

[CAPTION]

**DEFENDANT'S MOTION TO DECLARE JURY RULE 20(a) (8) UNCONSTITUTIONAL AND
REQUEST FOR EVIDENTIARY HEARING**
(Death Penalty Case)

The Defendant, by counsel, respectfully requests this Court to issue an Order declaring Jury Rule 20(a) (8) unconstitutional, and to bar its application to the Defendant's trial. In support of the Motion, the Defendant states the following:

1. Effective January 1, 2005, Jury Rule 20(a) (8) provides that the preliminary instructions given to the jury shall include the following statement:

that jurors are permitted to discuss the evidence among themselves in the jury room during recesses from trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence.

2. The new rule fails to define what it means to "discuss" the evidence. The rule fails to define the difference between "discussions" and "deliberations." On its face, the rule authorizes discussion throughout the guilt innocence phase (or Phase I), but fails to limit that discussion to the issue of guilt or innocence. In fact, the rule implicitly authorizes discussion of "the outcome of the case," which in the context of a capital case, must of necessity include discussion of penalty, as long as the jurors "reserve judgment about the outcome." Consequently, there is a very real risk that jurors will discuss penalty prior to the close of the evidence in Phase I. This violates Defendant's rights to a fair trial by an impartial jury, to have the state prove each element beyond a reasonable doubt and his right to the presumption of innocence under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Art. 1, Secs. 12 and 13 of the Indiana Constitution.

3. The rule states that the jurors must "reserve judgment" until "deliberations commence." However, the rule fails to provide the jurors with any guidance as to what it means to "reserve judgment." The rule fails to admonish jurors that they are required by law to presume the defendant is innocent throughout any and all Phase I discussions and that they are barred by law from any discussion whatsoever in Phase I as to penalty.

4. Data from extensive surveying of over 1200 actual capital jurors conducted by the Capital Jury Project establishes that actual capital jurors, both in Indiana and every other state studied, make a decision as to the appropriate penalty roughly 50% of the time not only before the start of penalty deliberations, but, at times, even before all of the penalty phase evidence is in, before the deliberations on phase I are complete, and, at times, even before the closing arguments are done at the end of Phase I. Simply put, this is against the constitutional strictures that define proper capital sentencing deliberations. Undersigned counsel will present evidence from the Capital Jury Project's extensive research studies of actual jurors inability to reserve their judgment, an inability that will only be made worse if jurors are instructed regarding their right to commence immediate discussions as is provided for in Jury Rule 20(a)(8).

5. The rule provides the jurors no guidance as to how to ensure that all jurors fully comply with the rule. Under the rule, it is improper for the jurors to discuss the case unless each and every member of the panel is present and listening. However, there is no enforcement mechanism. Absent instruction from the Court, it is unrealistic to expect each and every juror to take on the burden of reporting the absence of another juror – or the inattentiveness of another juror when one or more jurors commence an informal discussion of the case. It is equally unrealistic to expect self- reporting, or the reporting of a fellow juror if any mention of penalty is made.

6. The rule is not self enforcing. Jurors must be specifically told what would be improper. They must further be told to report anything improper. The rule is devoid of any mechanism by which the jury is carefully charged as to the proper implementation of the discussions the rule allows, and the complete avoidance of discussions the law does not allow.

7. The rule gives no guidance as to whether alternate jurors' presence and attentiveness is required.

8. In order to ensure that the jury does not prematurely begin to deliberate, the Court would have to instruct the jury as to what constitutes permissible discussion versus impermissible deliberation. In order to ensure that the jurors reserve judgment, the Court would need to instruct the jurors as to the range of appropriate goals for discussion and when the pursuit of those goals crosses over into the

impermissible arenas of deliberation and passing judgment. Since the rule fails to delineate the line between proper discussion and improper deliberation, the presumption of innocence is in jeopardy, as well as the presumption in favor of life versus death.

9. If the rule is followed in this case, the scope of potential collateral attack on the finality of any jury verdict will be expanded due to the inevitable post conviction scrutiny of whether the jurors honored the obligation to only discuss the case, "when all are present." Recesses are taken from court proceedings in part to give jurors necessary opportunities to go to the bathroom, read a book, have a cigarette, or a snack. Many of these activities inevitably take one or more jurors away from being present to each other. If two jurors start discussing the case, it is easy to posit that they will not always remember to stop until each and every one of the twelve, plus the alternates are listening. This will lead to extensive post trial inquiry of jurors and heightened collateral attack.

10. If jurors are allowed to discuss the case early on, the psychological concept of primacy will favor the party that goes first, which of course, in a criminal case, is the prosecution. Early individual impressions generally favor the prosecution because it goes first. By authorizing premature discussions, these individual impressions can be confirmed and alliances formed and commitments made before hearing all of the evidence, or any evidence whatsoever from the defense.

11. Jurors forming alignments and making commitments prior to hearing all of the evidence enhances the likelihood of a rush to judgment rather than a careful weighing of both sides after all of the evidence and argument are in. In many defenses, there is a "yes, but," aspect to the defense. For example, "yes, I did shoot the alleged victim, but I did so in self defense. Yes, I did burn the building, but I was insane. Yes, I shot the deceased, but it was an accident." Typically, a significant portion of the defense is established not merely through cross examination of the state's case, but affirmative presentation of defense evidence. Jurors should not be invited to engage in premature dialogues regarding only one side of the dispute. This smacks more of grand jury procedure than historical understandings of the way trial deliberations should occur.


12. The express language of the rule states that a juror can decide the case the moment deliberations commence. This runs afoul of longstanding precedent imposing a duty to deliberate on each juror. A capital juror has an obligation to give careful consideration to whether the state has proven the alleged aggravator(s) beyond a reasonable doubt, whether any individual juror finds that a statutory and/or a nonstatutory mitigator has been proved, whether the aggravator(s) outweigh the mitigators, and even if the aggravators are found to outweigh the mitigators, whether the jury still believes a sentence other than death is appropriate. Immediate decision making flies in the face of these multi-stepped inquiries and strips the proceedings of the reliability and fairness that are the mandatory attributes of a constitutional capital sentencing scheme under the Eighth, Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Secs. 12 and 16 of the Indiana Constitution.

WHEREFORE, the Defendant, by counsel, respectfully requests this Court to issue an Order declaring that Jury Rule 20(a) (8) is unconstitutional and barring it from being applied in the trial of his case, and for all other relief just and proper in the premises.

(Signature)

CASE LAW

Fuller v. State, [851 N.E.2d 22](#) [Shepardize](#) (Ind.Ct.App. 2006) (rejecting Defendant's challenges to Indiana Jury Rule 20(a)(8) that it 1) violated due process by allowing discussions before all evidence was presented; 2) jurors should have been sequestered because they were effectively deliberating if they were discussing the case; and 3) instruction base on the Rule was misleading and confusing about when discussion could take place).

Weatherspoon v. State, [912 N.E.2d 437](#)  (Ind.Ct.App. 2009) (rejecting Defendant's argument that juror's participation in juror discussions, permitted by 2008 amendment to Jury Rule 20(a)(8), are equivalent of deliberations and therefore he was denied his constitutional & statutory right to a jury of twelve).