IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1091

IN RE: AMENDMENTS TO THE FLORIDA RULES OF CIVIL PROCEDURE, THE FLORIDA RULES OF CRIMINAL PROCEDURE, THE STANDARD JURY INSTRUCTIONS IN CIVIL CASES, AND THE STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES –IMPLEMENTATION OF JURY INNOVATIONS COMMITTEE RECOMMENDATIONS PROPOSED AMENDMENTS TO THE FLORIDA RULES OF CIVIL PROCEDURE

COMMENTS OF THE MIAMI CHAPTER OF THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS ON THE AMENDMENT ALLOWING QUESTIONING OF JURORS IN CRIMINAL CASES.

The Florida Association of Criminal Defense Lawyers Miami Chapter ("FACDL-Miami") respectfully submits these comments in response to the proposed amendment to the standard jury instructions in criminal cases that proposes to allow questioning by jurors in criminal cases..

Wisely, the Committee on Standard Jury Instructions - Criminal "does *not* endorse allowing questions by jurors." (Emphasis added.) It does, however, offer proposed instructions to be used if a trial judge determines to permit juror questions. FACDL - Miami has no quarrel with the proposed instructions; we write, however, to underscore our agreement with the conclusion reached by the Committee: Allowing questions by jurors is a bad idea. It ought not to be done.

We begin our analysis by contrasting the role of a petit jury and its members with that of a grand jury and its members. Although the modern-day grand jury has devolved into an assembly line for the manufacture of indictments, in its conception the grand jury is a true investigative body, empowered to conduct the widest-ranging fact-finding. *See, e.g., Miami Herald Publishing Co. v. Marko*, 352 So.2d 518 (Fla. 1977). Few if any of the evidentiary rules resulting in exclusion or suppression of evidence at trial are applicable in the grand jury.[1] On the contrary; it is an apothegm of the law that "the grand jury is entitled to every man's evidence." Jurors may, and often do, ask questions of witnesses in grand jury proceedings. There is no reason they shouldn't.

A trial jury is a very different thing from a grand jury, because a trial is a very different thing from a grand jury proceeding. A criminal trial is not a meandering quest for "the truth." It is a tightly choreographed elicitation of facts and inferences from facts. It is conducted according to rules of evidence that strike the layman as byzantine because they are byzantine; even the best of lawyers and judges need years to assimilate the intricacies of the law of evidence. But experience has taught that those intricacies serve the purposes of a jury trial: to

[1] A notable exception has to do with the law of privilege. A timely and *bona fide* assertion of privilege in grand jury proceedings will result in the non-receipt of the privileged evidence.

provide jurors with probative evidence, lawfully obtained, and intended to enable them to reach a just verdict. It is the duty of the judge to see to it that the trial is conducted in accordance with the law of evidence.

It is the duty of the attorneys to advocate their clients' causes within the metes and bounds of the law of evidence. It is the duty of the jury to reach a verdict based upon nothing but what has been presented to them according to the law of evidence. Error inevitably arises when one actor in the trial process attempts to assume the role reserved to another (as, for example, when the jury usurps the judge's role to determine what the applicable law is). Permitting jurors to suggest questions to witnesses undermines the structure of trials as much as would permitting lawyers to send notes in to a deliberating jury suggesting appropriate topics for deliberation. "Juror questioning is fraught with dangers which can undermine the orderly progress of the trial to verdict." *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 516 (4th Cir. 1985).

The posing of questions to witnesses at trial is, by its very nature, an adversarial exercise. Jurors who are told at the outset of trial that they may participate in that exercise are being told, in effect, that they may become advocates. The juror, instead of struggling to maintain a scrupulous neutrality, takes on the role of detective, inquisitor, partisan. Neutrality goes by the boards in

the effort to "solve the case." But it is not the juror's role to "solve the case." It is not the juror's role to develop facts. It is the juror's role to draw inferences and reach conclusions from facts developed by those whose role it is to develop facts.

It is no answer to say that the juror's proposed questions will be filtered through the judge. What is ill-advised and dangerous in conception becomes laborious and time-consuming in application. A witness is examined by counsel for the parties. The judge then invites questions from the jury. Slips of paper are handed to the bailiff, who in turn hands them to the court. A side-bar conference is necessitated, as the admissibility of each question is debated at length. Some questions are asked, some re-phrased and asked, some declined. What conclusions the jurors draw from those questions that are declined we cannot know; instructing them not to concern themselves with questions not asked conveys the message that there was something crucially important about those impermissible questions and the answers that would have been given to them. Now the witness responds to the court's questions. His answers prompt the prosecutor to re-open his examination. That in turn prompts defense counsel to seek additional cross-examination, which of course will then be followed by additional prosecutorial re-direct. With each witness this painful and dilatory process will be repeated.

These and similar considerations have led some American courts to conclude that juror questioning is impermissible as a matter of law in criminal cases. *See, e.g., State v. Costello*, 646 N.W.2d 204 (Minn. 2002); *Wharton v. State*, 734 So.2d 985 (Miss. 1998); *Morrison v. State*, 845 S.W.2d 882 (Tex. Crim. App. 1992); *State v. Zima*, 468 N.W.2d 377 (Neb. 1991). We recognize that many courts have reached a contrary conclusion, *viz.* that juror questioning may be allowed in the discretion of the trial judge. *See, e.g., Medina v. People*, 114 P.2d 845 (Col. 2005); *State v. Culkin*, 35 P.3d 233 (Haw. 2001) (collecting cases). The issue in all these cases, however, was not the propriety of juror questioning, but its legality. Not all that is lawful is wise.

We recognize, too, that there exist law review articles and social-scientific literature supporting the notion of juror questioning. *See, e.g., State v. Doleszny*, 844 A.2d 773, 781-2 (Vt. 2004) (collecting authorities). The membership of FACDL - Miami is second to none in its admiration of the contributions of theoreticians and academics; but their methodology is not ours. The membership of FACDL - Miami has a cumulative total of thousands of years of trial experience litigating hundreds of thousands of jury trials. Experience -- hands-on, in-court experience -- is our methodology; and our experience teaches us that juror questioning of witnesses is a very bad idea indeed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided via U.S. Mail this 3rd day of November, 2005 to Adrienne Frischberg Promoff, 44 West Flagler Street, Suite 2100, Miami 33130-6807; Aubrey George Rudd, 7901 Southwest 67th Ave., Suite 206, South Miami 33143-4538; George Euripedes Tragos, 600 Cleveland Street, Suite 700, Clearwater 33755-4158; Judge Winifred J. Sharp, Fifth District Court of Appeal, 300 South Beach Street, Daytona Beach 32114-5002; Judge Dedee Costello, P.O. Box 1089, Panama City 32402; Judge Chris. W. Alternbernd , Second District Court of Appeal, 1700 N. Tampa Street, Suite 300, Tampa 33602; and Judge O.H. Eaton, Seminole County Courthouse, 301 North Park Ave., Sanford 32771-1243

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