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Court reworks death penalty jury instructions

After years of study and recommendations, the Florida Supreme Court has overhauled jury instructions in death penalty cases to conform to recent rulings and make them easier for jurors. But three justices argued they should have been made even more jury — and judge — friendly.

The court, in an October 29 per curiam opinion, acted on recommendations made by the Supreme Court Committee on Standard Jury Instructions in Criminal Cases and the Florida Supreme Court's Criminal Court Steering Committee. The court asked the two panels in 2004 to undertake a review of jury instructions in death penalty cases, including whether they matched recent case law.

The initial recommendations were held in abeyance while the court considered *State v. Steele*, 921 So. 2d 538 (Fla. 2005), which addressed "the propriety of specific instructions for aggravating circumstances." Also during that delay, the ABA issued The Florida Death Penalty Assessment Report. (See story in the October 1 Bar *News*.)

The report found, among other things, that a significant number of jurors did not understand their roles and duties in death penalty cases.

The two committees reconsidered their recommendation in light of the *Steele* decision and the ABA recommendations, and the court heard oral arguments in 2007, shortly before four justices resigned or retired.

The court made changes throughout Instruction 7.11, including new instructions on a defendant's constitutional right not to testify; changing the definition of mitigating circumstances including that the burden of proof is the greater weight of the evidence rather than being "reasonably convinced;" clarifying that only statutorily enumerated aggravating factors may be considered; and approving an instruction to give great weight to the jury's recommendation on the death penalty, although that instruction will not be given if the defendant does not present mitigating circumstances.

The court also approved 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."

The court went on to say, "These amendments are intended to address the ABA's finding that a substantial percentage of Florida's capital jurors (over 36 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 25 percent of those interviewed) if they found the defendant to be 'a future danger to society. . . .'" The ABA report also concludes: "Approximately 48 percent of capital jurors believed that mitigating circumstances had to be proved beyond a reasonable doubt, 35 percent of jurors did not know that any mitigating evidence could be taken into consideration, and 14 percent of

jurors believed that only the enumerated mitigating circumstances could be considered."

However, the court rejected ABA recommendations that jurors be required to report any instance of racial bias during deliberations and on the defendant's mental disability or disorder.

"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," the court said.

The court also rejected a steering committee recommendation, supported by the Florida Association of Criminal Defense Lawyers, for a special guilt-phase verdict form to indicate whether a guilty verdict was based on felony murder or premeditated murder grounds, or both.

"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," the court said. "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."

In a separate concurring opinion, Justice Barbara Pariente, joined by Justices Jorge Labarga and James E.C. Perry, said she would have mandated using the verdict forms on both the guilt and penalty phases of the proceedings. That was originally recommended by the Criminal Court Steering Committee, although it later dropped the recommendation for the penalty phase.

Pariente said having the forms would help both trial and appellate judges.

"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). . . ," she wrote. "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."

Having the form in the penalty phase would help the trial judge know how the jury viewed evidence and weighed mitigating and aggravating factors, Pariente argued. Without that, it's almost impossible for the judge to give the jury's recommendation "great weight" in determining the final sentence, she added.

"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," Pariente concluded.

The court acted in the consolidated cases of *In Re: Standard Jury Instructions in Criminal Cases*, case no SC05-960, and *In Re: Standard Jury Instructions in Criminal Cases – Penalty Phase of Capital Trials*, case no. SC 05-1890. The changes were effective with the release of the opinion.