigating circumstances are proven by the greater weight of the evidence; (~~5~~ 4) whether the aggravating factor(s) outweigh the mitigating circumstance(s); and (~~6~~ 5) whether 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.

p. 17 of the opinion (second new paragraph)

Our concern: The use of the word "each" presupposes that the State has alleged more than one aggravating factor and also implies that the jury must find all of the alleged aggravating factors exist in order to vote for a death sentence. By changing "each" to "an" it becomes clear that the jury need only find that one of the aggravating factors was proven in order to move forward with its analysis. The additional language (in red below) is proposed to make certain that the jury understands that there must be unanimity regarding the *same* aggravator.

You must unanimously agree that ~~each~~ an aggravating factor was proven beyond a reasonable doubt before it may be considered by you in arriving at your final verdict. If more than one aggravating factor has been alleged, you should consider each aggravating factor separately and reach a separate

finding as to the existence of each distinct factor alleged. You may not consider any aggravating factor that was not found to be proven beyond a reasonable doubt by the unanimous jury. In order to consider the death penalty as a possible penalty, you must unanimously determine that at least one aggravating factor has been proven beyond a reasonable doubt.

The State has the burden to prove ~~each~~ an aggravating factor beyond a reasonable doubt. A reasonable doubt is not a mere possible doubt, a speculative, imaginary, or forced doubt. . . .

p. 22 of the opinion (first new paragraph)

Our concern: We are proposing the change in language as outlined below to make it clear that the jury need only find that one aggravating factor exists to move forward with its analysis.

Additionally, we are concerned with the use of the word "*established*" instead of "*proven*" as it relates to a mitigating circumstance. Although the instruction later explains that a mitigating circumstance need only be "proven" by the greater weight of the evidence, an earlier reference uses the word "established." Since it is easier to establish a fact than it is to prove a fact, we think the language should be consistent and neutral toward both parties throughout the instructions.

Mitigating Circumstances:

Should you find one or more 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 factor(s) that you unanimously find to have been proven beyond a reasonable doubt outweigh the mitigating circumstance(s) that you find to have been ~~established~~ proven. Unlike aggravating factors, you do not need to unanimously agree that a mitigating circumstance has been ~~established~~ proven.

Interim Instruction 7.11(a)

p. 30 of the opinion (paragraph 3)

Our concern: We think that the proposed language could cause the jury to believe that each of the aggravating factors alleged by the State must be found to exist in order for the jury to vote

for death. Our proposed changes (in red below) repeat some of the earlier instructions and remind the jury that there must be unanimity as to, at least, one of the aggravating factors in order to move forward with its analysis.

A finding that an aggravating factor exists must be unanimous. ~~that is, all of you must agree that each presented aggravating factor exists.~~ If more than one aggravating factor has been alleged, you should consider each aggravating factor separately and reach a separate finding as to the existence of each distinct factor alleged. You may not consider any aggravating factor that was not found to be proven beyond a reasonable doubt by the unanimous jury. You will be provided a form to make this finding [as to each alleged individual aggravating factor] and you should indicate whether or not you find [the] individual ~~[each]~~ aggravating factor(s) ~~has~~ have been proven beyond a reasonable doubt.

p. 30 of the opinion (just prior to *Mitigating Circumstances)*

Our concern: We are proposing some language that will help the jury understand what is meant by "sufficiency" of the aggravators. We would suggest the following language:

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

p. 32 of the opinion (paragraphs 1 and 2)

Our concern: We were not certain what was meant by the sentence: **"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."** If we are correct on what was meant, we changed the wording as referenced in red below, adding the language that the mitigating factors do not require

unanimity. We also changed the word "establish" to "prove" for the reasons referenced in our earlier comments.

It is the defendant's burden to prove that mitigating circumstance(s) exist. As explained before these proceedings, the defendant need only ~~establish~~ prove that a mitigating circumstance exists 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~~ proven 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.~~ In other words, the jury is entitled to consider any mitigating circumstance, and the consideration of a mitigating circumstance does not require unanimity by the jury.

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

p. 33 of the opinion (paragraph 2)

Our Concern: The use of the word "each" implies that the jury must find all of the proposed aggravating factors exist in order to vote for a death sentence and also assumes the State has alleged more than one aggravator. By changing the word to "an" it becomes clear that the jury need only find that one of the aggravating factors was proven in order to move forward with its analysis.

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~~ an aggravating factor exists must be unanimous, your finding that the aggravating factor(s) are sufficient to impose death must be unanimous, and your finding that the aggravating

factor(s) found to exist outweigh the ~~established~~ proven mitigating circumstance(s) must be unanimous, and your decision ~~if~~ to impose a sentence of death must be unanimous.

Interim Verdict Form 3.12(e)
Section C (p. 9-10)

Our Concern: We do not think that the jury should make findings on the mitigating circumstances. We understand the reason for the interrogatories may be to assist the trial judge in the final analysis; however, since the jury has the ability to recommend a life sentence without finding that any mitigating circumstances exist, the jury interrogatory could cause unnecessary confusion and dissension in deliberations. Additionally, the judge must still make independent findings and (unlike aggravating factors) the judge can consider mitigation that was not presented to the jury. The impact of voting on the mitigators may undermine the language utilized in proposed instruction 7.11(a) wherein the jury is told: "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." (p. 33 of the opinion). Finally, if the Court disagrees with our comments and decides to retain its Section C on the verdict form, we recommend the phrase "Mitigating Circumstance" be used instead of "Statutory Mitigating Circumstance." The word "statutory" is not used in the sections referring to aggravating factors and may cause confusion because it suggests there may be non-statutory mitigation, which is no longer true in light of the catch-all provision within § 921.141(7)(h), Florida Statutes.

Our suggestion for the verdict form is as follows.

3.12(e) JURY VERDICT FORM—DEATH PENALTY

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

A. Aggravating Factor(s) 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 or more of the aggravating factors listed, please proceed to Section B. If you answered NO to ~~every~~ the aggravating factor(s) 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 Factor(s) as to Count ___:

Reviewing the aggravating factor(s) that we unanimously found to be established beyond a reasonable doubt (Section A), we the jury unanimously find that the aggravating factor(s) 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~~C. Eligibility for the Death Penalty for Count ___.

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

YES _____
NO _____

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

~~E~~D. Jury Verdict as to Death Penalty

Having unanimously found that ~~at least~~ one or more aggravating factor(s) ~~has~~ have been established beyond a reasonable doubt (Section A), that the aggravating factor(s) are sufficient to warrant a sentence of death (Section B), and the aggravating factor(s) outweigh the mitigating circumstance(s) (Section ~~D~~C), 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)

Thank you for taking the time to consider our comments. Attached as "Appendix A" to this letter is a courtesy copy of the interim instructions with our proposed changes. We are sincerely grateful for the opportunity to assist in ensuring that our standard jury instructions are both accurate and beneficial to the citizens who are tasked with the enormous responsibility of recommending whether a person receives a life or death sentence.

Respectfully submitted,

s/ Debra Johnes Riva
Judge Debra Johnes Riva
Circuit Court Judge
Florida Bar No.: 879703
P.O. Box 48927
Sarasota, Florida 34230
(941) 861-7941
driva@jud12.flcourts.org

Attachment(s): Appendix "A"

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing correspondence with attachment was furnished to the Criminal Jury Instructions Committee Chair, The Honorable F. Rand Wallis, c/o Bart Schneider, Office of the General Counsel, 500 Duval Street, Tallahassee, Florida 32399-1925, at Schneidb@flcourtrs.org.; The Honorable Howard L. "Rex" Dimmig, II, at rdimmig@pd10.org; and Attorney Peter Mills at pmills@pd10.org; this 29th day of May 2017.

s/ Debra Johnes Riva
Judge Debra Johnes Riva
Circuit Court Judge
Florida Bar No.: 879703
P.O. Box 48927
Sarasota, Florida 34230
(941) 861-7941
driva@jud12.flcourts.org