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IN THE
SUPREME COURT OF FLORIDA

SC17-583

IN RE: STANDARD CRIMINAL JURY INSTRUCTIONS
IN CAPITAL CASES

COMMENTS OF THE FLORIDA CENTER FOR CAPITAL
REPRESENTATION AT FIU COLLEGE OF LAW AND
FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The Florida Center for Capital Representation at FIU College of Law and the Florida Association of Criminal Defense Lawyers respectfully submit their comments to the amendments to the Standard Criminal Jury Instructions in Capital Cases and to the new Standard Criminal Jury Instructions in Capital Cases.

I. 3.12(e) The Jury Verdict Form

A. Verdict Forms B., D., and E.

Verdict Forms B., D., and E. are missing the burden of proof of beyond a reasonable doubt as to various findings of fact: 1) that the aggravating factors are sufficient to warrant a possible sentence of death (B.); 2) that the aggravating factors outweigh the mitigating circumstances (D.); and 3) that the defendant should be sentenced to death (E.). This Court's decision in *State v. Perry*, 210 So. 3d 630, 633 (Fla. 2016), made clear that "the findings necessary to increase the penalty from a mandatory life sentence to death must be found *beyond a reasonable doubt* by a

unanimous jury." (emphasis supplied; footnote omitted). Citing to the Court's decision in *Hurst v. State*, 202 So. 3d 40, 44-45 (Fla. 2016), the Court identified held that the reasonable doubt standard must be applied to "all aggravating factors to be considered," to the finding that "sufficient aggravating factors exist for the imposition of the death penalty," to the finding that "the aggravating factors outweigh the mitigating circumstances," and to "the final jury recommendation for death." *Id.*

In conformity with *Perry*, as well as the Sixth and Fourteenth Amendments to the United States Constitution and Article I, section 22 of the Florida Constitution, verdict forms B., D., and E. should be modified to reflect that the jury's findings must not only be unanimous, but must be based on proof beyond a reasonable doubt.

B. Verdict Form C.

Verdict Form C. refers to "Statutory Mitigating Circumstances" and a burden of proof of "established by the greater weight of the evidence." First, as to the former provision, we believe that referring to the mitigating circumstances as "statutory," while appropriate under the pre-*Lockett v. Ohio*, 438 U.S. 586, 606 (1978), and *Hitchcock v. Dugger*, 481 U.S. 393 (1987), death penalty statute, is no longer appropriate because a jury must "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."

Lockett, 438 U.S. at 604 (emphasis in original); *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982); *see also Meeks v. Dugger*, 576 So. 2d 713, 717 (1991) (Kogan, J., specially concurring). While the statute has now added a "catch-all" provision, this does not render the reference to "statutory" mitigating circumstances appropriate. This is addressed in more detail below, in the comments to the jury instructions on the mitigating circumstances.

Second, as to Form C.'s burden of proof, we believe no such burden can be imposed. As stated above, *Lockett* requires that the jury be allowed to consider any mitigating circumstances that the defense "*proffers*," not just those that the defense "proves." *Lockett*, 438 U.S. at 604 (emphasis added). Thus, no burden of proof is appropriate for consideration of mitigating circumstances. Further, the "greater weight of the evidence" standard, aside from being vague and obtuse, conflicts with the basic Eighth Amendment premise underscored in *Lockett* and *Eddings* that each juror *must consider* the mitigation proffered and give it whatever weight that the individual juror believes is merited. *Id.; Eddings,* 455 U.S. at 118.

Specifying a particular burden of proof, even if it were one amenable to common understanding, conflicts with the notion that mitigation should not be circumscribed beyond the basic test of "relevancy," as specified by the Legislature. *See* § 921.141(1), Fla. Stat. (2017) ("In the proceeding, evidence may be presented as to matters that the *court deems relevant* to the nature of the crime and the character

of the defendant….") Any further restriction on the jury's consideration of mitigation runs afoul of the Supreme Court's recognition that "'virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances.'" *Tennard v. Dretke*, 542 U.S. 274, 285 (2004) (quoting *Eddings*, 455 U.S. at 114). Indeed, "Once this low threshold for relevance is met, the 'Eighth Amendment requires that the jury be able to consider and give effect to' a capital defendant's mitigating evidence.'" *Id.* (citations omitted). Based on the foregoing, the burden of proof requirement for the jury's consideration of mitigating evidence should be removed from Verdict Form C.

Finally, we recommend that the initial phrase on Verdict Form C., "We the jury find," should be modified to, "One or more individual jurors find." It is beyond controversy that a single juror's consideration of mitigation circumstances does not depend on agreement by any other jurors. Each juror conducts his or her own individual assessment and is free to give weight to any mitigating circumstances proffered by the defense. *See McKoy v. North Carolina*, 494 U.S. 433, 439-40 (1990); *Mills v. Maryland* 486 U.S. 367, 374 (1988). The existing phrase suggests otherwise.

II. <u>7.11 Preliminary Instructions in Penalty Proceedings</u>

A. <u>Section 1(b)</u>

We recommend that the Court remove the note to the trial court that if the jury inquires whether the defendant will receive credit for time served against a sentence of life imprisonment with a mandatory-minimum sentence of 25 years, the court should instruct that "the defendant will receive credit for time served but that there is no guarantee the defendant will be granted parole either upon serving 25 years or subsequently." Fla. Std. Jury Instr. (Crim) 7.11(1)(b) (proposed) (citing *Green v. State*, 907 So. 2d 489, 496 (Fla. 2005)).

It is true that this Court held in *Green* that the trial court did not abuse its discretion in answering the jury's question about parole, *id.* at 496-98; but that is very different from holding that the court's chosen response is the appropriate one in all cases, which the *Green* Court certainly did not hold. Indeed, the Court took pains to point out that it also had upheld trial courts' refusals to answer similar questions about parole by juries. *Id.* at 496-97 (citations omitted).

The Eleventh Circuit has recognized that, under the "abuse of discretion" standard, "[b]y definition. . . there will be occasions in which we affirm the district court even though we would have gone the other way had it been our call." *United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir. 2004) (*en banc*), *cert. denied*, 544 U.S. 1063 (2005). This Court explained, in *Salazar v. State*, 991 So. 2d 364, 372 (Fla. 2008), "Under the abuse of discretion standard, a trial court's ruling will be upheld unless the "judicial action is arbitrary, fanciful, or unreasonable....

[D]iscretion is abused only where no reasonable [person] would take the view adopted by the trial court." *Trease v. State,* 768 So.2d 1050, 1053 n.2 (Fla. 2000) (second alteration in original) (quoting *Huff v. State,* 569 So.2d 1247, 1249 (Fla.1990)).

That this Court did not find that the trial court abused its discretion in reinstructing the jury as it did in *Green* was hardly an endorsement of the propriety of the reinstruction. And there are notable reasons why the trial court's reinstruction should not be affirmatively recommended by this Court. First, it is the height of understatement that a capital defendant sentenced to life imprisonment without the possibility of parole for 25 years is not "guaranteed" that he or she will be paroled, in 25 years, or ever. Few capital defendants so sentenced have been paroled to date. As this Court noted in *Atwell v. State*, under Florida's parole system, with primary weight in parole consideration dependent on the seriousness of the offense, a capital defendant's presumptive parole release date could span from hundreds of months to nearly ten thousand months, well beyond a lifetime. 197 So. 3d 1040, 1048 (Fla. 2016).

Second, as Justice Anstead and Justice Pariente noted in dissent in *Green*, the majority's assessment that the trial court's instruction "was actually *favorable"* to the defendant, *see id.* at 498, was not the case given how soon Green was to be considered for parole at the time of his resentencing:

> [W]e should be clear that the response given certainly did not favor the defendant since it told the jury that with a life sentence the defendant would soon be eligible for parole, not in twenty-five years, but in ten, a very short time, indeed, if the jury is concerned, as jurors logically would be, with keeping a killer off the streets for a long time.

Id. at 505 (Anstead, J., dissenting in part). Justices Anstead's and Pariente's concern that the instruction may bias the jury against a life sentence takes on additional weight for defendants constitutionally entitled to resentencings under *Hurst*: they will face the same "Catch-22" that Green did, but be even closer than he was to a parole determination when the instruction is given. *See id.* ("[T]he defendant was placed in a veritable Catch-22; he was constitutionally entitled to a new sentencing, but the delay in providing a proper sentence was then used against him.")[1] *Id.* This will undoubtedly impact the jury's deliberations to the defendant's detriment.

As an alternative to the Court's recommended instruction, we recommend that the posed jury question should be resolved on a case-by-case basis. In the older cases, the capital defendant may waive the possibility of parole and that waiver should be noted. In other cases, the trial court may deem the question irrelevant. And in still others, the parties or court may craft a response that better neutralizes the concern expressed by Justices Anstead and Pariente.

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[1] Although the facts were somewhat unique in *Green* because the defendant faced the possibility of another consecutive 25-year term on another count, and so the accuracy of the trial court's instruction was questionable, Anstead's described catch-22 is no less applicable to defendants who will now obtain resentencings under *Hurst.*

B. Section 2

Punishment for the Crime

The above discussion about the jury's natural concern about the possibility of parole carries over to cases in which a defendant faces a potential sentence of life imprisonment without the possibility of parole. Because of the rampant confusion on whether "life" means "life," it is suggested that current first sentence in section 2 be followed by: "A sentence of life without parole means that the defendant will never be released from prison." That, or a similar sentence, would assist in advising the jury of the true nature of the sentencing alternative to the death penalty.

Findings to be Made by Jury

The paragraph describing why the evidence is being presented to the jury, includes: "(4) whether mitigating circumstances are **proven** by the greater weight of the evidence. . . ." For the reasons stated *supra*, we suggest as a proper substitution: "whether mitigating circumstances **exist**."

Aggravating Factors

The first sentence under this heading uses the word "recommending." Because of the importance of the now-recognized Sixth Amendment role of the jury under *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), any word that diminishes the jury's sense of responsibility should be avoided. We believe that a better word is "verdict" so that the sentence would read, "An

aggravating factor is a standard to guide the jury in making the choice between **a verdict of** life imprisonment without the possibility of parole or death." As the Supreme Court explained in *Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985), "[T]his Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.'"

The second paragraph under this heading is missing one reference to the burden of proof for an aggravating factor and should be adjusted as follows: "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."

Finally, the amended instructions delete the final portion of the last sentence in this section: "and give it whatever weight you determine it should receive." We believe that that portion is necessary because the next step for the jury is to determine whether the aggravating factors are sufficient. To make that determination, the jurors will be called upon to, in essence, attach a certain weight to the aggravating factors.

Mitigating Circumstances

We have several suggestions regarding the instructions on the mitigating circumstances, many of which devolve from what has been set forth *supra*. The first

paragraph uses the word "recommending" in explaining to the jury: "Should you find sufficient aggravating factors do exist to justify **recommending** the imposition of the death penalty, . . ." Because the word "recommendation" or its variant minimizes the significance of the jury's sentencing verdict in denigration of the holding of *Caldwell*, as discussed *supra,* it is recommended that this word be removed.

The conclusion of the first paragraph informs the jury that, unlike the aggravating factors, the jury need not agree unanimously on what mitigating circumstance has been established. We suggest that an additional sentence is needed to clarify this point: "Rather, whether a mitigating circumstance exists is an individual judgment by each juror."

The second paragraph contains the word "reasonably" in providing, "a mitigating circumstance may include an aspect of the defendant's character. . . that **reasonably** may indicate that the death penalty is not an appropriate sentence in this case." That word is inaccurate since mitigation has already been limited to relevant mitigation by the trial judge under the statute. All mitigation must be considered by the jury—each juror is left to assign a weight to the evidence, not to assess the reasonableness of its relevance.

We believe that the third paragraph should be changed to omit the word "proven" in the first sentence because there is no burden of proof for mitigating

circumstances. "Established" is preferable here. The second sentence that sets forth a "greater weight of the evidence" burden of proof should be deleted. The third sentence should be altered so that, instead of: "If you determine by the greater weight of the evidence that a mitigating circumstance exists, you may consider it established and give that evidence such weight as you determine it should receive. . . .", the instruction should read: "If you, individually, determine that a mitigating circumstance exists, you **may give that mitigation such weight as you individually determine** it should receive in reaching your conclusion as to the sentence to be imposed."

The instruction as written violates the rule of law articulated in *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Mills v. Maryland*, 486 U.S. 367 (1988), that consideration of relevant mitigation is both unlimited and individual. Our suggestions are offered to remove the burden of proof and permit each juror to **consider** all relevant mitigation and give it whatever weight he or she believes appropriate, consistent with the Eighth Amendment command. Again, as previously stated, the defendant's mitigation presentation will already have been restricted to relevant mitigation, all of which each juror must be permitted to consider.

III. <u>7.11(a) Final Instructions in Penalty Proceedings</u>

Aggravating Factors

We suggest that the introduction to the specific aggravating factors alleged by the State -- "The aggravating factor[s] alleged by the State [is] [are]" – should be preceded with an explanation of the statutory aggravating factors. Specifically, the jury should be instructed: "The Legislature has provided 16 statutory aggravating circumstances." This instruction is necessary so that the jury is not misled that the case on trial meets all of the factors identified by the Legislature as increasing the seriousness of the offense and warranting a death sentence. Without that explanation, the jury may believe that the case before it is precisely the type of case for which the legislature determined the death penalty is appropriate; that is, the case "fits" every statutory aggravating factor codified by the Legislature as calling for a sentence of death.

Prior to reading the last paragraph of this section, we suggest adding an additional instruction to clarify the jury's next step following its findings on the aggravating factors: i.e., to determine whether those aggravating factors are sufficient to warrant a possible death sentence. There is a separate verdict form that corresponds to this step (3.12(e)B.), but the proposed instructions do little to explain it. Instead, the instructions simply state: "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 with the possibility of parole or death." Before proceeding to the next sentence, we propose adding the following explication of "additional findings": "The first additional finding is whether the aggravating factor(s) that you have unanimously found beyond a reasonable doubt [is] [are] sufficient to warrant a possible death sentence." The proposed instruction would then continue with the existing concluding sentence: "If you do unanimously find the existence of at least one aggravating factor and that the aggravating factor(s) [is] [are] sufficient to impose a sentence of death, the next step in the process is for you to determine whether any mitigating circumstances exist."

Mitigating Circumstances

We suggest that the lead in to the mitigating circumstances should be altered to delete "may reasonably indicate" that the death penalty is not an appropriate sentence in this case. The use of the word "reasonably" at this point may confuse the jury with the State's burden of proof of beyond a reasonable doubt. Additionally, this restriction is not necessary because mitigation has been delimited by the trial judge to relevant mitigation. The sentence can best be modified to provide: "may indicate. . . ."

The introduction to the mitigating circumstances is also incomplete. Since these instructions will be given apart from the previously addressed preliminary instructions to the jury, we believe there should be an instruction at this point that

consideration of mitigation need not be unanimous but is an individual judgment for each juror to make. The following could be added:

> The jury need not be unanimous regarding a finding that a mitigating circumstance exists. Instead, each juror should make his or her own decision about whether a mitigating circumstance exists and what weight it should be given.

Because *Lockett* and its progeny have now established that mitigation is limited only by a relevancy standard, the statutory mitigating circumstances that predated *Lockett* are no longer apposite. Instead, the note to judges to "instruct on any additional mitigating circumstances as requested" on page 31 should hold true for all mitigation, and it should be incumbent on defense counsel to request instructions on all mitigators that will be presented to the jury. Only after the jury is charged on the defense-requested mitigating circumstances, is it appropriate to provide the "catch-all" instruction set forth as number 8 on page 31.

Similarly, the adjectives and adverb used to describe the statutory mitigating circumstances, *i.e.*, "extreme," "substantial," "substantially," are a remnants from the pre-*Lockett* statute, under which mitigation was limited to seven statutory factors. *See State v. Dixon*, 283 So. 2d 1, 9-10 (1973); *Meeks v. Dugger*, 576 So. 2d 713, 717-720 (Fla. 1991) (Kogan. J., specially concurring). In *Lockett's* aftermath, those modifiers impose artificial and vague limitations that are no longer relevant or proper. They should be removed.

As previously noted, the defense does not bear a classic "burden of proof" for mitigation. We suggest that the first paragraph on page 32 should be replaced with a sentence that advises that "Each juror, individually, should give mitigating circumstances such weight as you determine it should receive in reaching your verdict about the appropriate sentence to be imposed." The paragraph that follows should delete the word "established" as a modifier of mitigating circumstances. Instead, the 'decision regarding the appropriate sentence should be based upon proven aggravating factors and **the** mitigating circumstances that have been presented to you.

Merging Aggravating Factors

The "doubling" jury instruction is confusing for jurors because it conflicts with the later instruction on page 33 that informs them that the weighing process is not a "mathematical process" and that they "should not merely total the number of aggravating factors… ." If that is the case, it can only confuse jurors to instruct them on two aggravating factors but then advise them that "you must consider them as only one aggravating factor during the weighing process… ." We suggest a better alternative is to permit the State to choose one of the doubled aggravating circumstances and instruct the jury on the chosen factor.

The final sentence in that paragraph either omits, or confuses, a step in the weighing process: the finding that the aggravating factors are sufficient to justify a

death sentence. Thus, instead of, "even if you find that the sufficient aggravators outweigh the mitigators, the phrase should read "even if you find that the aggravators are sufficient to justify a death sentence and that the aggravators outweigh the mitigators. . . ." For clarity's sake, because this sentence comingles several concepts, we recommend adding an explanatory sentence stating that "each individual juror has the power to consider mercy and decline to vote that the defendant should be sentenced to death." *See Gregg v, Georgia*, 428 U.S. 153, 203 (1976).

The second paragraph on page 33 should be augmented with the burden of proof of "beyond a reasonable doubt" for each finding and for any final decision to impose death, consistent with *Hurst v. State* and *Perry v. State.*

Rules for Deliberation

Rule 1., which begins with, "You must follow the law. . . " and the final paragraph of the proposed jury instructions on page 38: "it is important that you follow the law spelled out in these instructions[,]" and "[n]o juror has the right to violate rules[,]" are in tension with the instruction to the jury that "the law neither compels nor requires you" to vote for death (page 33). The former instructions suggest that the law requires a certain outcome. But the latter instruction recognizes that, even if the end result of the weighing process justifies a death sentence, a juror is not required to vote for death. These additional instructions that the jurors must

follow the law are unnecessary. It is presumed that the jury will follow the instructions of the court.

Rule 6. on page 36 instructs the jury that its decisions "should not be influenced by feelings of prejudice, racial or ethnic bias or sympathy. Your decision must be based on the evidence and the law contained in these instructions." We are concerned about the use of the word "sympathy" here. Miriam-Webster's Learner's Dictionary defines "sympathy" as "the feeling that you care about and are sorry about someone else's troubles, grief, misfortune, etc." The Oxford Dictionary defines "sympathy" as "feelings of pity and sorrow for someone else's misfortune." This emotion may be an appropriate response, under the law, to a defendant's mitigation evidence and plea for mercy. *See*, *Gregg v. Georgia*, *supra.*

Jurors could mistake this "no-sympathy" instruction as precluding them from considering a capital defendant's mitigation describing, for example, a turbulent family background with childhood abuse or abandonment. If it were so construed, it would undermine *Eddings*' dictate that the capital jury should consider such mitigation in determining the propriety of a death sentence. *See Eddings*, 455 U.S. at 115-16.

Victim Impact Evidence

This instruction, which advises the jury that it may not consider victim-impact evidence as an aggravating factor, is confusing because the only other possible type

of evidence for the jury to consider is mitigation. We suggest that a more complete instruction would that the jury "may not consider this evidence in the weighing process."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by e-mail on the Criminal Jury Instructions Committee Chair, Honorable F. Rand Wallis, c/o Bart Schneider, Office of the General Counsel, 500 South Duval Street, Tallahassee, Florida 32399-1925, schneidb@flcourts.org, this 29th day of May, 2017.

/s/ Karen M. Gottlieb