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## **In re Standard Jury Instructions (Criminal)**

**SC05-960 | SC05-1890**

ALL RISE.

HEAR YE, HEAR YE, HEAR YE.

THE SUPREME COURT OF FLORIDA

NOW IN SESSION.

ALL THOSE HAVING BUSINESS

BEFORE THIS COURT, DRAW

NIGH.

GIVE ATTENTION, AND YE SHALL

BE HEARD.

GOD SAVE THESE UNITED

STATES, THE GREAT STATE OF

FLORIDA, AND THIS HONORABLE

COURT.

>> GOOD MORNING.

>> GOOD MORNING.

>> LADIES AND GENTLEMEN, THE

FLORIDA SUPREME COURT

SUPREME COURT.

PLEASE BE SEATED.

>> GOOD MORNING, AND WELCOME

TO THE ORAL ARGUMENT

CALENDAR FOR THURSDAY, APRIL

19th.

THE FIRST MATTER WE WILL

CONSIDER THIS MORNING,

STANDARD JURY INSTRUCTIONS

IN CRIMINAL CASES.

JUDGE HEATEN, ARE YOU GOING

TO LEAD OFF?

>> GOOD MORNING, MR. CHIEF

JUSTICE, JUSTICES.

MY NAME IS O. H. EATON, JR.

I AM A CIRCUIT JUDGE IN THE

18th CIRCUIT AND I CHAIR

YOUR HEARING COMMITTEE.

AFTER MANY MONTHS, NOW IT'S

COME TO YEARS, WE HAVE

FINALLY PRESENTED TO YOU A

VERSION OF THE PROPOSED JURY

INSTRUCTIONS IN CAPITAL

CASES FOR THE PENALTY PHASE.

I WILL BE ADDRESSING THE

SECOND AMENDED REPORTS

VERSION OF THOSE

INSTRUCTIONS, AND I WANT TO DISCUSS SOME OF THE POINTS IN THEM THAT ARE DIFFERENT FROM THE STANDARD INSTRUCTIONS THAT ARE CURRENTLY IN PLACE. FIRST, I THINK WE NEED TO DISCUSS THE FRANKY PROBLEM. IN THE FRANKY CASE, THIS COURT CITED THE HENNYARD CASE, AND IN THAT CASE, THE PROSECUTOR AT VOIR DIRE TOLD THE POTENTIAL JURORS THAT IF THE CIRCUMSTANCES OUTWEIGHED THE MITIGATING CIRCUMSTANCES THEY WERE REQUIRED TO RETURN A VERDICT OF DEATH PENALTY. THIS COURT HELD THAT THAT PARTICULAR STATEMENT WAS NOT A CORRECT STATEMENT OF THE LAW.

AND CITED PREEXISTING AUTHORITY FOR THAT PROPOSITION.

BECAUSE A JURY DOES NOT HAVE TO RECOMMEND THE DEATH PENALTY, EVEN IT IS FINDS THE AGGRAVATING CIRCUMSTANCES OUTWEIGH THE MITIGATING CIRCUMSTANCES. THIS IS PRACTICALLY UNIVERSAL IN WEIGHING STATES LIKE FLORIDA.

>> NOW, THAT IS, IF, IF THERE HAS BEEN A MISSTATEMENT.

WHAT YOU ARE SAYING --

>> THE CASE -- THE CASE IS THAT -- CASES THAT WERE CITELOAD HAD SOME KIND OF REASON FOR THIS ISSUE -- CITED ALL HAD SOME KIND OF REASON FOR THIS ISSUE TO COME UP, AND IT WAS BECAUSE THE PROSECUTOR MISBEHAVED.

>> BUT ARE YOU ALSO PROPOSING THAT THAT KIND OF STATEMENT BE GIVEN EVEN IF THERE IS NO MISSTATEMENT, THAT THE JURORS CAN AT ANY, NEVER HAVE TO IN ESSENCE, IMPOSE THE DEATH PENALTY, NO MATTER WHAT THE AGGRAVATORS AND MITIGATORS SAY.

>> YES, THE COMMITTEE'S POSITION FROM READING THE CASE LAW THAT IF IT IS THE LAW, THAT THE JURY DOESN'T HAVE TO IMPOSE THE DEATH PENALTY WHICH -- WHEN THE AGGRAVATING CIRCUMSTANCES OUTWEIGH THE MITIGATING CIRCUMSTANCES BECAUSE THE PROSECUTOR MISBEHAVES IT OUGHT TO BE THE LAW WHEN THE PROSECUTOR DOESN'T MISBEHAVE.

IT OUGHT TO BE THE LAW --

>> THE PROSECUTORS' ATTORNEY ASSOCIATION AS I READ THEIR COMMENT AS I READ THEIR COMMENT IN OTHER KINDS OF CIRCUMSTANCES WHERE THERE HAS NOT BEEN A MISSTATEMENT THAT SUCH A, AN INSTRUCTION WOULD REALLY MAKE THE IMPOSITION OF THE DEATH PENALTY ARBITRARY AND, AND VIOLATION OF ALL THE FEDERAL COURTS THAT SEEM TO SUGGEST, I MEAN, AS THE UNITED STATES SUPREME COURT, THAT IN ORDER TO HAVE A VALID DEATH PENALTY, IT MUST BE, YOU KNOW, NARROWED AND NOT ARBITRARY, SO WHAT DOES YOUR COMMITTEE SAY ABOUT THAT PARTICULAR ARGUMENT?

>> IF YOU, IF YOU READ THE VARIOUS FEDERAL CASES THAT, THAT DEAL WITH STATES THAT HAVE WEIGHING RESPONSIBILITIES, YOU KNOW, SOME STATES DON'T HAVE THE JURY WEIGH THE AGGRAVATING AND MITIGATING CIRCUMSTANCES. BUT IN THE STATES THAT DO, I THINK YOU'LL FIND THAT THIS RULE THAT THE COURT LAID DOWN IS THE RULE THROUGHOUT THE, THROUGHOUT THOSE STATES.

THERE MAY BE SOME EXCEPTIONS

--

>> WHAT DO THE FEDERAL COURTS DO IN TERMS OF THEIR INSTRUCTIONS?

>> THEY REFER TO THESE, THIS PARTICULAR PROPOSITION AS IF IT'S JUST SOMETHING THAT EVERYBODY KNOWS.

AND I, I CAN'T --

>> BUT IN THERE, THEIR PATTERN INSTRUCTIONS, IN THE FEDERAL COURTS, --

>> OH, I DON'T KNOW, JUSTICE.

I DON'T KNOW.

I HAVEN'T READ THE FEDERAL PATTERN INSTRUCTIONS.

I DON'T KNOW.

>> JUDGE EAT SNN.

>> YES, MA'AM.

>> YOUR CHARGE STARTED BEFORE THE AVA, THE COURT CAME OUT, THE AVA REPORT -- FINDINGS ABOUT -- CONFUSION FROM THE CAPITAL JURY INSTRUCTIONS AS THEY EXIST.

DID YOU HAVE A CHANCE TO LOOK AT THAT REPORT?

>> WELL I HELPED WRITE --

>> WELL, DO YOU BELIEVE THAT THE THE PROPOSED CHANGES WILL ALLEVIATE WHAT -- CURRENT CONFUSION IN THE CRITICAL AREAS?

>> WELL, THAT'S WHAT WE WERE HOPING TO DO, AND THE SECOND POINT I WANTED TO TALK ABOUT HAD TO DO WITH JUST THAT.

INN FOR INSTANCE, IN OUR PROPOSED INSTRUCTIONNESS, WE HAVE PROVIDED DEFINITIONS OF WHAT AN AGGRAVATING CIRCUMSTANCE IS AND WHAT A MITIGATING CIRCUMSTANCE HAS BEEN IS.

AND IT HAS BEEN OUR COLLECTIVE CIRCUMSTANCE THAT JURORS ARE CONFUSED ABOUT THESE TERMS BECAUSE THEY -- IT'S UNFAMILIAR.

IT'S REALLY AN UNFAMILIAR KIND OF TERRITORY TO TAKE SOMEBODY IN FROM OFF THE STREET AND PUT THEM IN A JURY BOX AND SAY WE ARE GOING TO GO THROUGH THIS CAPITAL TRIAL AND WE ARE NOT GOING TO DEL YOU WHAT AN

AGGRAVATING CIRCUMSTANCE IS ALL ABOUT.

I MEAN, WHAT IS IT FOR?

SO THAT'S THE REASON WE PROPOSE THAT IN ORDER TO TRY TO CLEAR UP THOSE PROBLEMS.

>> ONE OF THE, OF COURSE, THERE'S STILL I GUESS THE DEBATE IN THIS STATE AS TO HOW -- WOULD APPLY, BUT IT SEEMS THAT PRETTY CLEAR THAT AT THE VERY LEAST THAT THE JURORS ARE THE FINDERS OF THE FACT AS TO THE AGGRAVATING CIRCUMSTANCES.

DID YOU YOUR COMMITTEE CONSIDER WHETHER THAT STATEMENT STATEMENT SHOULD BE INCLUDED IN THE CAPITAL JURY INSTRUCTIONS?

>> WHICH STATEMENT, JUSTICE?

>> THAT JURIES ARE THE FINDERS OF FACTS AS TO THE AGGRAVATING CIRCUMSTANCES.

>> I THINK THE INSTRUCTIONS ASSUME THAT.

>> THEY TALK ABOUT -- JURY SENTENCE.

>> RIGHT.

WELL, THE COURT HAS ALREADY RULED THAT WE CAN'T SEND THEM AN INTERROGATORY AND ASK THEM WHAT TO DECIDE.

-- THEY DECIDE.

SO I CAN'T DO THAT I DON'T KNOW HOW TO APPROACH IT ANYMORE THAN WHAT WE HAVE DONE.

>> YOU HAVE PREVIOUSLY SUBMITTED SOME SPECIAL INTERROGATORIES.

>> DR. STEELE WITHDREW THEM, YES, MA'AM.

>> BUT THE OTHER ISSUE, AND I WAS LOOKING AT THE DEATH PENALTY STATUTES BUT IT'S THE QUESTION ON THE BURDEN OF PROOF ON WHETHER SUFFICIENT -- SHOWN THAT ANY AGGRAVATING CIRCUMSTANCES HAVE BEEN PROVED BEYOND A REASONABLE DOUBT AND THE JURY HAS DEFINED THE MORE AGGRAVATING CIRCUMSTANCE --

TENDED TO BE ELIGIBLE FOR DEATH.

BUT THE QUESTION IS WHETHER SUFFICIENT AGGRAVATING CIRCUMSTANCES EXIST, AND THEN, SECOND, WHETHER SUFFICIENT MITIGATING CIRCUMSTANCES EXIST WHICH OUTWEIGH THE AGGRAVATING CIRCUMSTANCES.

>> RIGHT.

>> WHAT IS THE JURY TO THINK, EVEN IN REVISED JURY INSTRUCTIONS WHOSE BURDEN IS IT TO ESTABLISH WHETHER THE AGGRAVATING CIRCUMSTANCES -- AGGRAVATING CIRCUMSTANCES OUTWEIGH THE MITIGATING CIRCUMSTANCES. HOW DO YOU --

>> THE WAY THE INSTRUCTION READS, THE WAY THE STATUTE READS IS THAT THE MITIGATING CIRCUMSTANCES HAVE TO OUTWEIGH THE AGGRAVATING CIRCUMSTANCES.

WE TOOK THE POSITION ORIGINALLY THAT IT SHIFTS THE BURDEN OF PROOF UNFAIRLY.

AND THE RECENT SUPREME COURT HAS HELD BASICALLY THE SAME THING.

>> WHAT IS THE JURY -- WHAT IS THE BURDEN OF PROOF IF IT SHIFTS, IF IT IS NOT SHIFTS THE BURDEN OF PROOF THEN THE DEFENDANT HAVE TO SHOW THE MITIGATING CIRCUMSTANCES THAT OUTWEIGH THE AGGRAVATING CIRCUMSTANCES. IS THAT BY A PREPONDERANCE OF EVIDENCE.

HAVE YOU EVER WE TALKED ABOUT THAT?

>> NO, I DON'T THINK YOU HAVE --

>> AND AGAIN HAVING BEEN ON THIS COURT FOR MANY YEARS -- JURISPRUDENCE DOES THAT MEAN -- THE JUROR READING THESE INSTRUCTIONS, I WOULDN'T KNOW.

>> RIGHT.

WELL ALL YOU WOULD KNOW IS  
THAT THE AGGRAVATING  
CIRCUMSTANCEWISE TO BE  
PROVEN BEYOND A REASONABLE  
DOUBT AND AND THE MITIGATING  
CIRCUMSTANCES THEY JUST HAVE  
TO BE REASONABLY CONVINCED  
ABOUT.

AND THEY ARE SUPPOSED TO DO  
SOMETHING THAT JUGTLED  
SOMEHOW AND SUBJECTIVELY  
MAKE A DECISION.

AND THAT'S --

>> -- ARBITRARY?

>> I AGREE WITH YOU, BUT,  
BUT I DIDN'T WRITE THE  
STATUTE, AND, AND THE COURT  
HAS UPHELD IT, I GUESS  
THAT'S WHERE WE ARE WITH IT.

>> WE HAVE NEVER FOCUSED ON  
THAT FAMILIAR THING  
[INAUDIBLE]

>> I WOULD LIKE TO TALK  
ABOUT --

>> LET ME ASK YOU THIS,  
JUDGE EATON, THAT, THE SENSE  
NOW OF WHAT THE COMMITTEE  
HAS DONE IN ITS SUPPLEMENTAL  
REPORT IS TO BRING THE  
INSTRUCTIONS IN CONFORMITY  
AS BEST THE INSTRUCTIONS CAN  
BE WITH THE STATUTE.

THAT -- IS THAT RIGHT?

>> YES, YES.

AS FAR AS THE AGGRAVATING  
AND MITIGATING CIRCUMSTANCES  
WEIGHING ITS CONCERN.

>> [INAUDIBLE]

>> RIGHT.

RIGHT.

>> YOU MADE SOME CHANGES  
THAT WILL NOW BRING IT INTO

--

>> INTO LINE WITH THE CASE  
LAW, YES.

>> [INAUDIBLE]

I GUESS YOU'VE ALSO  
ADDRESSED THE, THE --  
ATTORNEYS' CONCERN ABOUT THE  
ISSUE ABOUT THE --

[INAUDIBLE]

WHETHER THEY ARE ON RARE  
CIRCUMSTANCES, YOU'VE  
CHANGED THAT TOO.

>> YES, WELL, WE ADOPTED THEIR LANGUAGE. WE THOUGHT IT WAS BET, SO WE ADOPTED THE FLORIDA PROSECUTING ATTORNEY'S ASSOCIATION.

I WANT TO TALK JUST BRIEFLY ABOUT THE PROPOSED VERDICT FORM.

WE HAVE A PROPOSED VERDICT FORM THAT DOES HAVE AN INTERROGGATORY IN IT, AND HERE IS THE PROBLEM.

THE LAW SAYS THAT THE PROSECUTOR DOESN'T HAVE TO ELECT BETWEEN THE THEORY OF PREMEDITATION AND THE THEORY OF FELONY MURDER.

AND SO BOTH OF THESE THEORIES GO TO THE JURY.

WELL, THE PROBLEM WITH IT WHEN YOU GET A GENERAL VERDICT BACK FROM THE JURY IS YOU DON'T KNOW WHETHER THE JURY DETERMINED THAT THE FELONY MURDER RULE WAS APPLYING OR PREMEDITATION WAS APPLYING.

WELL, I CAN ASSURE YOU THAT IN EACH -- IN ANY OF THESE CASES, THEY ARE GOING TO COME FORWARD AND THEY ARE GOING TO SAY, WELL, WE WANT COLD CALCULATED AND PREMEDITATED AND WE WANT FELONY MURDER FOR THE AGGRAVATING.

WELL, IF YOU DON'T KNOW WHAT THE JURY DID, THEN YOU DON'T KNOW WHETHER TO ALLOW PARTICULARLY COLD CALCULATED AND PREMEDITATED.

>> IS THAT THE -- WHAIS THE PURPOSE OF THE ACTUAL NUMBERS?

I MEAN, YOU HAVE, AS I UNDERSTAND THE VERDICT FORM, YOU HAVE BOTH OF THEM ON THERE, AND YOU, YOU TELL THE JURY TO SAY FOUR OF US AGREE THAT IT WAS FELONY MURDER AND, AND 8 OF US AGREED THAT IT WAS PREMEDITATED MURDER.

>> RIGHT.

>> SO WHAT DOES THE NUMBER

--

>> THE NUMBERS ARE VERY IMPORTANT TO ME, OR AT LEAST, AND I'VE USED THIS VERDICT FORM NOW IN A COUPLE OF CASES.

BY THE WAY, IN EACH OF THOSE CASES, I GOT 12 VOTES FOR ONE OR THE OTHER.

OKAY?

BUT I TOLD THE PROSECUTOR, YOU KNOW, IF, IF YOU DON'T WANT TO ELECT -- ELECT, THAT'S YOUR BUSINESS, BUT IF I DON'T GET 12 VOTES ON ONE OF THESE, YOU ARE NOT GOING TO GET THAT AGGRAVATING CIRCUMSTANCE BECAUSE IT REQUIRES A UNANIMOUS VERDICT.

>> [INAUDIBLE]

CAUSE THE PROBLEMS WITH THE, THE CASE --

[INAUDIBLE]

LEGALLY INSUFFICIENT.

THE VERDICT FORMS THAT UP HERE, THE COURT SPECIAL VERDICT FORMS NEVER, I DON'T RECALL SEEING THE NUMBER --

[INAUDIBLE]

ALWAYS ASSUME THAT EITHER ONE JURY HAD -- --

[INAUDIBLE]

WOULDN'T THAT BE A CHANGE IN THE LAW?

>> I DON'T THINK SO.

ALL I'M TRYING TO DO IS FIND OUT WHAT THEY -- YOU KNOW, WHAT THEY DETERMINED.

AND IT'S DIFFERENT BY THE WAY, --

>> BUT IT'S GOING TO CREATE PROBLEMS WITH THE SUFFICIENCY OF THE EVIDENCE IF WE FIND IT NOT SUFFICIENT

--

>> NO --

>> NO, BECAUSE YOU, YOU'VE RULED THAT IT DOESN'T MAKE ANY DIFFERENCE WHETHER THEY, WHETHER SOME OF THEM THINK WITH ONE THEORY AND SOME OF THEM THINK WITH ANOTHER, AS

LONG AS THEY AGREE THAT IT'S  
FIRST-DEGREE MURDER.

>> WELL, --

[INAUDIBLE]

>> WE'VE ALSO SAID THAT IT  
DOESN'T MATTER WHETHER SOME  
OF THEM AGREE ON CCP OR SOME  
OF THEM AGREE ON HAC AS LONG  
AS THEY ALLGRY ON AN  
AGGRAVATOR EXISTS.

>> BUT WE ARE NOT TALKING  
ABOUT THE PENALTY PHASE, WE  
ARE TALKING ABOUT THE GUILT  
PHASE.

>> BUT YOU WERE SAYING  
BEFORE IF IT WASN'T  
UNANIMOUS, YOU WOULDN'T  
ALLOW THE AGGRAVATOR.

>> PROBABLY NOT, BUT BECAUSE  
OF OUR CASE LAW, THAT SAYS  
YOU DON'T HAVE TO BE  
UNANIMOUS IN FINDING A  
PARTICULAR.

>> THAT'S TRUE.

BUT WE'RE NOT TALKING ABOUT,  
WE'RE NOT TALKING ABOUT THE  
GUILT PHASE AND WE ARE NOT  
TALKING ABOUT THE OVERALL  
CONCEPT OF WHETHER THE  
PERSON IS GUILTY OF  
FIRST-DEGREE MURDER.

WE ARE TALKING ABOUT GIVING  
THE TRIAL JUDGE SOME  
DIRECTION ABOUT WHAT THE  
JURY THOUGHT OF THE  
EVIDENCE.

AND, IN ORDER TO TAKE A  
DETERMINATION AS TO WHETHER  
WE SHOULD ALLOW PARTICULAR  
AGGRAVATING CIRCUMSTANCES.  
REMEMBER, THE, THE HOLDING  
THAT WE HAVE IN APRESENTI,  
THE VERDICT, THE PENALTY IS  
LIMITED TO THE FACTS THAT  
ARE REFLECTED IN THE  
VERDICT.

>> WE HAVEN'T YET, AND WE  
SAID THIS IN STEELE, WE  
HAVEN'T YET DEALT WITH THE  
REPERCUSSIONS OF APRESENTI  
AS FAR AS THE AGGRAVATORS  
AND WHETHER IT MEANS THAT A  
JURY MUST DECIDE THAT AN  
AGGRAVATOR EXISTS, WHATEVER

IT IS.

THAT THEY SAY AN AGGRAVATOR EXISTS OR THEY SAY THIS MURDER OCCURRED IN A HEINOUS, ATROCIOUS, OR CRUEL WAY SO WE HAVEN'T YET, I GUESS, REACHED THAT POINT.

>> I'M NEARLY OUT OF TIME.

I WOULD LIKE TO RESERVE A MINUTE AND A HALF.

THANK YOU.

>> MS. SAUNDERS, YOU WANT TO PROCEED NEXT?

>> GOOD MORNING.

MAY IT PLEASE THE COURT.

I'M PAULA SAUNDERS AND I'M HERE TODAY ON BEHALF OF THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS.

LET ME FIRST ADDRESS THE INSTRUCTION REGARDING WHETHER THE MITIGATING FACTORS OUTWEIGH THE AGGRAVATING FACTORS AND WHETHER THE DEFENSE MUST SHOW THE AGGRAVATING FACTORS OUTWEIGH THE MITIGATING FACTORS.

THE STERG COMMITTEE INITIALLY RECOMMENDED THAT THE INSTRUCTION READ THAT THE JURY MUST DETERMINE WHETHER AGGRAVATING FACTORS EXIST, THAT OUT WEIGH ANY MITIGATING FACTORS FOUND TO EXIST, AND THE RATIONALE GIVEN BY THE STEERING COMMITTEE IS THAT MANY JUDGES WERE ALREADY GIVENIN' THIS INSTRUCTION.

WHEN YOU ACTUALLY READ THE CASE LAW, WHAT'S VERY INTERESTING IS THAT YOU SEE EVEN IN PROSECUTORIAL ARGUMENT, THIS IS WHAT'S BEING PRESENTED TO THE JURY, THAT IT'S LOGICALLY THE WAY IN WHICH THE INSTRUCTIONS SHOULD FOLLOW.

THE STATE HAS THE BURDEN OF PROOF AS TO EACH AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT. THERE SHOULD BE A

PRESUMPTION IN FAVOR OF WHY  
NOT IN FAVOR OF DEATH.  
AND THE PROSECUTION,  
PROSECUTION SHOULD BEAR THE  
BURDEN OF SWAYING THE JURY  
THAT DEATH IS THE  
APPROPRIATE PENALTY.  
AND THEY MUST SHOW NOT JUST  
THEIR SUFFICIENT AGGRAVATING  
FACTORS, BUT THE AGGRAVATING  
FACTORS ARE SUFFICIENT TO  
OUTWEIGH THE MITIGATING  
FACTORS.

YOU KNOW, THE WAY THE  
STATUTE READS, IT SAYS THAT  
THE JURY MUST FIND THAT  
THERE IS INSUFFICIENT WANT  
MITIGATION WHICH WOULD  
OUTWEIGH THE AGGRAVATION.  
WELL, WHAT IS INSUFFICIENT  
MITIGATION?

>> IT SAYS WHETHER  
SUFFICIENT MITIGATING  
CIRCUMSTANCES EXIST.  
I HAVE THE STATUTE -- IN  
FRONT OF ME.

>> OKAY.  
BUT IT'S NOT A COUNTING  
PROCESS.xD

AND WE NEED TO MAKE SURE  
THAT THE JURY DOESN'T FIND  
THAT THIS IS A COUNTING  
PROCESS.

IT'S NOT JUST A BALANCING ON  
THE SCALES IN TERMS OF  
NUMBERS.

IF THERE'S AGGRAVATION, AND  
WE KNOW EVEN ONE AGGRAVATING  
FACTOR CAN BE SUFFICIENT TO  
JUSTIFY IMPOSITION OF DEATH  
BUT ONE AGGRAVATING FACTOR  
MAY NOT OUTWEIGH MITIGATING  
FACTORS BUT THE INSTRUCTIONS  
SHOULD READ WHETHER THE  
AGGRAVATION OUTWEIGHATHIZE  
MITIGATION.

THIS IS ALIVATE AG--  
ALLOCATE AGBURDEN OF PROOF

--  
>> DO YOU ALSO FEEL THE JURY  
SHOULD BE INSTRUCTED THAT NO  
MATTER WHAT, THEY SHOULD  
NEVER BE REQUIRED TO  
RECOMMEND THE DEATH PENALTY?

>> ABSOLUTELY.

THAT'S THE LAW.

>> HOW IS THAT CONSIST ABOUT WITH -- CONSISTENT WITH THE STATUTE THAT SAYS IF YOU FIND AGGRAVATORS THEN ARE THERE SUFFICIENT MITIGATING CIRCUMSTANCES?

WHAT IF THEY FIND WHAT AREN'T SUFFICIENT MITIGATING CIRCUMSTANCES BUT WE'RE STILL INSTRUCTING THEM YOU ARE NEVER REQUIRED TO RECOMMEND DEATH PENALTY.

>> WELL, I WOULD ASSUME THAT IN ORDER FOR A JURY TO RECOMMEND LIFE SENTENCE THEY ARE GOING TO FIND SOMETHING IN MITIGATION, WHETHER IN CIRCUMSTANCES OF THE DEFENSE OR IN BACKGROUND OF THE DEFENDANT THEY ARE GOING TO HAVE TO FIND SOMETHING IN MITT GHAGS, BUT THE JURY IS GIVEN TWO SENTENCING OPTIONS, AND THE JURY IS DELIVERED BODY THAT IS GOING TO COME A RATIONALAL DECISION AS TO WHICH OF THOSE SENTENCES ARE APPROPRIATE.

IT IS A DISCRETIONARY DECISION ON THE PART OF THE JURY.

IT'S NEVER MANDATORY TO IMPOSE LIFE OR TO IMPOSE DEATH UNLESS THERE IS SIMPLY NO AGGRAVATING FACTORS FOUND, AND THEN OF COURSE -- IMPOSED OR RECOMMENDED.

BUT IT IS THE LAW.

FRANKLY, IT IS VERY CLEAR THAT THE JURY HAS NEVER REQUIRED TO RECOMMEND A DEATH SENTENCE, SO LET'S TELL THE JURY.

IF IT'S THE LAW, THEN LET'S TELL THE JURY THAT THEY ARE NEVER REQUIRED TO RECOMMEND THAT.

>> DO YOU ALSO THINK WE SHOULD RETAIN THE INSTRUCTION THAT ONLY UNDER A RARE CIRCUMSTANCE THAT THE JUDGE WOULD

OVERRIDE THE JURY'S FINDING.

>> YES, I THINK THAT IS APPROPRIATE.

IT GUIDES THE JURY IN RECOMMENDING -- THAT THE RECOMMENDATION IS ADVISORY BUT IT WILL -- IT IS ENTITLED TO GREAT WEIGHT AND WILL BE FOLLOWED EXCEPT IN VERY RARE CIRCUMSTANCES.

I THINK THAT'S A VERY APPROPRIATE INSTRUCTION. TO GIVE THE JURY.

>> DOES THAT CONFORM TO OUR LAW, TETTER AND OTHER CASES LAW?

KEAN I BELIEVE.

>> I BELIEVE IT DOES, I BELIEVE IT DOES.

I WOULD ASK THAT THE COURT KEEP THE INSTRUCTION ON THE GREAT WEIGHT THAT WAS IN THE FIRST PROPOSED INSTRUCTIONS AND NOT IN THE SECOND AMENDED REPORT.

I ALSO WHOLEHEARTEDLY ENDORSE THE SPECIAL VERDICT FORMS.

I HAVE SEEN IT USED IN MANY TRIALS.

I THINK IT ADDS CERTAINTY TO THE PROCESS, AND IT'S VERY GOOD.

>> DO YOU AGREE THAT IT --

>> GO AHEAD.

>> HAVEN'T WE ALREADY CROSSED THAT BIJ IN STATE v. STEELE AS FAR AS --

>> YES,.

YES, I THINK SO.

>> ON THE ONE, ON THE FELONY MURDER VERSUS, VERSUS PREMEDITATED MURDER, YOU AGREE THAT THE JURY SHOULD BE ASKED TO RECORD THEIR NUMBERS ON IT OR JUST EITHER THEORY HAVE TO BE FOUND BY A UNANIMOUS JURIS?

>> WELL, THE COURT HAS ALREADY ACKNOWLEDGED THAT COURT DOES NOT HAVE TO UNANIMOUSLY AGREE ON THE THEORY BUT I THINK AS JUDGE EATON HAS ALREADY SAID, IT

DOES A JUDGE IN KNOWING  
WHERE THE JURY STANDS AND  
WHAT AGGRAVATING FACTORS ARE  
APPROPRIATE TO PRESENT TO  
THE JURY.

VERY QUICKLY, I'D LIKE TO  
JUST SAY THAT I THINK IT'S  
VERY IMPORTANT TO GIVE  
DEFINITIONS OF THE  
AGGRAVATING AND MITIGATING  
CIRCUMSTANCES.

THE JURY NEEDS TO KNOW THIS  
IS NOT JUST A LAUNDRY LIST,  
BUT THE PRINCIPLES BEHIND  
APPLYING THE ENUMERATE!!ING  
AGGRAVATING FACTORS, AND I  
DO ALSO ENDORSE THAT.  
THE ONE INSTRUCTION THAT I  
DID -- THE VERY FIRST  
INSTRUCTION.

--

>> YOU ARE BEYOND, SO IF YOU  
COULD VERY PRECISELY ADDRESS  
THIS.

>> IN ONE A WHEN YOU ARE  
EMPANEL AGNEW PENALTY PHASE  
JURY, I DO NOT BELIEVE A  
JURY NEEDS TO BE TOLD OR  
SHOULD BE TOLD THAN AN  
APPELLATE COURT HAS  
CONFIRMED CONVICTION OR  
REMANDED A SENTENCING FOR A  
NEW TRIAL.

WE DON'T TELL JURIES WHEN A  
JURY HAS BEEN CONVICTED FOR  
A CASE THAT HAS BEEN  
REMANDED FOR A NEW TRIAL.  
WE SHOULDN'T TELL A JURY  
THAT A CONVICTION HAS BEEN  
CONFIRMED AND A DEFENDANT IS  
PREVIOUSLY BEEN SENTENCED TO  
DEATH.

THANK YOU.

>> THANK YOU.

MS. BRILL, YOU GOING TO GO  
NEXT?

>> EXCUSE ME, ASSISTANT  
STATE ATTORNEY FOR THE 11th  
JUDICIAL CIRCUIT ALONG WITH  
GENERAL COUNSEL FOR THE  
FLORIDA PROSECUTING  
ATTORNEYS' ASSOCIATION.

>> WOULD YOU PULL THE  
MICROPHONE DOWN?

I THINK IT WOULD HELP US  
HEARING.

>> BASICALLY, YOUR HONOR,  
SINCE 1976 WE HAVE HAD THESE  
STANDARD JURY INSTRUCTIONS,  
AND THEY HAVE WORKED WELL  
OVER THESE YEARS, EXCEPT FOR  
WHEN THERE HAS BEEN  
MEANINGFUL CHANGES THAT HAVE  
BEEN REQUIRED THROUGH  
DECISIONS BY THIS COURT, FOR  
EXAMPLE, WHEN WE HAD TO  
CHANGE OUR HEINOUS,  
ATROCIOUS, AND CRUEL  
INSTRUCTION OR CCP BECAUSE  
THE LAW REQUIRED THAT.

>> SOME WOULD ARGUE THAT  
THEY HAVEN'T WORKED WELL,  
THAT THE JURORS ARE CONFUSED  
ABOUT LOT OF THINGS.

>> BUT THEY ARE NOT,  
FRANKLY.

YOU KNOW I READ THE AVA,  
REPORT AND YOU HAVE TO GO  
BEYOND ABA REPORT AND LOOK  
AT THE STUDY THAT THEY  
RELIED ON IS VERY  
INTERESTING.

TO SAY THEY RELIED ON, THEY  
INTERVIEWED JURORS WHO, WHO  
SAT IN CASES NORTH OF TAMPA.  
THEY LEFT OUT MORE THAN HALF  
THE STATE OF FLORIDA.

HOW CAN YOU RELY ON A REPORT  
THAT SAYS THE JURORS WERE  
CONFUSED WHEN YOU DON'T EVEN  
INCLUDE THE WHOLE STATE OF  
FLORIDA.

IT'S ONLY ONE-THIRD OF THE  
STATE.

IT WAS QUITE -- I FOUND IT  
TO BE --

>> I'M NOT SURE THERE'S  
GOING TO BE A GEOGRAPHICAL  
DIFFERENCE IN THE AMOUNT OF  
CONFUSION.

>> WELL, I THINK THERE IS,  
YOUR HONOR, HAVING BEEN IN  
MIAMI-DADE COUNTY, I CAN  
TELL YOU JURORS IN  
MIAMI-DADE COUNTY ARE NOT  
THE SAME JURORS LIVING IN  
PENSACOLA.  
THEY HAVE DIFFERENT VALUES.

>> I AM LOOKING AT JUSTICE  
BELL YOU MEANING THAT -- --  
SAYING THE INSTRUCTIONS ARE  
FINE FOR THE BRIGHT.  
[LAUGHTER]  
>> MY JURORS CAN UNDERSTAND

--  
>> I THINK YOUR JURERS CAN  
UNDERSTAND JUST AS WELL BUT  
I DON'T KNOW WHICH JURORS  
THEY MIGHT HAVE LOOKED ON --  
RELY ON THAT STUDY.  
THAT WAS MY POINT.  
IF YOU DON'T LOOK AT THE  
WHOLE -- ALL OF FLORIDA, YOU  
CANNOT SAY THIS IS  
REPRESENTATIVE OF THE WHOLE  
STATE OF FLORIDA.

>> NOW, THE SUPPLEMENTAL  
REPORT BY THE COMMITTEE,  
HAVE YOU HAD AN OPPORTUNITY  
TO LOOK AT THAT?

>> YES, YES, SIR,.  
>> AND, THEY ADOPTED MANY OF  
THE PROSECUTORS' SUGGESTIONS  
AS FAR AS CHANGES.  
DO YOU HAVE A PROBLEM WITH  
NOW WHAT THE COMMITTEE IS  
RECOMMENDING?

>> YES, SIR, WE STILL DO.  
YES, AND I HAVE BASICALLY  
FIVE POINTS IF I CAN DO THEM  
AS QUICKLY AS I CAN.

>> TRY GETTING FIVE POINTS  
IN --

>> OBVIOUSLY WE HAVE THE --  
ININSTRUCTION.  
PERSONALLY, I THINK WE CALL  
IT THE, THE JURY  
PARTSTRUCTION.

ALL INTENTS AND PURPOSES.  
AND I WANTED TO READ REALLY  
QUICKLY FROM FRANKIE, WHICH  
I THINK IS IMPORTANT THAT  
THIS COURT IN THE OPINION  
WHERE YOU HAD THE PROBLEM  
WITH THE ISSUE, AND BY THE  
WAY, THERE ISN'T A FRANKIE  
PROBLEM.

SINCE FRANKIE CAME OUT IN  
2002, I DON'T RECALL THIS  
COURT REVERSING ANY CASES OR  
EVEN COMMENTING ON THE FACT  
THAT THE PROSECUTORS OR THE

COURTS HAVE MISSTATE THE LAW.

I THINK WE HAVE LEARNED FROM THEN THAT THIS IS NOT AN ISSUE ANYMORE.

>> I DON'T THINK WE HAVE HAD A CASE ANYMORE.

>> RIGHT.

I DON'T THINK THERE IS A FRANKIE PROBLEM ANYMORE. BUT JUST READING FROM FRANKIE ANYMORE THIS COURT STATED FROM STATE v. DIXON AND SAID IT MUST BE EMPHASIZED THAT THE PROCEDURE TO BE FILED BY TRIAL JUDGES AND JURIES IS NOT A MERE COUNTING PROCESS OF X NUMBER OF AGGRAVATING CIRCUMSTANCES AND Y NUMBER OF MITIGATING CIRCUMSTANCES. BUT A RATHER A REASONABLE JUDGMENT OF WHAT CIRCUMSTANCES REQUIRE IMPOSITION OF DEATH AND CAN BE SATISFIED BY LIFE IMPRISONMENT IN LIGHT OF THE CIRCUMSTANCES.

IT'S INTERESTING IN FRANKIE THE COURT HAS USED THE WORD REQUIRE.

>> IT WASN'T USED IN THE SENSE OF REQUIREMENT OF THE STATUTE.

>> I'M SAYING THE POINT OF THE MATTER IS -- IT'S NOT PROPER TO TELL THE JURY IF YOU GO THROUGH 15, 20 PAGES OF JURY INSTRUCTIONS WHICH BASICALLY THEN SAYS NEVER MIND.

FORGET WE JUST TOLD YOU. YOU CAN SORT OF DO WHAT YOU WANT TO DO BECAUSE YOU CAN DO THAT.

SAME THING IN A TRIAL. EVEN THOUGH THE STATE MAY PROVE THE CASE BEYOND A REASONABLE DOUBT, WE DON'T TELL THE JURY YOU HAVE AN INHERENT RIGHT TO PARD THEN DEFENDANT AND FIND HIM NOT GUILTY EVEN THOUGH THE STATE HAS FOUND -- IN FACT, WE

TELL THEM IT'S IMPORTANT TO FOLLOW THE LAW.

THE LAST INSTRUCTION WE GIVE THE JURY IN THIS GUILT PHASE I THINK IT SHOULD ALSO APPLY IN THE PENALTY PHASE IS IT'S IMPORTANT TO FOLLOW THE LAW. OVER 200 YEARS, WE FOLLOWED THE LAW.

AND THAT'S WHAT THEY SHOULD BE TOLD.

NOT TO WHAT YOU WANT BECAUSE IT INJECTS ARBITRARINESS INTO IT.

THAT'S THAT ISSUE.

THE SECOND ISSUE IS THE VERDICT FORMS.

THAT'S A BIG PROBLEM BECAUSE I THINK YOU HAVE TO LOOK AT WHAT IS YOU'RE TELLING THE JUROR.

FIRST OFF, JURORS, WE ALL AGREE YOU DON'T HAVE TO BE UNANIMOUS FOR WHICH THEORY SO WHAT ARE YOU GO TO HAVE A CASE WHERE YOU HAVE 12 JURORS AND LET'S ASSUME NINE JURORS SAY I THINK YOU PROVED PREMEDITATED BUT 12 OF THEM -- YOU ALSO PROVED FELONY SO WHAT ARE THEY GOING TO PUT ON THERE.

THEY STILL HAVE FIRST-DEGREE MURDER OR 6-6, 4-8, OR 12 AND 12 FOR BOTH THEORIES. IT'S NOT GOING TO HELP THE JUDGE BECAUSE WE REALLY DON'T KNOW, AND FURTHERMORE, THE PROBLEM IS, IS THE DEATH PENALTY.

IF THE FELONY MURDER, 98% OF THE TIME, THEY HAVE BEEN CHARGED WITH THAT FELONY, AND IF THEY HAVE BEEN FOUND GUILTY OF THE FELONY, YOU KNOW THERE IS FELONY MURDER. YOU KNOW YOU CAN THEN HAVE THAT AGGRAVATING CIRCUMSTANCE BECAUSE, YOUR HONOR, YOUR COURTS IN A LOT OF CASES HAVE NO PROBLEM WITH THE RING BECAUSE THEY FOUND THE FELONY. SO THEY ARE GOING TO BE

FINDING THAT FELONY ANYWAY DURING THE COURSE OF -- YOU DON'T NEED JURY INSTRUCTIONS FOR FELONY MURDER.

THERE WILL BE SOMETIMES WHEN THEY -- WHERE THEY WON'T BE INSTRUCTED BUT MOST OF THE TIME THEY HAVE THE INSTRUCTION ON THE FELONY, AND IF THERE IS NO FELONY MURDER, THEY HAVE BEEN FOUND GUILTY OF PREMEDITATED MURDER SO THEN THERE IS THE QUESTION OF IS THERE ENOUGH FOR CCP WHICH YOU ARE NOT GOING TO FIND FROM THE GUILT PHASE ANYWAY.

NOT NECESSARILY.

PREMEDITATED NOT GOING TO TELL YOU THAT ANYWAY SO THERE IS NO PURPOSE FOR THAT PARTICULAR VERDICT FORM. IT IS ONLY GOING TO REALLY CONFUSE.

TELL THEM TO WRITE NUMBERS ON THIS.

THEY ARE GOING TO BE VERY CONFUSED.

I THINK THE FTA BELIEVES THERE SHOULD BE A STANDARD JURY INSTRUCTION FOR VICTIM IMPACT.

ONE THING I HAVE FOUND IN DOING A LOT OF TRIALS IN MIAMI-DADE COUNTY I WILL HAVE DIFFERENT JUDGES GIVE DIFFERENT INSTRUCTIONS. BECAUSE THERE IS NO STANDARD.

I THINK THERE NEEDS TO BE A STANDARD JURY INSTRUCTION ON VICTIM IMPACT.

>> WHAT IS IT GOING TO SAY.

>> IF WE SUGGEST WHAT WE TOOK FROM THIS COURT IN FURENEY WLUV THIS COURT WANTS TO DO, IT SHOULD BE ONE THIS COURT IMPROVES.

>> VICTIM IMPACT IS NOT A AGGRAVATOR IN CONSIDERING WHETHER TO RECOMMEND DEATH. IT IS NOT A MITIGATOR, OBVIOUSLY, SO WHAT ARE YOU GOING TO INSTRUCT THEM ABOUT

EXCEPT TO DISREGARD IT.

>> --

[INAUDIBLE]

WHAT HAS BEEN PROPER ABOUT ONE THE STEERING COMMITTEE HAS IS THAT THEY ADOPTED THE FACDL'S POSITION WHICH SAYS YOU CAN -- YOU'VE HEARD EVIDENCE OF THE, FROM FAMILY MEMBERS, I'M SORRY, FAMILY MEMBERS, USE THE WORD COLLEAGUES INSTEAD OF COMMUNITY.

AND COLLEAGUES IS WRONG. THAT'S NOT WHAT THE STATUTE SAYS.

IT SAYS COMMUNITY AND 230U USE COLLEAGUES AND NOT COMMUNITY YOU CAN BE LEAVING OUT A WHOLE BUNCH OF PEOPLE

--

>> STEERING COMMITTEES AGREE IN THEIR AMENDMENT TO GO BACK TO COMMUNITY?

>> NO, NO THEY DID NOT.

IT STILL SAYS COLLEAGUES IF THEY DID I WOULDN'T BE BRINGING IT UP AND I THINK IT NEEDS TO BE COMMUNITY BECAUSE THAT IS THE -- THAT'S THE STANDARD AND THAT'S WHAT THE STATUTE SAYS.

>> IF YOU COULD CAPTURE IN A COUPLE OF MINUTES. YOU ARE WELL OVER YOUR TIME.

>> TWO MINUTES?

>> COMPLETION, PLEASE. VERY CONCISELY.

>> VERY QUICKLY -I THINK THE DEFINITION OF AGGRAVATING AND MITIGATING IS NOT NECESSARILY, ESPECIALLY THE AGGRAVATING ONE IS LEGALLY WRONG BECAUSE IT LEAVES OUT THE FACT THAT ONE AGGRAVATOR WHICH THE VIOLENT PRIOR FELONY HAS TO DO WITH THE CHARACTER OF THE DEFENDANT. AND DOESN'T MENTION THAT. THAT'S THAT IS A AGGRAVATOR SO THE WAY IT IS WORDSER LEGALLY INCORRECT.

-- WORDER IS -- WORDED IS

LEGALLY INCORRECT.

WE REQUEST A CHANGE IN  
REBUTTAL INSTRUCTION IN  
PRIOR SIGNIFICANT -- NO LACK  
OF PRIOR SIGNIFICANT HISTORY.  
IN THE COMMENT BECAUSE IT  
SHOULD SAY INSTEAD OF  
CONVICTION, COMMISSION.  
AND THE MERGING INSTRUCTIONS  
HAS TO BE CHANGED IN THE  
ORDER THE STEERING COMMITTEE  
HAD IT.

>> THANK YOU.

>> THANK YOU VERY MUCH,  
MS. BRILL.

>> MS. SNURKOWSKI?

SNYE MAY IT PLEASE THE COURT  
I'M CAROLYN SNURKOWSKI FROM  
THE ATTORNEY GENERAL'S  
OFFICE AND I STAND HERE TO  
REPORT THAT WE AGREE WITH  
THE STATE ATTORNEY'S  
PROPOSALS THAT HAVE BEEN  
PRESENTED.

WE AALSO AGREE WITH THE  
STEERING COMMITTEE'S  
ADOPTION OF THOSE PORTIONS  
OF IT AND WE STILL THERE ARE  
YOU SHOULD ISSUES THAT NEED  
TO BE RESOLVED.

WE THINK IT'S CLEAR FROM  
WHAT YOU HEARD THIS MORNING  
THAT A VERY GREAT NUMBER OF  
INDIVIDUALS, VERY LIMITED  
INDIVIDUALS HAVE LOOKED AT  
THESE INSTRUCTIONS AND  
DETERMINED THAT THERE ARE  
SOME DIFFICULTIES WITH  
REGARD TO THE -- WHAT THIS  
COURT HAS SIGNALLED TO THE IS  
THAT THERE ARE STILL SOME  
QUESTIONS BROUGHT TO THE  
COURT CONCERNS ABOUT THEM.  
AND I THINK AT THIS POINT IN  
TIME, I THINK MS. BRILL'S  
OBSERVATION IS KREKD --  
CORRECT THAT WE HAVE HAD A  
LONG PERIOD OF TIME WHEN  
STANDARDS AND INSTRUCTIONS  
HAVE OPERATED VERY  
SUCCESSFULLY.

WHETHER IT'S, TO THE LIKING  
OF EVERYONE, OBVIOUSLY IT'S  
NOTCH WE HAVE HAD SOME

DISSENSION AND OBVIOUSLY WE  
HAVE HAD OCCASIONS WHERE WE  
HAVE HAD TO MAKE  
MODIFICATIONS TO THE JURY  
INSTRUCTIONS BUT I DON'T  
KNOW NAT WE ARE HERE TO DO A  
WHOLESALE REVISION OF  
SOMETHING THAT HAS BEEN  
OPERATIONING AND IS  
UNDERSTOOD BY MOST OF THE  
COURTS.

I THINK WHAT WE HAVE ALSO  
HEARD IS THAT WE HAVE  
INDIVIDUAL JUDGES ALONG THE  
WAY AND PROSECUTORS AND  
DEFENSE LAWYERS ASKING FOR  
MODIFICATIONSES OF THE JURY  
INSTRUCTIONS.  
TO THEIR PARTICULAR REGIONAL  
CONCERNS.

AND THAT'S HAPPENING WHICH  
MEANS THAT WE DON'T HAVE  
UNIFORM INSTRUCTIONS  
THROUGHOUT THE STATE, AND I  
THINK THAT'S PROBABLY  
SOMETHING WE ALL OUGHT TO  
GIVE PAUSE TO AND DETERMINE  
WHETHER IN FACT THAT IS  
SOMETHING WE WANT TO  
CONTINUE ALLOWING TO HAPPEN.  
MAYBE WE OUGHT TO BE MAKING  
SOME OBSERVATIONS WITH  
REGARD TO THE FACT THAT  
PEOPLE ARE DIVERTING FROM  
THE STANDARD JURY  
INSTRUCTIONS TO THE EXTENT  
THAT THEY NOW ARE SOME  
DIFFERENT AREA WHERES WE  
HAVE CHANGES IN THOSE  
INSTRUCTIONS.

>> COULD YOU JUSTDRIES THE  
ISSUE OF -- JUST ADDRESS THE  
ISSUE OF WHO'S ON THE BURDEN  
ABOUT SUFFICIENT  
MITIGATISHIN' CIRCUMSTANCES  
EXIST THAT OUTWEIGH THE  
MITIGATING CIRCUMSTANCES.  
I'M A JUROR.

I FIND THE AGGRAVATING  
CIRCUMSTANCES, TWO  
AGGRAVATING CIRCUMSTANCES  
WERE PROVEN BEYOND A  
REASONABLE DOUBT AND THEN I  
FIND THE MITIGATING

CIRCUMSTANCES, YOU KNOW,  
HAVE BEEN PROVEN BY A  
PREPONDERANCE OF THE  
EVIDENCE.

ALL RIGHT, NOW I AM GOING TO  
WEIGH THE AGGRAVATING  
AGAINST THE MITIGATING.  
HOW DO I, IN TERMS OF  
FIGURING OUT WHO HAS SHOWN  
THAT THESE MITIGATING  
CIRCUMSTANCES OUTWEIGH THE  
AGGRAVATING OR THE  
AGGRAVATING OUTWEIGH THE  
MITIGATED?

IT SEEMS LIKE A PRETTY  
IMPORTANT POINT, AND EITHER  
WE NEED TO SAY IF IT IS THE,  
WHAT IS IT IN TERMS OF THE  
LAW, AND WHY DO THESE JURY  
INSTRUCTIONS ADDRESS IT?

>> WELL, CERTAINLY I THINK  
WE GIVE THE INSTRUCTIONS TO  
THE JURY THAT THEY ARE TO  
UNDERSTAND AND FOLLOW THAT  
THE STATE HAS A BURDEN OF  
COMING FORTH AND PROVING THE  
AGGRAVATION BEYOND A  
REASONABLE DOUBT SO THEY  
UNDERSTAND THE BURDEN WITH  
REGARD TO THAT.

>> THAT'S EASY.

>> AND THEY PRESENT -- AND  
THEY ARE ALSO TOLD THE  
DEFENDANT REALLY HAS NO  
BURDEN BUT PRODUCTION IN  
ESSENCE WITH REGARD TO  
MITIGATION.

ANYTHING CAN BE CONSIDERED.  
SO I THINK THEY HAVE THAT.

>> WELL, THEY HAVE TO SHOW  
IT BY A PREPONDERANCE OF THE  
EVIDENCE, AND THAT'S STATED.

>> PARDON ME?

>> IT'S STATED IN THE  
INSTRUCTIONS.

>> YEAH, EXACTLY.

>> NOW WE GET TO THE  
CRITICAL ISSUE, WHICH IS THE  
WEIGHING PROCESS WHICH  
JUDGES ALL OVER THE STATE  
AND WHY WE HAVE DEATH  
PENALTY COURSES AND WHY WE  
REVIEW SENTENCING ORDERS AND  
WHY WE HAVE CASE AFTER CASE

IS CRITICAL ISSUE OF  
WEIGHING, WHICH WE KNOW IS  
NOT A QUANTITATIVE BUT IT'S  
QUALITATIVE WEIGHING.  
WHEN THEY'RE WEIGHING IT,  
THEY SAY, WHAT HAS THE STATE  
SHOWN THIS OR HAS THE  
DEFENDANT SHOWN THAT?  
WHAT DO WE EXPECT THE JURORS  
TO DO?

I THINK WE EXPECT THE  
JURJURORS TO FOLLOW THE LAW.  
I THINK THEY ARE INFORMED  
THE AGGRAVATION HAS BEEN  
PROVEN.

YOU HAVE MITIGATION THERE.

>> BUT WHO HAS TO PROVE --  
DOES THE STATE HAVE TO PROVE  
THAT THE AGGRAVATION -- THAT  
ONCE THE MITIGATION HAS BEEN  
ESTABLISHED.

IF NOTHING WAS PRESENTED,  
WELL, THEN IT'S PROBABLY,  
YOU KNOW, NO MITIGATION.  
BUT MITIGATION HAS BEEN  
PRESENTED.

NOW, NOW WHAT HAPPENS?  
>> YOU KNOW, I THINK WE ARE  
TALKING ABOUT A SLIPPERY  
SLOPE OF WHETHER WE HAVE TO  
HAVE DEFINITIONS YOU HAVE  
HEARD TODAY ABOUT WHETHER  
THE DEFINITIONS OF  
MITIGATION.

I THINK IN THE SENSE OF  
TALKING ABOUT THAT, YOU ARE  
PUTTING INTO FOCUS WHAT  
THEIR ROLES --

>> BUT WE CAN'T JUST LOOK AT  
WHAT THE STATUTE SAYS  
BECAUSE THE STATUTE DOESN'T  
EXPLAIN AGGRAVATING  
CIRCUMSTANCES HAVE TO BE  
PROVEN BEYOND A REASONABLE  
DOUBT OR MITT GALETS -- MITT  
DPATING CIRCUMSTANCES HAVE  
TO BE MOVE -- MITIGATING  
CIRCUMSTANCES HAVE BEEN  
PROUFBEN BY A MITIGATING --  
OUTWEIGH THE AGGRAVATING  
DOESN'T BY STAYING IT  
DOESN'T TELL THE JURY HOW  
THEY SHOULD WEIGH IT.  
BUT AREN'T YOU -- IN ALL DUE

RESPECT IT SOUNDS LIKE YOU ARE TELLING THEM THAT THE STATE HAS TO PROVE THESE, THEY HAVE TO PROVE AN AGGRAVATING FACTOR BEYOND A REASONABLE DOUBT.

THE DEFENSE CAN PROVE OR PRESENTS EVIDENCE WITH REGARD TO MITIGATION.

YOU MAY CONSIDER IT BASICALLY WHICH IS WHAT PREPONDERANCE.

AND IT SEEMS TO ME IF WE ARE DANCING AROUND HERE ON THIS ISSUE AND TRYING TO FIND WHAT THIS IS, DON'T WE FIND OF -- KIND OF FALL BACK INTO THE PROBLEMS THAT HAVE OCCURRED IN A NUMBER OF CASES WHERE THE COURT HAS CHASTISED THE PROSECUTOR, FOR EXAMPLE, FOR SUGGESTING THAT THE MITIGATION WAS NOT VALID OR IT WASN'T -- IT WAS IMPROPERLY PRESENTED OR IT DOESN'T -- I THINK YOU ARE KIND OF LOOKING AT THIS WHOLE BIG PICTURE OF WHAT EXACTLY YOURER ALLOWING THE STATE TO DO.

>> I DON'T THINK YOU ARE GIVING AN ANSWER TO MY QUESTION.

IS THERE MITIGATION OF NO BIRD SNN I AM JOUST JUST GOING TO ROLL THE DICE AND FIGURE OUT IN THIS CASE, YOU KNOW, WHETHER MITIGATION OUTWEIGHATHIZE AGGREGATION? IT'S NOBODY'S BIRD SNN.

>> THE JURY IS TOLD THEY HAVE TO OUTWEIGH THE MITIGATION AND AGGRAVATION AND WHEN THEY COME AND OUT DETERMINE THERE IS AGGRAVATION AND MITIGATION DOES THE MITIGATION OUTWEIGH THE AGGRAVATION AND THAT IS WHAT THEY ARE TOLD AND I THINK, THAT -IT'S NOT LIKE MAGIC WORDS LIKE YOU HAVE TO GIVE THAT MUCH WEIGHT. I DON'T THINK WE WANT TO DO THAT.

>> SO YOUR ANSWER IS  
BASICALLY SAYING THERE IS NO  
BURDEN OF PROOF.

>> WELL, BASICALLY -- I  
DON'T KNOW IF --

>> WELL I HATE THE WORD  
BURDEN.

>> WELL, THAT'S THE QUESTION  
IS THERE ONE AND I THINK  
YOU ARE SAYING NO.

>> NO, NO THERE'S NOT.  
IUM I APOLOGIZE IF I WAS  
BEING OBTUSE.

I THINK WE ARE EXPECTING THE  
BURDEN.

PRODUCE AND LET THEM DECIDE.

>> PROVES HIS DEFENSE HE  
GOES FORWARD AND PRESENTS  
WHAT HE HAS TO PRESENT.

WE DON'T TELL THE JURY NOW  
YOU HAVE TO SAY WHAT WE TELL  
THEM IS THE STATE HAS PROVEN  
THIS CASE BEYOND A  
REASONABLE DOUBT WITH REGARD  
TO THE CONVICTION.

WE DON'T --

>> MOST RESPECTFULLY, IF WE  
HAVE BURDENS, WHETHER IT'S  
INTOXICATION OR SELF-DEFENSE,  
WE, OF COURSE, TELL THE JURY  
IF SOMETHING, IF THE BURDEN  
HAS BEEN SHIFTED OR WE  
EXPLAIN WHOSE BURDEN IS IT.

>> AND I ABSOLUTELY AGREE  
WITH YOU BUT I AM TALKING  
ABOUT THE DIFFERENCE BETWEEN  
THIS WORD BURDEN YOU ARE  
USING.

IT IS WITHIN YOUR CONFINES  
-- THE BURDEN HAS BEEN SET  
TO THE ELEMENTS AND DEGREE  
OF PROVE AND IT IS FOR THE  
JURY TO DECIDE WHAT IS THE  
APPROPRIATE FINDING.

>> THANK YOU VERY MUCH.  
WITH OUR HELP, YOU HAVE  
EXHAUSTED YOUR TIME JUDGE  
EATON'S.

>> FIRST, AS FAR AS  
PARAGRAPH ONE A IS CONCERNED  
THAS TO DO WITH THE FACT  
THAT THE CASE HAS BEEN SENT  
BACK.

THAT'S THE STANDARD

INSTRUCTION.

AND THE STEERING COMMITTEE  
DID NOT RECOMMEND ANY  
CHANGES ON THAT, AND I DON'T  
THINK ANYBODY DID.

BUT THERE IT IS.

SECONDLY, JUSTICE BELL, OR  
JUSTICE CONTARA, I'M SORRY,  
THE RECOMMENDATION THAT WE  
HAVE HERE DOES CHANGE THE  
RARE CIRCUMSTANCES  
INSTRUCTION.

YOU KNOW, THAT INSTRUCTION  
WAS DEvised BY SUSAN SHARE  
YEARS AGO.

IT GOT CORPORATED INTO  
THINGS BUT THE PROSECUTION'S  
INSTRUCTION SUGGESTED THE  
LANGUAGE OUGHT TO BE CHANGED  
ALTHOUGH THE RECOMMENDATION  
OF THE JURY TO THE PENALTY  
IS ADVISORY IN NATURE AND IS  
NOT BINDING THE JURY  
RECOMMENDATION MUST BE GIVEN  
GREAT WEIGHT AND DEFERENCE  
IN THE COURT IN DETERMINING  
WHICH PUNISHMENT TO IMPOSE.

>> HOW DOES THAT CHANGE THE  
CURRENT INSTRUCTION.

>> I DON'T THINK IT REALLY  
DOES.

IT JUST MAKES THEM HAPPY.

>> THAT'S THE POINT.

ISN'T IT -- DON'T WE KNOW  
THAT JURIES SOMETIMES  
RECOMMEND DEATH BECAUSE THEY  
THINK WELL, IT'S ONLY A  
RECOMMENDATION.

IT'S REALLY THE JUDGE IS  
GOING TO IMPOSE A SENTENCE  
AND THEREFORE, THEREFORE, WE  
WIPE OUR HANDS.

THIS IS JUST A  
RECOMMENDATION AND KIND OF  
MORE FREELY RECOMMEND DEATH  
BECAUSE THEY KNOW THAT IS  
NOT THE SENTENCE.

IT'S THE JUDGE THAT'S GOING  
TO IMPOSE SENTENCE.

WHAT THEY DON'T KNOW IS MORE  
OR LESS THE JUDGE IS ALMOST  
ALWAYS GOING TO ABIDE BY  
THEIR RECOMMENDATION.

>> MY RECLECTION NOW IS THE

GREAT DEFERENCE INSTRUCTION  
IS SOMETHING THAT THE  
COLLEGE OF ADVANCED JUDICIAL  
STUDIES INVENTED.

I DON'T THINK IT'S PART OF  
THE STANDARD INSTRUCTION  
NOW.

I MAYBE WRONG, BUT I DON'T  
THINK IT IS.

>> JUDGE EATON, LET ME  
DIRECT YOUR ATTENTION, IF  
YOU WILL, CERTAINLY WE HAVE  
NOT DRIESED IN THIS COURT --  
NOT ADDRESSED IN THIS COURT  
THE SENSE OF THE EARLIER  
CASES WHAT THE LAWYERS CAN  
TELL THE, THE JURORS ABOUT  
THE MITIGATION  
AGGRAVATION BUT THERE IS NO  
QUESTION IN READING VOIR  
DIRE THAT THAT IS THE LEAST  
UNDERSTOOD ASPECT WHEN  
JURORS GO INTO A COURTROOM  
IT'S A FIRN WORLD TO THEM.  
THEY DON'T UNDERSTAND THAT'S  
HOW THE DEATH PENALTY WORKS.  
SO WHAT IS YOUR RESPONSE TO  
THE QUESTION THAT JUSTICE  
PARIENTE HAS PRESENTED AND  
THAT IS THERE A BURDEN?  
SHOULD THERE BE SOME KIND OF,  
OF WORDING ON A BURDEN TO  
SORT OF CLARIFY WHO'S  
SUPPOSED TO DO WHAT AS THE  
THING GOES FORWARD AND  
SOMEHOW, SOME METHOD TO, TO  
BE APPLIED TO WEIGHING AND  
WHETHER ONE OUTWEIGHED ONE  
OR THE OTHER BECAUSE IT  
REALLY SEEMS TO ME IF WE  
COME BACK INTO A  
CIRCUMSTANCE IT'S JUST WELL,  
DO WHAT YOU WANT.  
THAT DOESN'T REALLY -- THE  
ENTIRE STATUTORY SCHEME INTO  
SOME REAL PROBLEMS.

>> WELL, THAT'S THE WAY THE  
STATUTE'S WRITTEN AND I --  
LET ME EXPLAIN.

IF I HAD MY BROTHERS I DO A  
LOT OF CHANGING ON THAT  
STATUTE BECAUSE I HAVE DEALT  
WITH IT FOR YEARS AND YEARS.  
BUT, YOU HAVE TO DEAL WITH

WHAT YOU HAVE.

AND I THINK MS. SNURKOWSKI  
IS CORRECT.

THAT'S THE WAY IT IS.

>> SO THERE IS A DANGER IN  
PUTTING THESE OTHER  
REQUIREMENTS INTO IT IS WHAT  
YOU ARE SAYING BY WAY OF  
JURY INSTRUCTIONS?

>> WELL, YES, IN THE FIRST  
PLACE, I DON'T THINK ANY HAS  
BEEN PROPOSED.

>> WELL, SOME OF THEM HAVE  
BEEN TALKED ABOUT SO I THINK  
IT'S AN ISSUE WE HAVE TO  
ADDRESS.

DO YOU --

>> ANY CASE THAT'S DEALT  
WITH THE BURDEN ISSUE?

>> NO.

NO.

>> OTHER OUT OF THIS COURT  
AND THE U.S. SUPREME COURT.

>> IN FACT, NATIONWIDE, I  
HAVE NEVER READ ANYTHING  
ABOUT ANY PROBLEMS WITH IT.

>> OF COURSE, YOU NEED TO  
UNDERSTAND NOW, MOST OF THE  
STATES HAVE THE GEORGIA  
SCHEME SO, YOU KNOW, WORRY  
ABOUT THIS ISSUE.

THEY ALREADY ARE.

THE LAST THING I WOULD LIKE  
TO MENTION IS I REALLY DON'T  
HAVE ANY PROBLEM WITH  
SUBSTITUTED THE WORD  
COMMUNITY FOR COLLEAGUES.

IF THAT'S A PROBLEM IN THE  
DEFINITION OF WHAT YOU'RE TO  
DO WITH VICTIM IMPACT BUT I  
THINK WE NEED TO DO  
SOMETHING ABOUT VICTIM  
IMPACT BECAUSE IT IS VERY  
CONFUSING.

AND IT JUST INTERJECTS AN  
ISSUE INTO THE TRIAL THAT  
JURIES JUST DON'T KNOW WHAT  
TO DO WITH.

>> DID Y'ALL CONSIDER THE,  
WHAT WAS THE DISCUSSION  
ABOUT THE PROSECUTORS'  
CONCERN ABOUT THE DEFINITION  
OF AGGRAVATOR?

>> I DIDN'T REALLY HEAR THAT

THERE WAS A CONCERN OTHER  
THAN JUST A GENERAL  
COMPLAINT THEY DON'T WANT TO  
HAVE A DEFINITION.  
BUT MY EXPERIENCE WITH  
JURIES IS THEY DON'T  
UNDERSTAND WHAT THESE THINGS  
ARE.

AND IF YOU DON'T TELL THEM  
WHAT THEY ARE YOU ARE ASKING  
ONCE AGAIN TO DO ARBITRARY  
AND THIS IS A PROBLEM.

ESPECIALLY WHEN WE  
DON'T KNOW WHAT THEY HAVE  
DONE BECAUSE ALL WE GET BACK  
IS A, IS A RECOMMENDATION  
SAYING BY A NUMBER OF BLANK  
TO BLANK, WE RECOMMEND THE  
FOLLOWING.

BUT WE DON'T KNOW WHAT  
AGGRAVATING CIRCUMSTANCES  
THEY FOUND.

>> PRESENTLY, THE JURY IS  
INSTRUCTED THAT THEY ARE  
LIMITED TO CONSIDER AS  
AGGRAVATING CIRCUMSTANCES  
THE STATUTORY SETUP.

>> THEY ARE NOT TOLD WHAT TO  
DO WITH VICTIM IMPACT.

>> I JUST WANTED TO SAY THAT  
WE HAVE HAD A LOT OF  
QUESTIONS.

THERE HAVE BEEN A LOT OF  
REPORTS.

I KNOW -- THE COURT KNOWS  
HOW HARD YOU HAVE WORKED IN  
THE COMMITTEE TO TRY TO  
BRING SOME FURTHER CLARITY  
IN THIS VERY DIFFICULT AREA.

>> WELL, IT MAY NOT BE CLEAR  
YET BUT AT LEAST WE HAVE GOT  
SOMETHING BEFORE YOU THAT  
YOU CAN PUT YOUR TEETH INTO.

>> THANK YOU.

>> THANK YOU.

>> WE THANK YOU FOR YOUR  
TIME THAT YOU HAVE EXPENDED  
ON THIS AND ALL OF YOU FOR  
PARTICIPATING THIS MORNING  
AND ATTEMPTING TO MAKE IT  
BETTER FOR TOMORROW SO THANK  
YOU VERY MUCH.