

)	In the Circuit Court of the
)	Ninth Judicial Circuit, in and for
)	Orange County, Florida
STATE OF FLORIDA)	
)	Case No.: 482008-CF-0015606-O
v.)	Division 16
)	
CASEY MARIE ANTHONY,)	Hon. Stan Strickland
)	
Defendant.)	
)	

MOTION TO DECLARE § 921.141 FLORIDA STATUTES UNCONSTITUTIONAL BECAUSE IT IMPROPERLY SHIFTS BURDENS OF PROOF TO THE DEFENDANT, THEREBY CREATING A PRESUMPTION OF DEATH.

COMES NOW the Defendant, CASEY MARIE ANTHONY, by and through her attorneys, ANDREA D. LYON and JOSE A. BAEZ, and moves to declare Section 921.141, Florida Statutes unconstitutional. In support thereof Miss Anthony alleges that:

1. Section 921.141, Florida Statutes governs capital sentencing in Florida. With regards to the jury's advisory verdict, it provides that juries are expected to take into consideration "Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist." Fla. Stat. § 921.141(2)(b).
2. Juries are instructed pursuant to the standard jury instructions that there is a "more likely than not" standard regarding mitigation:

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, which means evidence than more likely than not tends to prove the existence of a mitigating circumstance.

Exhibit A, *In Re: Standard Jury Instructions in Criminal Cases - Penalty Phase of Capital Trials*, No. SC05-1890 (Fla. 2009).

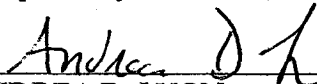
3. When the court makes its decision, it too is expected to base an imposition of the death sentence on a finding "That there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Fla. Stat. § 921.141(3)(b).
4. Miss Anthony contends that the foregoing statute is unconstitutional in three ways:
 - A) First, it impermissibly shifts the burden of production of mitigating evidence to her at the sentencing phase, resulting in a "presumption of death" if she is unable to meet her burden.
 - B) Second, it results in jury instructions that impose an unduly high standard of proof on the defendant with regard to mitigating circumstances, requiring her to prove any mitigating circumstance by a preponderance of the evidence in order for the jury to consider it established.
 - C) Third, the statute places on the defendant an unconstitutionally vague standard of proof by forcing her to persuade the jury that the mitigating circumstances in her case are "sufficient" to outweigh the aggravating factors without providing any guidance to the jury as to what is meant by "sufficient."
5. For the foregoing reasons, Miss Anthony contends that Florida Statutes § 921.141 violates the Due Process clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution, and Article 1, Sections 9, 16, 21, and 22 of the Florida Constitution.
6. In support of her motion, Miss Anthony presents the attached Memorandum of Law.

WHEREFORE, the Defendant, CASEY MARIE ANTHONY, respectfully requests that this Court grant her application and enter its order:

1. Declare Florida Statutes 921.141 on its face and as applied to Miss Anthony;
2. Order the prosecution to file a response motion and memorandum of law within thirty days of

- the filing of this motion and accompanying memorandum of law;
3. Allow the defense ten business days from the Prosecution's filing of its responsive motion and memorandum of law to file a reply motion and memorandum of law;
 4. Set a hearing date, at which time this Honorable Court may hear arguments relating to the defense and prosecution's motions.

Respectfully submitted,



ANDREA D. LYON, one of the attorneys
for CASEY MARIE ANTHONY.



JOSE A. BAEZ, one of the attorneys for
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Dated: 11/25/09

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished to the Office of the State Attorney, 415 North Orange Avenue, Orlando, Florida 32801; via facsimile and /or U.S. Mail on this 25 day of November, 2009.



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The statute governing capital sentencing in Florida, Section 921.141, requires that juries take into consideration "Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist" when rendering their advisory verdict. Fla. Stat. § 921.141(2)(b). In addition, juries are instructed pursuant to the standard jury instructions that there is a "more likely than not" standard regarding mitigation:

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, which means evidence that more likely than not tend 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 give that evidence such weight as you determine it should receive in reaching your conclusion as to the sentence that should be imposed.

Exhibit A, *In Re: Standard Jury Instructions in Criminal Cases - Penalty Phase of Capital Trials*, No. SC05-1890 (Fla. 2009).¹ Courts are expected to base an imposition of the death sentence on a finding "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Fla. Stat. § 921.141(3)(b).

Miss Anthony hereby moves this Court to declare this statute unconstitutional because it improperly shifts the burdens of production and persuasion to her with regard to mitigating circumstances, thereby creating a presumption that the death penalty will be imposed if she is unable to meet her burden.

ARGUMENT

The statute governing capital sentencing in Florida is unconstitutional because it violates the basic principle that a defendant may not be convicted of a crime unless the State proves her guilt

¹ The Florida Supreme Court recently approved this new set of jury instructions, which raise the standard of proof from the previous, "reasonably convinced" standard. These instructions will become final when the Supreme Court decision does.

beyond a reasonable doubt. *Patterson v. New York*, 432 U.S. 197 (1977); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In Re Winship*, 397 U.S. 358 (1970); *Davis v. United States*, 160 U.S. 469 (1895).

Although Florida courts have thus far upheld the statute, Miss Anthony contends that it violates the Due Process Clauses of the Constitution by improperly imposing a burden of proof on the defendant. Courts have held that to convict a defendant of a crime, the State must prove every element of the offense beyond a reasonable doubt. *Mullaney v. Wilbur*, 421 U.S. 684 (1975). If that much protection is required in the conviction phase of a trial, even more protection should be required in the sentencing phase of a capital case, where the defendant's life is at stake. *See generally Zant v. Stephens*, 462 U.S. 862, 884-85 (1983) ("because there is a qualitative difference between death and any other permissible form of punishment, 'there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.'") (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)); *see also* Linda Carter, *A Beyond a Reasonable Doubt Standard in Death Penalty Proceedings: A Neglected Element of Fairness*, 52 Ohio St. L.J. 195, 208 (1991).

Florida Statute § 921.141 violates this principle of due process in three ways. First, it is unconstitutional on its face because it places the burden of production of mitigating evidence on the defendant at the sentencing phase. Second, it is unconstitutional on its face because it shifts to the defendant the burden of persuading the jury that the evidence she has produced is "sufficient." Not only does this language impose an improper burden of persuasion on Miss Anthony, it fails to provide a standard of proof by neglecting to define the vague term "sufficient." Finally, the statute is unconstitutional as applied because it results in jury instructions that preclude consideration of mitigation by requiring the defendant to show by a preponderance of the evidence that a mitigating circumstance exists before it can be considered. As currently written, the statute creates a presumption of death by placing on the defendant the burden to prove that "sufficient" mitigating evidence exists to outweigh the aggravating evidence.

For these reasons, Florida Statutes § 921.141 violates the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, and Article 1, Sections 9, 16, 21, and 22 of the Florida Constitution.

I. Heightened Standards of Due Process Apply In A Capital Case.

The Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution, and Article 1, Section 9 of the Florida Constitution, provide that the State shall not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. V; U.S. Const. amend. XIV § 1; Fla. Const. art. 1 § 9. It is well established that in a criminal case, the State has the burden to prove defendant's guilt beyond a reasonable doubt. *Patterson v. New York*, 432 U.S. 197 (1977); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In Re Winship*, 397 U.S. 358 (1970); *Davis v. United States*, 160 U.S. 469 (1895). This principle is based on a "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Winship*, 397 U.S., at 372 (Harlan, J., concurring).

Because this is a capital case in which the prosecution is asking this Court to impose the death penalty, heightened standards of due process apply. *See Mills v. Maryland*, 486 U.S. 367, 376 (1988) ("In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds."); *Proffitt v. Wainwright*, 685 F.2d 1227, 1253 (11th Cir. 1982) ("Reliability in the fact-finding aspect of sentencing has been a cornerstone of [the Supreme Court's death penalty] decisions."); and *Beck v. Alabama*, 447 U.S. 625, 638, (1988) (same principles apply to guilt determination). "Where a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." *Gregg v. Georgia*, 428 U.S. 153, 187, (1976) (plurality opinion).

II. Fla Stat. § 921.141 Is Unconstitutional Because It Impermissibly Places the Burden of Production of Mitigating Evidence On the Defendant.

During a criminal trial, a defendant is not required to produce any evidence to disprove her guilt. *Davis v. United States*, 160 U.S. 469 (1895). The United States Court of Appeals for the Eleventh Circuit has held that "a defendant need not offer any defense. It has long been established that: The burden of proof is never upon the accused to establish his innocence, or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial, and applies to every element necessary to constitute the crime." *United States v Kloess*, 251 F.3d 941 (11th Cir. 2001), quoting *Davis v. United States*, 160 U.S. 469, 487, (1895).

Under Florida law, the State has the burden at the sentencing phase to prove a statutory aggravating factor beyond a reasonable doubt. Then, however, the burden of production shifts to the defendant to produce some mitigating factor that the court will weigh against the aggravating factors. See Exhibit A; see also Defendant's Memorandum of Law in Support of Motion to Declare Fla. Stat. § 921.141 Unconstitutional Under *Ring v. Arizona*. This burden-shifting is unconstitutional. The Florida statute, by requiring a court to base its sentencing decision on whether there are "sufficient mitigating circumstances to outweigh the aggravating circumstances," places the burden of production of mitigating evidence on the defendant. This burden-shifting precludes consideration of mitigating circumstances in situations where the evidence exists but the defendant has not met her burden of production - for example, where there is mitigating evidence inherent in the crime itself. Requiring the defendant to produce "sufficient" evidence precludes consideration of the evidence if defendant is unable to meet the burdens of production and persuasion.

II. By Imposing a "Sufficient Mitigating Evidence" Standard, Fla. Stat. § 921.141 Improperly Shifts the Burden of Persuasion to the Defendant at the Sentencing Phase.

In addition to shifting the burden of producing mitigating evidence at the sentencing phase to the defendant, Fla. Stat. § 921.141 also impermissibly shifts to the defendant the burden of persuading the court that the mitigating evidence she has produced outweighs the aggravating evidence.

The Supreme Court has held that a sentencer cannot be precluded from considering any mitigating factors in a capital case. *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 155 U.S. 104 (1982). In *Lockett*, the Court observed that "a statute that prevents the sentencer in all capital cases from giving *independent mitigating weight* to aspects of the defendant's character and record ... creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable." 438 US at 605. (emphasis added).

Like the statute in *Lockett*, this statute and its resulting jury instructions preclude the sentencer from giving independent mitigating weight to all the evidence. First, the jury instruction requires that the defendant establish any mitigating factor by a preponderance of the evidence before it can be considered in mitigation by the jury. The preponderance of the evidence standard was created by recent amendments to the Florida capital jury instructions, increasing the standard of proof from the previous, "reasonably convinced" standard. See Exhibit A. Such a burden is inappropriate under *Lockett* because it prevents the sentencer from giving "independent mitigating weight" to the evidence produced when the defendant has not met her burden of persuasion.

Second, the statute itself imposes an improper burden of persuasion by requiring the defendant to show that the mitigating circumstances are "sufficient" to outweigh the aggravating circumstances. By neglecting to give a definition for the vague term "sufficient," the statute fails to guide the jury in determining whether or not the defendant has met her burden. Imposing this vague burden of

persuasion on the defendant creates the unacceptable risk that the jury will impose a sentence of death without giving appropriate weight to legitimate mitigating factors.

In *Mullany v. Wilbur*, the Supreme Court held that it was impermissible to shift the burden of persuasion to the defendant on a certain element of a criminal offense, reasoning, "Shifting the burden of persuasion to the defendant obviously places an even greater strain upon him since he no longer need only present some evidence with respect to the fact at issue; he must affirmatively establish that fact." 421 U.S. 684, 702 (1975).

Just as it is impermissible to shift the burden of persuasion to a defendant on an element of a crime, it should be impermissible to shift the burden of persuasion to the defendant to prove mitigation at the sentencing phase of a capital trial. This burden-shifting creates at the sentencing phase a presumption of death that the defendant must affirmatively overcome. See Beth S. Brinkmann, Note, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing*, 94 Yale L.J. 351, 363 (1984) ("[C]apital sentencing statutes must reflect the fundamental due process notion that a convicted defendant is presumed to have the right to live incarcerated for the rest of his or her life unless the prosecution persuades the sentencing authority that death is the singularly appropriate punishment for the defendant").

In *Kansas v. Marsh*, the Supreme Court upheld a Kansas statute that required a jury to impose a death sentence if it found that the aggravating and mitigating factors were in equipoise. 548 U.S. 163 (2006). In holding that the statute did not create an impermissible "presumption of death," the Court reasoned that although the defendant bore the burden of production of mitigating circumstances, "he never bears the burden of demonstrating that mitigating circumstances outweigh aggravating circumstances. Instead, the State always has the burden of demonstrating that mitigating evidence does not outweigh aggravating evidence." *Id.* at 179. The Court further held that the Kansas statute did not preclude jurors from giving independent mitigating weight to the evidence, reasoning that the jury was

able to "consider *any* evidence relating to *any* mitigating circumstance in determining the appropriate sentence for a capital defendant, so long as that evidence is relevant." *Id.* at 176. (emphasis in original).

Miss Anthony's case is distinguishable from *Marsh* in two ways. First, unlike the Kansas statute, which allows juries to give any relevant mitigating evidence independent weight, the amended Florida jury instruction requires that the defendant prove any mitigating factor by a preponderance of the evidence before it can be considered. *See Exhibit A*. Second, whereas the Kansas statute clearly states that the State bears the burden of establishing that the aggravating circumstances outweigh the mitigating factors, the Florida statute does not place that burden on the State, instead leaving it to the jury to decide whether the mitigating factors presented by the defendant are "sufficient" to outweigh the aggravators proven by the State. The lack of these two key protections - relieving the defendant of a burden of proof with regard to mitigating factors, and placing the burden of persuasion that the aggravating circumstances outweigh the mitigating ones on the State - distinguish this case from *Marsh*.

Justice Marshall, in his dissent from *Thomas v. Maryland*, explained why such a statute is inappropriate:

First, it places on the defendant the burden of convincing the sentencer that mitigating evidence outweighs aggravating evidence, and it *requires* that a death sentence be imposed whenever aggravating factors are not outweighed. ... The statute thereby places on the defendant the burden of proving that which is, under the existing statute, the ultimate question. Second, by requiring that death be the sentence whenever aggravating factors are not outweighed, the statute prevents the sentencer from making what to my mind must be the ultimate inquiry: whether death is the appropriate sentence in a given defendant's case.

470 U.S. 1088, 1089 (1985) (Marshall, J., dissenting). Because the sentencing phase of a capital trial decides the "ultimate question" of whether a defendant lives or dies, and because requiring the defendant to prove that the aggravating factors do not outweigh the mitigating factors creates a

presumption that the death penalty will be imposed, a statute shifting the burden of persuasion to the defendant at that point is incompatible with the due process guarantees of the Fifth and Fourteenth Amendments of the U.S. Constitution, and Article 1 Section 9 of the Florida Constitution.

Although Florida courts have thus far upheld the constitutionality of the statute in this regard, at least one other state found that similar statutory language needed to be changed.² Although the Florida statute has not been amended by the legislature, the Florida Supreme Court recently approved amendments to the capital jury instructions. *See Exhibit A*. The court observed that the Supreme Court Committee on Standard Jury Instructions in Criminal Cases relied in part on an American Bar Association (ABA) Report relating that "over 35 percent of interviewed Florida capital jurors did not understand that they could consider any evidence in mitigation and 48.7 percent believed that the defense had to prove mitigating factors beyond a reasonable doubt." *Exhibit A*. Although the amended jury instructions address some of these concerns, evidence of such widespread misconception about the defendant's burden of proof at the sentencing phase of a capital trial merits a change in the statutory language as well.³ Furthermore, with regard to mitigating circumstances, the amended jury instructions actually raise the standard of proof by requiring the defendant to prove any mitigating circumstance by a preponderance of the evidence, imposing an impermissible burden of persuasion on the defendant as analyzed in section II above. *Exhibit A*. In light of the fact that the ABA report found that 36% of Florida capital jurors already believe that they are required to impose death if the statutory aggravating

² *See, e.g., Reynolds v. State*, 934 So. 2d 1128, 1151 (Fla. 2006); *Asay v. Moore*, 828 So. 2d 985 (Fla. 2002); *Muhammed v. State*, 782 So. 2d 343 (Fla. 2001). However, in 2003 the Illinois General Assembly changed the language of the first degree murder statute. P.A. 93-605 § 10, eff. November 19, 2003. The statute, "which formerly stated that a death sentence shall be imposed if the jury finds 'no mitigating factor sufficient to preclude imposition,' now states, in pertinent part: If the jury determines unanimously, after weighing the factors in aggravation and mitigation, that *death is the appropriate sentence*, the court shall sentence the defendant to death." *People v. Harris*, 866 N.E.2d 162, 185 (Ill. 2007) (emphasis in original). In *Harris*, the Illinois Supreme Court noted that the legislative amendment of the language of the statute prompted the court below to change the language of the jury instructions accordingly.

³ In a special concurrence to the Florida Supreme Court opinion, Justice Pariente urges changes to the death penalty statute to allow the additional protection of special verdict forms. *See Exhibit A*.

factor of "heinous, vile, or depraved" is established beyond a reasonable doubt, raising the defendant's standard of proof only increases the presumption against her, in violation of her due process rights.

Exhibit A.

For the foregoing reasons, Section 921.141 violates the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 9, 16, 21, and 22 of the Florida Constitution.

CONCLUSION

Florida Statutes 921.141 is facially unconstitutional because it impermissibly shifts the burden of production and the burden of persuasion to the defendant at the sentencing phase of the trial. Furthermore, it is unconstitutional as applied because it results in jury instructions that preclude consideration of mitigation by requiring the defendant to show by a preponderance of the evidence that a mitigating circumstance exists before it can be considered.

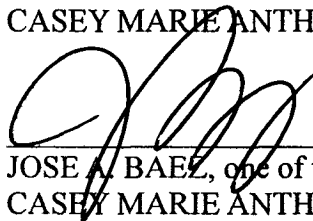
WHEREFORE, in the interests of her constitutional rights, Miss Anthony respectfully asks this Honorable Court to:

1. Declare Florida Statutes 921.141 on its face and as applied to Miss Anthony;
2. Order the prosecution to file a response motion and memorandum of law within thirty days of the filing of this motion and accompanying memorandum of law;
3. Allow the defense ten business days from the Prosecution's filing of its responsive motion and memorandum of law to file a reply motion and memorandum of law;
4. Set a hearing date, at which time this Honorable Court may hear arguments relating to the defense and prosecution's motions.

Respectfully submitted,



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CASEY MARIE ANTHONY.



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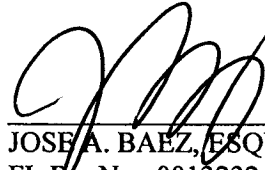
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished to the Office of the State Attorney, 415 North Orange Avenue, Orlando, Florida 32801; via facsimile and /or U.S. Mail on this 25 day of November, 2009.



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Exhibit A

Supreme Court of Florida

No. SC05-960

**IN RE: STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES—
REPORT NO. 2005-2.**

No. SC05-1890

**IN RE: STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES—
PENALTY PHASE OF CAPITAL TRIALS.**

[October 29, 2009]

PER CURIAM.

At the Court's request, the Supreme Court Committee on Standard Jury Instructions in Criminal Cases (Jury Instructions Committee) and the Florida Supreme Court's Criminal Court Steering Committee (Steering Committee) have submitted proposed changes to Standard Jury Instruction in Criminal Cases 7.11 (Penalty Proceedings—Capital Cases) and asked that the Court authorize the amended instruction for publication and use. We have jurisdiction. See art. V, §

2(a), Fla. Const. We authorize for publication and use the appended instruction, with new language indicated by underlining and deleted language struck through.

I. BACKGROUND

The Court, by letter dated June 4, 2004, addressed the Instructions Committee and Steering Committee as follows: “This Court has not undertaken a comprehensive re-evaluation of the standard penalty-phase instructions since 1997, when we adopted several changes recommended by the Committee on Standard Instructions in Criminal Cases.” The Court was concerned that “developments in the decisional law relative to capital cases may not be sufficiently reflected in the [current instructions],” and the Court asked that “the standard instructions and steering committees, working in conjunction, study the standard instructions and make recommendations as to possible amendments where appropriate.” The Instructions Committee and Steering Committee subsequently filed separate reports and proposals.

With respect to case SC05-960, the Instructions Committee proposes amendments to instruction 7.11 to address three matters: murders committed prior to May 25, 1994; the weight to be given the jury’s recommended sentence; and the jury’s role with respect to its findings and recommended sentence. With respect to case SC05-1890, the Steering Committee initially filed two comprehensive proposals. Proposal One was based on Florida’s present death penalty scheme but

placed greater emphasis on instructing the jury concerning aggravating and mitigating circumstances and the weighing process, and Proposal Two was a major rewrite of Florida's death penalty scheme based on United States Supreme Court decisions. The committees' proposals in both cases were published in the December 1, 2005, edition of The Florida Bar News, and comments were filed. The Steering Committee filed a response. The Court then held both cases in abeyance pending resolution of State v. Steele, 921 So. 2d 538 (Fla. 2005), wherein the Court addressed the propriety of specific instructions for aggravating circumstances.

While the cases were being held in abeyance, the American Bar Association (ABA) issued The Florida Death Penalty Assessment Report (ABA Report),¹ wherein the Florida Death Penalty Assessment Team evaluated the fairness and accuracy of Florida's death penalty system and concluded that Florida jurors are confused concerning their role in the sentencing process:

Significant Capital Juror Confusion . . . – Death sentences resulting from juror confusion or mistake are not tolerable, but research establishes that many Florida capital jurors do not understand their role and responsibilities when deciding whether to impose a death sentence. In one study, over 35 percent of interviewed Florida capital jurors did not understand that they could consider any evidence in mitigation and 48.7 percent believed that the defense had to prove

1. See American Bar Association, Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report (2006).

mitigating factors beyond a reasonable doubt. The same study also found that over 36 percent of interviewed Florida capital jurors incorrectly believed that they were required to sentence the defendant to death if they found the defendant's conduct to be "heinous, vile, or depraved" beyond a reasonable doubt, and 25.2 percent believed that if they found the defendant to be a future danger to society, they were required by law to sentence him/her to death, despite the fact that future dangerousness is not a legitimate aggravating circumstance under Florida law.

ABA Report at vi (footnotes omitted). The Assessment Team made the following recommendation: "The State of Florida should redraft its capital jury instructions with the objective of preventing common juror misconceptions that have been identified [in this report]." Id. at x.

After Steele was issued, the Court issued an order consolidating the present cases for oral argument and setting oral argument for January 5, 2007. The Steering Committee then filed an amended report with revised proposals, wherein the committee withdrew portions of Proposal One and withdrew Proposal Two in its entirety. The withdrawn proposals would have required the use of a special verdict form so the jury could indicate its vote as to aggravating and mitigating circumstances and indicate how many jurors agreed with the existence of each circumstance.

Although the amended report did not specifically mention the ABA Report, the Committee nevertheless appears to have revised several of its proposals in light of the ABA's recommendations, as noted below. The Court rescheduled oral

argument in the consolidated cases for April 19, 2007, and published the revised proposals in the January 1, 2007, edition of The Florida Bar News. Comments were filed, and the Steering Committee, rather than filing a response, filed a second amended report with revised proposals addressing several issues raised in the comments. In the interim, four justices of this Court retired from their positions on the Court and their replacements were appointed.

In amending these penalty phase instructions, the Court's primary goal is to promote the use of accurate and complete instructions to guide the jury in its penalty phase deliberations and to minimize the likelihood of confusion concerning the jury's critical role in Florida's capital sentencing scheme. Having now considered the committees' reports, the comments filed, and the oral arguments presented, we authorize for publication and use the amended instruction 7.11, as modified herein.²

II. AMENDMENTS

The following changes have been made to the initial portions of instruction 7.11. First, the instruction concerning murders committed prior to May 25, 1994, has been relocated to precede the provision to which it applies rather than to follow that provision. Second, the part of instruction 7.11 that follows the directive "Give

2. Several nonsubstantive, technical, or other minor changes are not discussed herein.

in all cases before taking evidence in penalty proceedings” has been bifurcated to distinguish between the form of instruction to be given to the jury that heard the evidence in the case at trial and the form to be given to a new penalty phase jury. Several other such instructions have been similarly bifurcated in these amended instructions. Third, the instruction that follows the directive “Give after the taking of evidence and argument” has been reworded and amended to emphasize the proper function of the jury, to notify jurors that they will be given definitions of aggravating and mitigating circumstances later, and to address the advisory nature of the jury’s recommended sentence. Fourth, new instructions, which have been drawn from the standard criminal instructions, have been added with respect to weighing the evidence, the credibility of witnesses, expert witnesses, and rules for deliberation. See Fla. Std. Jury Instr. (Crim.) 3.9, 3.9(a), 3.10. And fifth, new instructions have been added that instruct the jury on the defendant’s constitutional right not to testify or on the defendant’s choice to testify, depending on whether the defendant does or does not testify.

The following changes have been made to the intermediate portions of instruction 7.11. First, both a definition and expanded explanation of the burden of proof for aggravating circumstances have been added, and the instruction on reasonable doubt has been relocated to this section and reworded to provide the jury with an appropriate assessment of this fundamental principle. To ensure that

jurors' consideration of aggravating circumstances is limited to only those aggravators that have been defined by the Legislature, the amended instructions restrict the definition of an aggravating circumstance to a "statutorily enumerated circumstance," as suggested by the Florida Prosecuting Attorneys Association. For purposes of clarity, the proposed phrase "enormity of a crime" has been changed to "gravity of a crime" and the proposed phrase "injury to a victim" has been changed to "harm to a victim." Second, the term "crime" in the enumerated aggravating circumstances instruction has been changed to "capital felony," pursuant to section 921.141(5), Florida Statutes (2008). Third, the designation of an offender as a sexual predator has been added to the list of aggravating circumstances, pursuant to section 921.141(5)(o), Florida Statutes (2008).

Fourth, a definition for mitigating circumstances has been added. This definition provides that "a mitigating circumstance is not limited to the facts surrounding the crime" but can be "anything in the life of a defendant which might indicate the death penalty is not appropriate." The definition further provides that "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." And although this latter language varies slightly from the definition as proposed, the definition remains consistent with the proposal and is also consistent with the Court's case

law in this area. See Ford v. State, 802 So. 2d 1121, 1134 n.29 (Fla. 2001) (“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.”) (quoting Campbell v. State, 571 So. 2d 415, 419 n.4 (Fla. 1990)).

The burden of proof for mitigating circumstances also has been relocated to this section. Although the current and proposed instructions provide that the jury need only be “reasonably convinced” that a mitigating circumstance exists, our case law has stated this burden in terms of the greater weight of the evidence, see, e.g., Coday v. State, 946 So. 2d 988, 1003 (Fla. 2006); Weaver v. State, 894 So. 2d 178, 197 (Fla. 2004), or in terms of a preponderance of the evidence, see, e.g., Bryant v. State, 785 So. 2d 422, 431 (Fla. 2001); Knight v. State, 746 So. 2d 423, 436 (Fla. 1998), which are in fact synonymous. See Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000). We conclude that the better terminology for this standard is the more widely accepted “greater weight of the evidence,” which means “more likely than not,” and we have made the appropriate changes in the instruction. Further, consistent with the other amendments, the term “crime” in the enumerated mitigating circumstances instruction has been changed to “capital felony” to conform with section 921.141(6), Florida Statutes (2008).

The following changes have been made to the latter portions of instruction 7.11. First, a provision has been added instructing jurors that if one or more aggravating circumstances are established, jurors should then consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as they feel it should receive. Second, pursuant to section 921.141(7), Florida Statutes (2008), an instruction addressing “victim impact evidence” has been added, and this instruction provides that although victim impact evidence was presented to the jury, the jurors “may not consider this evidence as an aggravating circumstance” but rather must consider the aggravating and mitigating circumstances upon which they have been instructed. Third, new language has been added to the “Recommended sentence” instruction, advising the jury with respect to the weighing function and explaining that the weighing function is not a mechanical process and that there is no set time for a jury to reach its decision as to a recommended sentence.

As to the weighing function, we have authorized the proposed amendments for publication and use. First, in the initial portion of the instruction, we have authorized an amendment stating that the jury recommendation must be given great weight and deference. This proposal is consistent with the Court’s case law in this area. See Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975) (“A jury recommendation under our trifurcated death penalty statute should be given great

weight.”). While we agree with this proposal, we have included a directive to caution judges that this “great weight” instruction should be given only in cases where mitigation was in fact presented to the jury. See Muhammad v. State, 782 So. 2d 343, 361-62 (Fla. 2001) (“We do find . . . that the trial court erred when it gave great weight to the jury’s recommendation in light of Muhammad’s refusal to present mitigating evidence and the failure of the trial court to provide for an alternative means for the jury to be advised of available mitigating evidence.”).

And second, in the latter portion of the instruction, we have authorized an amendment stating that the jury is “neither compelled nor required to recommend death,” even where the aggravating circumstances outweigh the mitigating circumstances. This amendment is consistent with our state and federal case law in this area. See Cox v. State, 819 So. 2d 705, 717 (Fla. 2002) (“[W]e have declared many times that ‘a jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors’ ”) (quoting Henyard v. State, 689 So. 2d 239, 249-50 (Fla. 1996)); see also Gregg v. Georgia, 428 U.S. 153, 199 (1976) (plurality) (explaining that a jury can constitutionally dispense mercy in cases deserving of the death penalty). We note that this amended language is less stringent than the proposal, which provides: “Regardless of your findings with respect to aggravating and mitigating circumstances you are never required to recommend a sentence of death.”

These amendments are intended to address the ABA's finding that a substantial percentage of Florida's capital jurors (over thirty-six percent of those interviewed) believed that they were required to recommend death if they found the defendant's conduct to be "heinous, vile or depraved," or (over twenty-five percent of those interviewed) if they found the defendant to be "a future danger to society." ABA Report at vi. The ABA report also concludes as follows: Approximately forty-eight percent of capital jurors believed that mitigating circumstances had to be proved beyond a reasonable doubt, thirty-five percent of jurors did not know that any mitigating evidence could be taken into consideration, and fourteen percent of jurors believed that only the enumerated mitigating circumstances could be considered. Id. at 304. Because of the critical role that aggravators and mitigators play in the weighing process, these areas of confusion are a cause for concern. We are hopeful, however, that the re-ordering of these instructions, the definitions of key terms that have been added, and the amended explanatory language, including the discussion of burdens of proof, will assist jurors in understanding their role in the capital sentencing process and will eliminate juror confusion in this area.

With regard to the additional concern raised in the ABA Report regarding the need for a jury instruction indicating that it is improper for jurors to consider any racial factors in their decision-making, we have added an amendment to the

“Rules for deliberation” section providing that the jury’s recommendation should not be influenced by “racial or ethnic bias.” We have declined at this time, however, to implement two additional ABA recommendations: that the Court authorize for use both a jury instruction that “jurors should report any evidence of racial discrimination in jury deliberations,” see id. at 361-62, and a jury instruction concerning a defendant’s mental disorder or disability. See id. at 396-97. We agree, of course, that racial discrimination has no role in the jury deliberation process, but we are hesitant to craft any special instructions in this area without first being presented with specific proposals. As for defining the term “mental disorder or disability,” this is a technical matter that we will not undertake on our own motion. We do not foreclose the Jury Instructions Committee or Steering Committee from further reviewing the ABA recommendations and proposing amendments in this respect.

Finally, we reject the proposal that would have mandated the use of a special verdict form in the guilt phase designating whether the jury had found felony murder or premeditated murder or both as a basis for its verdict of first-degree murder. We have considered the Steering Committee’s reasons for recommending that such a form be used, and we have further considered the comments of the Florida Association of Criminal Defense Lawyers in favor of the form and the comments of the Florida Prosecuting Attorneys Association in opposition to the

form. While we agree that in some cases use of such a form would result in enhanced decision-making, we also recognize that in other cases use of the form could result in juror confusion. While we have never prohibited the use of special verdicts in the guilt phase for first-degree murder, we decline at this time to mandate their use.

III. CONCLUSION

We hereby authorize for publication and use modified instruction 7.11 as set forth in the appendix to this opinion. In doing so, we express no opinion with respect to the correctness of the instruction and remind all interested parties that this authorization forecloses neither requesting additional or alternative instructions nor contesting the legal correctness of the instruction. We further caution all interested parties that any notes and comments associated with the instruction reflect only the opinion of the committees and are not necessarily indicative of the views of this Court as to their correctness or applicability. New language is indicated by underlining, and deleted language is struck through. The instruction as set forth in the appendix³ shall be effective when this opinion becomes final.

3. The amendments as reflected in the appendix are to the Standard Jury Instructions in Criminal Cases as they appear on the Court's web site at www.floridasupremecourt.org/jury_instructions/instructions.shtml. We recognize that there may be minor discrepancies between the instructions as they appear on the website and the published versions of the instructions. Any discrepancies as to

It is so ordered.

QUINCE, C.J., and PARIENTE, LEWIS, CANADY, POLSTON, LABARGA,
and PERRY, JJ., concur.

PARIENTE, J., specially concurs with an opinion, in which LABARGA and
PERRY, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND
IF FILED, DETERMINED.

PARIENTE, J., specially concurring.

I concur in the majority's adoption of the proposed amendments to the
penalty phase jury instructions. My hope is that these amended instructions will
assist in minimizing the jury's confusion as to its roles and responsibilities when
deciding whether to recommend the death penalty, as identified in the American
Bar Association's Florida Death Penalty Assessment Report.

I write separately, however, to express my disagreement in two areas that in
my view would also assist the jury, the judge, and this Court with their roles and
responsibilities in capital cases: special verdict forms in the guilt phase and special
verdict forms in the penalty phase. The Criminal Court Steering Committee
recommended the mandated use of guilt phase special verdict forms and withdrew
its recommendation for the mandated use of penalty phase special verdict forms
after our opinion in State v. Steele, 921 So. 2d 538 (Fla. 2005).

instructions authorized for publication and use after October 25, 2007, should be
resolved by reference to the published opinion of this Court authorizing the
instruction.

The first area of disagreement is the majority's decision to decline to adopt the Steering Committee's recommendation mandating the use of a new capital case verdict form in the guilt phase. That form would have required the jury to state how many of the jurors found the defendant guilty of first-degree murder based on premeditation and how many jurors found that the murder was committed in the course of a felony, with that felony clearly identified. Although the majority opinion does not mandate the use of this form, nothing in our opinion forecloses trial courts from using special verdict forms for first-degree murder to delineate felony murder and premeditated murder as trial courts have done in the past.

The use of special verdict forms to specify felony murder and premeditated murder has numerous advantages as identified by the Steering Committee and those in favor of the forms. I would also defer to the expertise of our Steering Committee members, including the trial judges who have been utilizing the special verdict forms in first-degree murder cases and advocate their mandated use.

The Committee's proposal should be adopted because the new verdict form would assist both the trial court in making decisions as to what penalty to impose and this Court in reviewing the sentence in the following ways. First, a special verdict form indicating that a defendant was found guilty of first-degree murder based on a premeditated murder theory would obviate the need for the trial court to perform the requisite felony murder analysis under Enmund v. Florida, 458 U.S.

782 (1982), and Tison v. Arizona, 481 U.S. 137 (1987). As the United States Supreme Court noted in Ring v. Arizona, 536 U.S. 584 (2002):

Because Ring was convicted of felony murder, not premeditated murder, the judge recognized that Ring was eligible for the death penalty only if he was [the victim's] actual killer or if he was "a major participant in the armed robbery that led to the killing and exhibited a reckless disregard or indifference for human life."

Id. at 594 (citing Enmund; Tison). Second, if the State sought to establish either the cold, calculated, and premeditated or felony murder aggravators in the penalty phase, it would be helpful for the trial court to know how the jury viewed the evidence when discussing these aggravating circumstances in the sentencing order. Third, the use of a special verdict form in the guilt phase would guide the trial court in determining the applicable instructions in the penalty phase. Finally, the special verdict form would aid this Court in our review of evidentiary issues, as well as the sufficiency of the evidence as to either premeditated or felony murder.

I also believe that this Court has missed an opportunity to further enhance the process of imposition of the death penalty by requiring the use of special verdict forms in the penalty phase so that the jury could have had the opportunity to record its findings on aggravators and mitigators—the essential ingredients in the ultimate decision of whether to impose the death penalty. As the Committee explained in its initial report, "the trial judge [presently] does not know how the jury considered the various aggravating and mitigating circumstances," and it

would be “most helpful to the trial judge [in preparing the sentencing order] to know how the jury viewed the evidence presented in the penalty phase,” for this would “provide valuable assistance in deciding the weight to be given to each circumstance.” (Emphasis added). In withdrawing this proposal, the Committee apparently concluded that the Court’s decision in Steele precluded the use of such forms in the penalty phase.

I have stated many times in the past the importance of having the jury’s vote recorded on any matters that may form the basis for an aggravating factor that allows the trial court to impose a sentence of death. My most recent expression of the need for special interrogatories, an opinion in which Justice Labarga joined, explains the issue:

I write to address the difficulties created by our failure to allow or mandate special interrogatories in death penalty cases as more fully explained in my separate opinions in Lebron v. State, 982 So. 2d 649, 670 (Fla. 2008) (Pariente, J., concurring); Franklin v. State, 965 So. 2d 79, 103 (Fla. 2007) (Pariente, J., specially concurring); and Coday v. State, 946 So. 2d 988, 1024 (Fla. 2006) (Pariente, J., concurring in part and dissenting in part). As I stated in Coday and reiterated in Lebron, the use of special verdict forms would enable this Court “to tell when a jury has unanimously found a death-qualifying aggravating circumstance, which would both facilitate our proportionality review and satisfy the constitutional guarantee of trial by jury even when the recommendation of death is less than unanimous.” Lebron, 982 So. 2d at 671 (Pariente, J., concurring) (quoting Coday, 946 So. 2d at 1024 (Pariente, J., concurring in part and dissenting in part)). In both Coday and Lebron, the trial judges had in fact utilized a special verdict form. The majority opinions in Coday and Lebron concluded that, although the use of the special

verdict form was error based on our opinion in State v. Steele, 921 So. 2d 538 (Fla. 2005), it was harmless.

In Lebron, it was Chief Judge Belvin Perry, one of the most experienced trial judges in the State, who had utilized a special verdict form because he did not like “fishing in the dark.” Lebron, 982 So. 2d at 671. The frustration with not being able to use special verdict forms and the constitutional concerns with the inability to receive explicit jury findings were also expressed by the trial judge in this case, Judge O. H. Eaton, Jr., another one of our most experienced trial judges in death penalty cases, and the judge who teaches the State’s judges the death penalty course mandated by the Rules of Judicial Administration. See Fla. R. Jud. Admin. 2.215(b)(10). As Judge Eaton elaborated in his sentencing order in this case, in explaining why the jury recommendation of death is “essentially meaningless” to him without specific findings:

Defense counsel raised several constitutional arguments in his pretrial motions and in his sentencing memorandum. The court chooses to discuss some of them because they are issues that are of concern to the Court in deciding the sentence to be imposed in this case.

Florida’s death penalty scheme places certain duties upon the trial judge in determining whether to impose the death penalty or a sentence of life imprisonment without possibility of parole.

One of the duties placed upon the trial judge is to give the recommendation of the jury “great weight,” unless circumstances not applicable here allow lesser weight. See Muhammad v. State, 782 So. 2d 343 (Fla. 2001). However, a definition of this subjective term, “great weight,” is not contained in the statute or the case law. The most that can be said about the guidance the Supreme Court of Florida has given to the trial courts in applying this term is that when a jury returns a life recommendation, “great weight” almost always precludes the imposition of a death sentence, Smith v. State, 866 So. 2d 51 (Fla. 2004), while “great weight” does not

preclude the trial judge from disagreeing with a death recommendation and imposing a life sentence. Tompkins v. State, 872 So. 2d 230 (Fla. 2003). How “great” is the weight when the members of the jury cannot agree unanimously on the recommended sentence? Should a seven to five vote for death be given the same weight as a unanimous vote? These are issues the trial courts deal with in capital cases.

The role of the jury during the penalty phase under the Florida death penalty scheme has always been confusing. The jury makes no findings of fact as to the existence of aggravating or mitigating circumstances, nor what weight should be given to them, when making its sentencing recommendation. The jury is not required to unanimously find a particular aggravating circumstance exists beyond a reasonable doubt. It makes the recommendation by majority vote, and it is possible that none of the jurors agreed that a particular aggravating circumstance submitted to them was proven beyond a reasonable doubt. The jury recommendation does not contain any interrogatories setting forth which aggravating factors were found, and by what vote; how the jury weighed the various aggravating and mitigating circumstances; and, of course, no one will ever know if one, more than one, any, or all of the jurors agreed on any of the aggravating and mitigating circumstances. It is possible, in a case such as this one, where several aggravating circumstances are submitted, that none of them received a majority vote. This places the Court in the position of not knowing which aggravating and mitigating circumstances the jury considered to be proven and provides little, if any, guidance in determining a sentence. In fact, the trial judge is prohibited by law from requiring the jury to make findings through a verdict containing special interrogatories. State v. Steele, 921 So. 2d 538 (Fla. 2006). Accordingly, absent a recommendation for life, the jury recommendation is essentially meaningless to the trial judge, especially if the parties present additional

aggravating and mitigating circumstances at the Spencer hearing.

After the jury renders its recommendation, the trial judge is required by law to independently find the existence of aggravating and mitigating circumstances. The Statute provides, “[n]otwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is imposed.” Sec. 921.141, Fla. Stat. (2005).

There is no question about the trial court’s duty to make findings independent from those made by the jury. The Supreme Court of Florida has made that clear on a number of occasions. Recently, the Court stated, “[h]owever, we remind judges of their duty to independently weigh aggravating and mitigating circumstances. A sentencing order should reflect the trial judge’s independent judgment about the existence of aggravating and mitigating factors and the weight each should receive.” Blackwelder v. State, 851 So. 2d 650, 653 (Fla. 2003).

Since the jury makes no findings whatsoever, and only delivers a sentence recommendation, the question arises as to what “great weight” truly means. The Court concludes that when a jury returns a recommendation for the death penalty, “great weight” simply means the trial judge is not precluded from considering that option. As has been observed by the United States Supreme Court, “[a] Florida trial court no more has the assistance of a jury’s findings of fact with respect to sentencing issues than does a trial judge in Arizona.” Walton v. Arizona, 497 U.S. 639, 648[, 110 S. Ct. 3047, 111 L.Ed.2d 511] (1990).

Florida trial judges are bound to follow the

precedent laid down by the Supreme Court of Florida. That Court has taken the position that the Florida capital punishment scheme is constitutionally valid unless and until the United States Supreme Court declares otherwise. Marshall v. Crosby, 911 So. 2d 1129 (Fla. 2005). Following that precedent, knowing the obvious due process problems with Florida's death penalty scheme, certainly tests the resolve of trial judges, who must decide who will live and who will die. See Ring v. Ariz., 536 U.S. 584[, 122 S. Ct. 2428, 153 L.Ed.2d 556] (2002).

That being said, this Court will use the tools available under the present law in deciding the penalty to be imposed in this case.

Aguirre-Jarquin v. State, 9 So. 3d 593, 610-12 (Fla. 2009) (Pariente, J., specially concurring). Judge Eaton has thus “eloquently explained why special verdict forms would assist trial judges in assessing jury recommendations of death.” Id. at 613.

I continue to believe that this Court has the authority to require special interrogatories and since the Court does not believe that it has that authority, I urge, as did Justice Cantero before me, that there be changes to the death penalty statute to allow for the use of special verdict forms. See Steele, 921 So. 2d at 545-46.

LABARGA and PERRY, JJ., concur.

Two Cases:

Original Proceeding – Standard Jury Instructions in Criminal Cases

Judge Terry David Terrell, Chair, Supreme Court Committee on Standard Jury Instructions in Criminal Cases, First Judicial Circuit, Pensacola, Florida, Judge O.H. Eaton, Jr., Eighteenth Judicial Circuit, Sanford, Florida; John F. Harkness, Jr., Executive Director, The Florida Bar, Tallahassee, Florida; and Les Garringer, Senior Attorney, Office of State Courts Administrator, Tallahassee, Florida,

for Petitioners

Paula S. Saunders, Office of the Public Defender, Second Judicial Circuit, and Michael Ufferman of Michael Ufferman Law Firm, P.A., Tallahassee, Florida, for The Florida Association of Criminal Defense Lawyers; Carolyn M. Snurkowski, Assistant Deputy Attorney General, Tallahassee, Florida; John K. Aguero, Assistant State Attorney, Tenth Judicial Circuit, Bartow, Florida; Arthur I. Jacobs, General Counsel, Florida Prosecuting Attorneys Association, Fernandina Beach, Florida; Christopher R. White, Assistant State Attorney, Eighteenth Judicial Circuit, Sanford, Florida; Jay W. Thomas, Central Staff Attorney, Second District Court of Appeal, Lakeland, Florida; Larry B. Henderson, Assistant Public Defender, Ninth Judicial Circuit, Orlando, Florida; and Penny H. Brill, Assistant State Attorney, Eleventh Judicial Circuit, Miami, Florida,

Responding with comments

APPENDIX

7.11 PENALTY PROCEEDINGS — CAPITAL CASES

921.141, Fla. Stat.

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 by the supreme court 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. **Ladies and gentlemen of the jury, the defendant has been found guilty of Murder in the First Degree. [An appellate court has reviewed and affirmed the defendant's conviction. However, the appellate court sent the case back to this court with instructions that the defendant is to have a new trial to decide what sentence should be imposed.] Consequently, you will not concern yourselves with the question of [his] [her] guilt.**

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

- b. **Ladies and gentlemen of the jury, you have found the defendant guilty of Murder in the First Degree.**

For murders committed prior to May 25, 1994, the penalties were different; therefore, for crimes committed before that date, the following instruction should be modified to comply with the statute in effect at the time the crime was committed.

2. **The punishment for this crime is either death or life imprisonment without the possibility of parole. The final decision as to ~~what~~ which punishment shall be imposed rests ~~solely~~ with the judge of this court; however, the law requires that you, the jury, render to the court an advisory sentence as to ~~what~~ which punishment should be imposed upon the defendant.**

~~*For murders committed prior to May 25, 1994, the penalties were different; therefore, for crimes committed before that date, this instruction should be modified to comply with the statute in effect at the time the crime was committed.*~~

Give in all cases before taking evidence in penalty proceedings.

The State and the defendant may now present evidence relative to the nature of the crime and the character, background or life of the defendant. You are instructed that

Give only to the jury that found the defendant guilty.

{this evidence when considered with the evidence you have already heard}

Give only to a new penalty phase jury.

{this evidence}

is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any. At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation that you may consider.

Give after the taking of evidence and argument.

~~Ladies and gentlemen of the jury, it is now your duty to advise the court as to the what punishment that should be imposed upon the defendant for [his] [her] the crime of First Degree Murder in the First Degree. You must follow the law that will now be given to you and render an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty or whether sufficient mitigating circumstances exist that outweigh any aggravating circumstances found to exist. The definition of aggravating and mitigating circumstances will be given to you in a few moments. As you have been told, the final decision as to what which punishment shall be imposed is the responsibility of the judge. In this case, as the trial judge, that responsibility will fall on me. ; ~~h~~However, it is your duty to follow the law requires that will now be given you by the court and you to render to the court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist. as to which punishment should be imposed—life imprisonment without the possibility of parole or the death penalty.~~

Give only in cases where mitigation was presented to the jury by the defendant and not where mitigation was waived.

Although the recommendation of the jury as to the penalty is advisory in nature and is not binding, the jury recommendation must be given great weight and deference by the Court in determining which punishment to impose.

Give only to the jury that found the defendant guilty.

Your advisory sentence should be based upon the evidence of aggravating and mitigating circumstances {that you have heard while trying the guilt or innocence of the defendant and the evidence that has been presented to you in these proceedings}, {that has been presented to you in these proceedings}.

Give only to a new penalty phase jury.

Your advisory sentence should be based upon the evidence of aggravating and mitigating circumstances that has been presented to you in these proceedings.

Weighing the evidence.

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 considering your verdict. You may find some of the evidence not reliable, or less reliable than other evidence.

Credibility of witnesses.

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' testimony agree with the other testimony and other evidence in the case?**

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' 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. Was it proved that the witness had been convicted of a felony or a crime involving dishonesty?
10. Was it proved that the general reputation of the witness for telling the truth and being honest was bad?

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

Give only if the defendant did not testify.

A defendant in a criminal case has a constitutional right not to testify at any stage of the proceedings. You must not draw any inference from the fact that a defendant does not testify.

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.

Rules for deliberation.

These are some general rules that apply to your discussion. You must follow these rules in order to return a lawful recommendation:

1. You must follow the law as it is set out in these instructions. If you fail to follow the law, your recommendation 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 a wise and legal decision in this matter.
2. Your recommendation must be decided 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 recommendation 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 recommendation.
5. 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 or her testimony.
6. Your recommendation should not be influenced by feelings of prejudice, or by racial or ethnic bias, or by sympathy. Your recommendation must be based on the evidence, and on the law contained in these instructions.

Aggravating circumstances. § 921.141(5), Fla. Stat.

An aggravating circumstance is a standard to guide the jury in making the choice between the alternative recommendations of life imprisonment without the possibility of parole or death. It is a statutorily enumerated circumstance which increases the gravity of a crime or the harm to a victim.

An aggravating circumstance must be proven beyond a reasonable doubt before it may be considered by you in arriving at your recommendation. In order to consider the death penalty as a possible penalty, you must determine that at least one aggravating circumstance has been proven.

The State has the burden to prove each aggravating circumstance 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 circumstance 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 circumstance exists, or if, having a conviction, it is one which is not stable but one which wavers and vacillates, then the aggravating circumstance has not been proved beyond every reasonable doubt and you must not consider it in rendering an advisory sentence to the court.

Give only to the jury that found the defendant guilty.

It is to the evidence introduced during the guilt phase of this trial and in this proceeding, and to it alone, that you are to look for that proof.

Give only to a new penalty phase jury.

It is to the evidence introduced during this proceeding, and to it alone, that you are to look for that proof.

A reasonable doubt as to the existence of an aggravating circumstance 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 circumstance, you should find that it does not exist. However, if you have no reasonable doubt, you should find that the aggravating circumstance does exist and give it whatever weight you determine it should receive.

§ 921.141(5), Fla. Stat.

The aggravating circumstances that you may consider are limited to any of the following that you find are established by the evidence:

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

1. The ~~crime~~ capital felony ~~for which~~ (defendant) ~~is to be sentenced~~ was committed by a ~~while~~ ~~[he]~~ ~~[she]~~ ~~had been~~ person previously convicted of a felony and ~~[was under sentence of imprisonment]~~ ~~[or]~~ ~~[was on community control]~~ ~~[or]~~ ~~[was on felony probation]~~;
2. The defendant ~~has been~~ was previously convicted of ~~[another capital offense~~ felony] ~~or~~ ~~of~~ ~~[a felony involving the [use] [threat] of violence to some~~ the person];

Because the character of a crime if involving violence or threat of violence is a matter of law, when the State offers evidence under aggravating circumstance "2" the court shall instruct the jury of the following, as applicable:

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. **The defendant, ~~in committing the crime for which [he] [she] is to be sentenced,~~ knowingly created a great risk of death to many persons;**
4. **The crime capital felony for which the defendant is to be sentenced was committed while [he] [she] the defendant was**

**[engaged]
[an accomplice]**

in

**[the commission of]
[an attempt to commit]
[flight after committing or attempting to commit]**

~~the crime of~~ any

Check § 921.141(5)(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].**

[the unlawful throwing, placing or discharging of a destructive device or bomb].

- 5. The crime capital felony ~~for which the defendant is to be sentenced~~ was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.**
- 6. The crime capital felony ~~for which the defendant is to be sentenced~~ was committed for financial gain.**
- 7. The crime capital felony ~~for which the defendant is to be sentenced~~ was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.**
- 8. The crime capital felony ~~for which the defendant is to be sentenced~~ 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 heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

- 9. The crime capital felony ~~for which the defendant is to be sentenced~~ was a homicide and was committed in a cold, and calculated, and premeditated manner, ~~and~~ 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.

~~{As I have previously defined for you}~~, a 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 circumstance 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. The victim of the ~~crime~~ capital felony ~~for which defendant is to be sentenced~~ was a law enforcement officer engaged in the performance of ~~the officer's~~ [his] [her] official duties.
11. The victim of the ~~crime~~ capital felony ~~for which the defendant is to be sentenced~~ was an elected or appointed public official engaged in the performance of [his] [her] official duties, and if the crime motive for the capital felony was related, in whole or in part, to the victim's official capacity.
12. The victim of the capital felony was a person less than 12 years of age.
13. The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

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

14. The capital felony was committed by a criminal street gang member.

§ 921.141, Fla. Stat.

15. The capital felony 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.

Merging aggravating factors.

Give the following paragraph if applicable. When it is given, you must also give the jury an example specifying each potentially duplicitous aggravating circumstance. See Castro v. State, 596 So. 2d 259 (Fla. 1992).

The State may not rely upon a single aspect of the offense to establish more than one aggravating circumstance. Therefore, if you find that two or more of the aggravating circumstances are proven beyond a reasonable doubt by a single aspect of the offense, you are to consider that as supporting only one aggravating circumstance.

If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole.

Mitigating circumstances. § 921.141(6), Fla. Stat.

Should you find sufficient aggravating circumstances do exist to justify recommending the imposition of the death penalty, it will then be your duty to determine whether the mitigating circumstances outweigh the mitigating aggravating circumstances that you find to exist. ~~that outweigh the aggravating circumstances. Among the mitigating circumstances you may consider, if established by the evidence, are:~~

A mitigating circumstance is not limited to the facts surrounding the crime. It can be anything in the life of the defendant which 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 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, 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 give that evidence

such weight as you determine it should receive in reaching your conclusion as to the sentence to be imposed.

Among the mitigating circumstances you may consider are:

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

1. ~~(Defendant)~~ **The 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 crime~~ **capital felony** ~~for which the defendant is to be sentenced~~ was committed while ~~{he} {she}~~ **the defendant** was under the influence of extreme mental or emotional disturbance_;
3. The victim was a participant in the defendant's conduct or consented to the act_;
4. The defendant was an accomplice in the ~~offense for which {he} {she} is to be sentenced~~ but the offense was **capital felony** committed by another person and the defendant's **[his] [her]** participation was relatively minor_;
5. The defendant acted under extreme duress or under the substantial domination of another person_;
6. The capacity of the defendant to appreciate the criminality of **[his] [her]** conduct or to conform **[his] [her]** conduct to the requirements of law was substantially impaired_;
7. The age of the defendant at the time of the crime_;

Both 8a and 8b must be given unless the defendant requests otherwise

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

a. ~~Any [other] aspect of the defendant's character, record, or background.~~

b. ~~Any other circumstance of the offense.~~

~~Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision.~~

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you determine it should receive in reaching your conclusion as to the sentence that should be imposed.

Give before a new penalty phase jury

~~[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 circumstance 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 circumstance exists, or if, having a conviction, it is one which is not stable but one which wavers and vacillates, then the aggravating circumstance has not been proved beyond a reasonable doubt and you should disregard it, because the doubt is reasonable.~~

~~It is to the evidence introduced in this proceeding, and to it alone, that you are to look for that proof.~~

~~A reasonable doubt as to the existence of an aggravating circumstance 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 circumstance, you should find that it does not exist. However, if you have no reasonable doubt, you should find that the aggravating circumstance does exist and give it whatever weight you feel determine it should receive.]~~

~~If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.~~

~~A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.~~

Victim impact evidence. Give 1, or 2, or 3, or all as applicable.

You have heard evidence about the impact of this homicide on the

1. family,
2. friends,
3. 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 circumstance. Your recommendation to the court must be based on the aggravating circumstances and the mitigating circumstances upon which you have been instructed.

Recommended sentence.

The sentence that you recommend to the court must be based upon the facts as you find them from the evidence and the law. If, after weighing the aggravating and mitigating circumstances, you determine that at least one aggravating circumstance is found to exist and that the mitigating circumstances do not outweigh the aggravating circumstances, or, in the absence of mitigating factors, that the aggravating factors alone are sufficient, you may recommend that a sentence of death be imposed rather than a sentence of life in prison without the possibility of parole. Regardless of your findings in this respect, however, you are neither compelled nor required to recommend a sentence of death. If, on the other hand, you determine that no aggravating circumstances are found to exist, or that the mitigating circumstances outweigh the aggravating circumstances, or, in the absence of mitigating factors, that the aggravating factors alone are not sufficient, you must recommend imposition of a sentence of life in prison without the possibility of parole rather than a sentence of death.

The process of weighing aggravating and mitigating factors to determine the proper punishment is not a mechanical process. The law contemplates that different factors may be given different weight or values by different jurors. In your decision-making process, you, and you alone, are to decide what weight is to be given to a particular factor.

In these proceedings it is not necessary that the advisory sentence of the jury be unanimous.

The fact that the ~~jury can determination of whether you~~ recommend a sentence of ~~death or sentence of life imprisonment~~ life imprisonment or death in this case ~~can be reached by a~~ 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, ~~and all of it,~~ realizing that human life is at stake, and bring ~~to bear~~ your best judgment to bear in reaching your advisory sentence.

If a majority of the jury, seven or more, determine that (defendant) should be sentenced to death, your advisory sentence will be:

A majority of the jury by a vote of _____, to
_____ advise and recommend to the court that it
impose the death penalty upon (defendant).

On the other hand, if by six or more votes the jury determines that (defendant) should not be sentenced to death, your advisory sentence will be:

The jury advises and recommends to the court that it
impose a sentence of life imprisonment upon
(defendant) without possibility of parole.

When you have reached an advisory sentence in conformity with these instructions, that form of recommendation should be signed by your foreperson, dated with today's date and returned to the court. There is no set time for a jury to reach a verdict. Sometimes it only takes a few minutes. Other times it takes hours or even days. It all depends upon the complexity of the case, the issues involved and the makeup of the individual jury. You should take sufficient time to fairly discuss the evidence and arrive at a well reasoned recommendation.

You will now retire to consider your recommendation as to the penalty to be imposed upon the defendant. ~~When you have reached an advisory sentence in conformity with these instructions, that form of recommendation should be signed by your foreperson and returned to the court.~~

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], and 1998 [723 So. 2d 123], and 2009.