IN THE

SUPREME COURT OF FLORIDA

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 B IMPLEMENTATION OF JURY INNOVATIONS COMMITTEE RECOMMENDATIONS	Case No. SC05-1091

COMMENTS OF
THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The Florida Association of Criminal Defense Lawyers (AFACDL@) submits the following comments regarding four of the proposals pending before the Court in this case: (1) permitting the jury to ask questions of witnesses in criminal cases, (2) eliminating the provision in Florida Rule of Criminal Procedure 3.250 giving defendants the right to opening and concluding argument when no evidence other than the testimony of the accused is presented, (3) permitting judges to give jury instructions before closing arguments, and (4) allowing jurors to take notes during criminal trials. Each of these proposals will be addressed in turn below.

(1) Jury questions

The Committee on Standard Jury Instructions in Criminal Cases has drafted the following standard jury instruction regarding jury questions of witnesses in criminal cases:

> During the trial you may have a question that you think should be asked of a witness. You are bound by the same rules of evidence and procedure as the attorneys.
>
> In light of those rules, we will follow this procedure. When the attorneys have finished asking their questions of a witness, I will ask if any of you have questions. If you do, please write the question down, fold it, and give it to the bailiff without showing it to or discussing it with any other jurors. Please do not identify yourself on the question. I will meet with the attorneys to determine if it is an appropriate question. If it is, I will pose the question to the witness, the witness will answer, and the attorneys will then have the opportunity for follow up questions if they wish.
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> If the question is not permitted by the rules of evidence and procedure, I won=t ask it. Please do not draw any inferences or come to any conclusions if one of your questions is not asked. It is merely that the question, or its answer, is inadmissible as a matter of law.
>
> Please do not feel obligated to ask questions. Juror questions are permitted in the event that you missed something or didn=t understand something, or if it would be helpful in clarifying something about the testimony which you have just heard from a witness.

FACDL urges the Court to refrain from adopting a standard jury instruction regarding jurors asking questions of witnesses during criminal trials. FACDL notes that in the comment preceding the proposed instruction, the Committee on Standard Jury Instructions in Criminal Cases states that it Adoes *not* endorse allowing questions by jurors.@ (Emphasis added). Moreover, both the Judicial Administration Committee and the Criminal Procedure Rules Committee have considered the issue and both committees also declined to endorse a rule permitting jury questions in criminal cases. In light of this uncertainty, FACDL suggests that it would be appropriate for the Court to refrain from

adopting the instruction above until one of these committees proposes such a procedure. FACDL further suggests that the Court should refrain from ruling on this issue in the context of a jury instruction amendment; FACDL submits that the issue is more appropriately addressed in the context of an actual case and controversy. If the Court adopts the proposed instruction, then the Court will be implicitly giving its approval to a procedure that has no support by any of the committees that have considered the issue. As explained below, permitting jury questions in criminal cases has constitutional implications.

(a) Split among jurisdictions

In the past quarter-century, a debate has developed concerning whether courts should permit jurors to ask questions of witnesses during criminal trials. At least five states prohibit the practice: Georgia, Minnesota, Mississippi, Nebraska, and Texas. *See Johnson v. State*, 507 S.E. 2d 737, 742 (Ga. 1998) (AClearly, a juror is not permitted to question a witness.@); *State v. Costello*, 646 N.W. 2d 204 (Minn. 2002); *Wharton v. State*, 734 So. 2d 985, 990 (Miss. 1998) (holding that Ajuror interrogation is no longer to be left to the discretion of the trial court, but rather is a practice that is condemned and outright forbidden by this Court@); *State v. Zima*, 468 N.W. 2d 377, 379-80 (Neb. 1991) (ASince due process requires a fair trial before a fair and impartial jury, the judicial process is better served by the time-honored practice of counsel eliciting evidence which is heard, evaluated, and acted upon by jurors who have no investment in obtaining

answers to questions they have posed.@); *Morrison v. State*, 845 S.W. 2d 882, 886-89 (Tx. Crim. App. 1992) (holding that jurors are not permitted to ask witnesses questions).

Most recently, the Minnesota Supreme Court outlawed the practice of allowing jurors to ask questions of witnesses during a criminal trial. *See Costello*, 646 N.W. 2d 204. The Minnesota Supreme Court was concerned that allowing juror questions in criminal cases would (1) impact juror impartiality and (2) relieve the prosecution of its burden of proof.

(i) Issues of juror impartiality

To maintain juror independence and objectivity, it is a tenet of the criminal justice system that members of a jury should Apostpone or suspend the final formation of . . . opinion until the parties have >had their day in court= and have presented all the information that they consider relevant in the context of adjudication.@ Bostjan M. Zupaneie, *Truth and Impartiality in Criminal Process*, 7 J. CONTEMP. L. 39, 70 (1982). AThis principle is particularly important in criminal trials, in which the state presents all of its evidence first, and it is sometimes only after several days of listening to mounting evidence against a defendant that the jury may hear any exculpatory evidence.@ *Costello*, 646 N.W. 2d at 210. Jurors are usually instructed to keep an open mind until the end of the trial.[1] ABut in order to ask a question, a juror must first develop a hypothesis or, at

[1] For example, Instruction 2.1 of the Florida Standard Jury Instructions in Criminal Cases states, AYou should not form any definite or fixed opinion on the merits of the case until you have heard all the evidence, the argument of the lawyers and the instructions on the law by the judge.@

the very least, respond to a perceived flaw in a party=s presentation of the case before the time to deliberate has arrived.@ *Costello*, 646 N.W. 2d at 210-11. In light of these concerns, the Minnesota Supreme Court reasoned:

> To the degree jurors are encouraged to ask questions about facts and legal issues, they are encouraged to form Aat least a prior tentative opinion because one cannot investigate unless one has a hypothesis about what happened in the particular criminal case.@ Therefore, with such encouragement, there is an increased risk that jurors will Ainevitably . . . draw conclusions or settle on a given legal theory before the parties have completed their presentations, and before the court has instructed the jury on the law of the case.@ . . . Although it is impossible to guarantee that jurors will remain open-minded until the presentation of all of the evidence and instructions, passive detachment increases that probability.

Id. at 211 (citations omitted).

(ii) Issues of relieving the prosecution of its burden of proof

In a criminal case, the prosecution has the burden of proving the existence of every element of the crime charged beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364 (1970). AAllowing jurors to pose questions could, in some cases, elicit testimony from a witness that sufficiently proves an element of a crime, therefore relieving the State of its burden.@ *Costello*, 646 N.W. 2d at 211. Recognizing this potential problem, the Minnesota Supreme Court explained:

> The assistance provided to the prosecution by juror questioning may be direct or indirect. Juror questioning can directly assist the prosecution when . . . evidence could be revealed by a juror question. Juror questioning can indirectly assist the prosecution when it simply illuminates a facet of the case that interests the jurors. . . . Because the practice of juror questioning can actively assist the State in meeting its burden of proof, the jurors=role

may be compromised.

Id. at 211-12. If jury questions are permitted in criminal cases, the possibility exists that the prosecutor could forget or simply fail to develop an aspect of its case, and the jury, in effect acting on the part of the prosecutor, could ask questions of witnesses which ultimately fill the holes in the prosecution=s case. In such circumstances, the *jury*, not the prosecutor, would establish an element of the offense that otherwise would not have been established.

(iii) The Minnesota Supreme Court=s conclusion in *Costello*

As a result of the impact on juror impartiality and the potential for relieving the prosecution of its burden of proof, the Minnesota Supreme Court was Apersuaded that the exact effect of [jury] questioning is not quantifiable, and the inherent risks so significant that the practice must be proscribed.@ *Id.* at 214. The court held that Ano court shall permit jurors to question witnesses in a criminal trial.@ *Id.* Appellant Moore adopts the well-reasoned opinion of the Minnesota Supreme Court.

(b) Precedent in Florida

Florida law is by no means clear on the question of whether jurors can question witnesses in criminal trials. Despite the exhaustive panoply of criminal rules contained in the Florida Rules of Criminal Procedure, the rules are silent regarding whether jurors can question witnesses during a trial. In 1999, the Florida Legislature enacted a provision allowing jurors in a civil trial to submit written questions which are then considered

outside the presence of the jury. *See* '' 40.50(3) and (4), Fla. Stat. (1999). No similar provision was made for juror questioning in criminal cases. *See Mosher v. Anderson*, 817 So. 2d 812, 816 (Fla. 2000) (AUnder the doctrine of >*expressio unius est exclusio alterius*,= the mention of one thing implies the exclusion of another.@).

Almost fifty years ago, in *Ferrara v. State*, 101 So. 2d 797 (Fla. 1958), the Court was asked to consider whether it was error to distribute a particular pamphlet to jurors prior to a trial. The pamphlet, entitled AHandbook for Trial Jurors serving in all Courts of Record in Hillsborough County, Florida,@ explained to jurors their responsibilities. The handbook instructed jurors not to ask questions of the witnesses during the trial. The Court, in *dicta*, stated the following:

> We think that upon appropriate occasion a trier of fact might be completely justified in propounding a question. . . . We conclude that the procedure should be one to be controlled by the discretion of the trial judge.

101 So. 2d at 801. The jury in *Ferrara* did not ask any questions of the witnesses.

In 1994, the Court Adecline[d] to revisit@ the issue of whether jurors can ask questions of witnesses. *See Watson v. State*, 651 So. 2d 1159, 1163 (Fla. 1994). The Court recently Arevisited@ the issue when the Jury Innovations Committee (ACommittee@) proposed to the Supreme Court of Florida that individual jurors be permitted to submit questions of witnesses in criminal prosecutions. The issue was one of forty-eight proposals submitted to the Court by the Committee in 2001. *See* Final Report, Jury Innovations Committee, dated May 2001 (http://www.flcourts.org/) (Clerk=s Office link,

Petitions and Briefs, Case No. SC01-1226). On October 17, 2003, the Court declined the Committee=s request to implement a rule and instead referred the matter to the Criminal Procedure Rules Committee. *See* Administrative Order No. AOSC03-41, dated October 17, 2003 (http://www.flcourts.org/sct/clerk/adminorders/2003/sc03-41.pdf) (Clerk=s Office link, Administrative Orders, 2003). On January 16, 2004, the Criminal Procedure Rules Committee met to consider whether a rule should be adopted permitting jury questions in criminal cases. Notably, the Committee *declined* to adopt a rule permitting such questions. As a result, there remains substantial debate and uncertainty in this area of the law.[2] The refusal by the Criminal Procedure Rules Committee to adopt a rule permitting jury interrogatories is supportive of the position that a growing segment of lawyers and judges in this state believe that the practice is problematic.

The district courts of appeal in Florida are in conflict regarding whether the practice of allowing jurors to ask questions of witnesses should be encouraged. The Fourth District has Astrongly discourage[ed] trial courts from promoting jurors= questions or encouraging jurors to ask questions of witnesses.@ *Pierre v. State*, 601 So. 2d 1309, 1309 (Fla. 4th DCA 1994). The court added that Ait is hard to discern the benefit of such

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[2] FACDL relies on an article from the March 24, 2004, *Jacksonville Financial News & Daily Record*, wherein Fourth Judicial Circuit State Attorney Harry Shorstein expressed his concern with allowing jurors to ask questions in criminal cases. *See* AJurors should hold back the urge to ask questions at trial,@ *Jacksonville Financial News & Daily Record*, March 24, 2004 (http://www.jaxdailyrecord.com/showstory.php?Story_id=40555) (website visited October 24, 2005).

a practice when weighed against the endless potential for error.@ *Id.* The decisions of this First District, the Third District, and the Fifth District are in conflict with the Fourth District, as the decisions have not discouraged trial courts from allowing juries to ask witnesses questions. *See Patterson v. State*, 725 So. 2d 386 (Fla. 1st DCA 1998); *Tanner v. State*, 724 So. 2d 156 (Fla. 1st DCA 1998); *Bradford v. State*, 722 So. 2d 858 (Fla. 1st DCA 1998); *Scheel v. State*, 350 So. 2d 1120 (Fla. 3d DCA 1977); *Coates v. State*, 28 Fla. L. Weekly D2243, D2244 (Fla. 5th DCA Sept. 26, 2003). *But see Patterson*, 725 So. 2d at 387 (AI, too, believe the practice should be discouraged or at least become the subject of a procedural rule promulgated by the court.@) (Miner, J., specially concurring.).

As the issue is brought to the forefront, more courts are realizing the dangers with allowing juries to ask witnesses questions during criminal trials, as evidenced by the Minnesota Supreme Court=s recent decision in *Costello*. In light of this emerging trend, FACDL submits that the Court should refrain from putting its seal of approval on a practice that has not gained the support of any of the committees to have considered the issue.

(2) Eliminating giving defendants the right to opening and concluding argument

The Criminal Court Steering Committee proposes eliminating the provision in rule 3.250 giving defendant=s the right to opening and concluding argument when no evidence other than the testimony of the accused is presented at trial and recommends the adoption

of proposed rule 3.381, which guarantees the State the right to an opening and a concluding argument in all criminal cases. The Committee Notes suggest the rule was proposed Abecause the state has the burden of proof and to bring Florida practice in line with the practice in civil cases and in other jurisdictions.@ Neither explanation justifies changing rule 3.250. The State has historically had the burden of proof in criminal prosecutions, yet rule 3.250 has existed in one form or another for nearly 150 years in Florida. The burden of proof has not changed since common law and the burden of proof should not be a reason for changing a time-honored procedural right. *See Preston v. State*, 260 So. 2d 501 (Fla. 1972)(AIn our judgment it was precisely to counterbalance the weight of the State=s offensive in [cases where the defendant does not present evidence] that the Legislature, and later this Court, created an exception to the common law rule that the party with the burden of proof is entitled to the concluding argument before the jury.@). Additionally, although Florida has been, and remains, one of the few jurisdictions to allow defendants a concluding argument in narrowly defined circumstances, Florida is also among a minority of jurisdictions which allow criminal charges to be brought by a prosecutor without a grand jury indictment. Minority status alone does not warrant changing a firmly-entrenched, workable and sound rule of procedure.

This Court has long recognized that a defendant=s attorney should have final argument if the defendant has not put on evidence other than his or her own testimony.

In fact, this Court has often characterized the defendant=s right to a concluding argument as a Avested procedural right,@ a violation of which is *per se* reversible error. *See Wike v. State*, 648 So. 2d 683 (Fla. 1994); *Birge v. State*, 92 So. 2d 819 (Fla. 1957). In *Wike*, the Court traced the history of this vested right, noting:

> At common law, the generally accepted rule was that the party who had the burden of proof had the right to begin and conclude the argument to the jury. *Huston v. Green*, 91 Fla. 434, 108 So. 846 (1926). The rule applied to both civil and criminal cases. *Faulk v. State*, 104 So. 2d 519 (Fla. 1958); *Smith v. State*, 155 Fla. 148, 19 So. 2d 698 (1944). The rationale behind this common law rule was to provide the party who shouldered the disadvantage of the burden of proof with the advantage of the opening and closing arguments before the jury. *Faulk*. In 1853, this common law rule was changed in Florida through chapter 539, Laws of Florida (1853), to provide that a defendant who produced no testimony at trial was entitled to the advantage of making the concluding argument before the jury. That law was later codified as section 918.09, Florida Statutes.
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> As early as 1858, this Court determined that a trial judge had no discretion in following the statutory predecessor of section 918.09 and that the erroneous denial of a defendant=s right to concluding argument constituted reversible error. *Heffron v. State*, 8 Fla. 73 (1858). Throughout the years, Florida courts have never deviated from the holding that the denial of a defendant=s right to close under this rule constitutes reversible error. *Faulk*; *Morales v. State*, 609 So. 2d 765 (Fla. 3d DCA 1992); *Graddy v. State*, 606 So. 2d 1242 (Fla. 2d DCA 1992); *Lamar v. State*, 583 So. 2d 771 (Fla. 4th DCA 1990); *Crowley v. State*, 558 So. 2d 529 (Fla. 4th DCA 1990); *Terwilliger v. State*, 535 So. 2d 346 (Fla. 1st DCA 1988); *Gari v. State*, 364 So. 2d 766 (Fla. 2d DCA 1978); *Dampier v. State*, 336 So. 2d 683 (Fla. 2d DCA 1976); *Cagnina v. State*, 175 So. 2d 577 (Fla. 3d DCA 1965). In fact, this is true even though in 1968 section 918.09 was incorporated as rule 3.250 and in 1970 section 918.09 was repealed. *See, e.g.*, *Wilson v. State*, 284 So. 2d 24 (Fla. 2d DCA 1973) (even though the opening and closing of final argument statute is now a procedural rule, the denial of that 120-year-old right still constitutes reversible error), *quashed on other grounds*, 294 So. 2d 327 (Fla. 1974). Further, Justice Thormal made clear in *Birge v. State*, 92 So. 2d 819 (Fla. 1957), that erroneous denial of a defendant=s right to conclude the arguments is reversible error even when more than sufficient evidence exists to determine that a

defendant is guilty. The Court explained in *Birge* that it is not this Court=s privilege to disregard the right to concluding argument Aeven though we as individuals might feel that [a defendant] is as guilty as sin itself.@ 92 So. 2d at 822. *See also Terwilliger,* 535 So. 2d at 348 (the erroneous denial of a defendant=s right to concluding argument constitutes reversible error, >notwithstanding that the state=s evidence may be more than adequate to support a verdict of guilty=). As such, the law is clear that the erroneous denial of the right provided by rule 3.250 cannot be deemed harmless error. *Morales*; *Hart v. State*, 526 So. 2d 124 (Fla. 5th DCA 1988); *Gari*. As the Fourth District Court of Appeal stated in *Raysor v. State*, 272 So. 2d 867, 869 (Fla. 4th DCA 1973):

> [W]e are at a loss as a practical matter to know just how any criminal defendant could in fact make a demonstration of error because of the refusal of the trial court to follow the dictates of the Rule. It is inherent in the procedure, as all acquainted with trial tactics know, that the right to address the jury finally is a fundamental advantage which simply speaks for itself.

648 So. 2d at 686-87.

In short, the courts have vigorously protected a defendant=s right to be heard fully and adequately in closing argument, such that the denial of the final closing argument is deemed *per se* reversible error, recognizing that the tactical advantage of making the final address to the jury Asimply speaks for itself.@ Indeed, there is a compelling rationale for the rule. While the State maintains the burden of proof beyond a reasonable doubt in all criminal cases, defendants who present witnesses and those who do not are not similarly situated. A defendant who possesses and presents witnesses in his or her behalf has a distinct advantage in building his or her case and creating reasonable doubt in jurors= minds, whereas a defendant presenting no evidence is often left with only counsel=s

argument to raise doubt. The right to address the jury last gives a party a fundamental advantage, and when the defense does not present any evidence, having the concluding argument levels the playing field.

One supposed rationale for changing the rule is that the practice of allowing defendants the concluding argument discourages criminal defense attorneys from presenting potentially beneficial evidence in favor of having the final word, thereby opening the door to claims of ineffective assistance of counsel when such evidence is not presented. *See Diaz v. State*, 747 So. 2d 1021 (Fla. 3d DCA 1999). This rationale disparages defense counsel=s professional judgment which can only be made on a case-by-case basis with a full appreciation of the facts, the theory of defense, and the demeanor, strengths and shortcomings of the witnesses, and the impression they may have on the jury. The decision whether or not to call witnesses on a client=s behalf is a complicated one which confronts and confounds defense counsel in the majority of cases. It requires balancing the benefits gained and pitfalls risked by presenting evidence and the benefits of having the last word at trial. Evaluation of that option depends on many factors, such as the strength of the State=s case, the relative significance of the defense evidence, the credibility of the defense witnesses, the impact of the State=s cross-examination of the defense witnesses, whether the defense=s presentation potentially opens the door to rebuttal by the State, and other matters of trial tactics. This is a decision that only defense counsel, not trial judges, can make, and counsel is in the best

position to weigh the merits and weaknesses of its own evidence and what is to be gained by the introduction of that evidence against the loss of the final argument. While some judges might believe defense attorneys have elevated the right to final argument above the introduction of potentially beneficial evidence, it is neither unethical nor ineffective to forego marginally relevant evidence in favor of the Afundamental advantage@ of the concluding argument.

In *Birge v. State*, 92 So. 2d at 821-22, this Court said:

> The importance of the procedural right discussed above has been underscored by the fact that the privilege has been included in an act of the Legislature by which we are bound. It is not within our judicial province to disregard completely this legislative enactment which undoubtedly was passed to provide for those accused of crime an orderly judicial safeguard for the determination of their rights. As an appellate court we cannot speculate on the effect that the closing argument might have had on the jury. We are here confronted with the necessity of recognizing and preserving an important right guaranteed to the accused by our statute. It is not our privilege to disregard it even though we as individuals might feel that this appellant is as guilty as sin itself.

This Court is again confronted with the necessity of recognizing and preserving an important right guaranteed by the rules of procedure. For the reasons stated above, FACDL urges this Court to reject proposed rule 3.381 and to preserve a defendant=s right to concluding argument under the current rules.

(3) Jury instructions before closing arguments

FACDL is in favor of proposed rules 3.390(b) and 3.400(b), submitted by the Criminal Procedure Rules Committee, and opposes the amendment to rule 3.390(a),

proposed by the Criminal Court Steering Committee. Jury instructions are often complicated and lengthy. Written instructions will aid jurors in the deliberation process and presumably reduce the number of questions during deliberations. This procedure will not only facilitate the jurors= consideration of the witnesses and evidence, offenses charged, lesser offenses, burden of proof, and theory of defense, but will also assist in appellate review of challenged instructions. FACDL urges the Court to adopt the amendments to rules 3.390(b) and 3.400(b).

On the other hand, it is not advisable to give final instructions to the jury in piecemeal fashion both before and after closing argument. The final instructions include general instructions on weighing the evidence, the rules for deliberation, and an explanation of the verdict form. The meat of the instructions is the definition of the crime or crimes charged, the lesser included offenses, and theory of defense. The general and specific instructions applicable to each case form the cohesive and exclusive rules which guide the jury in its deliberations. Jurors are duty-bound to consider the final instructions as a whole (A. . . it is important that you follow the law spelled out in these instructions in deciding your verdict, [t]here are no other laws that apply to this case@), and they should be given as a whole B not in a bifurcated fashion.

In addition, there are many trials in which the strengths or weaknesses of a party=s case or a theory of defense are not clearly elucidated until the closing arguments are completed. The jury=s attention should be focused on the arguments and not diverted by

premature consideration of the instructions on the law.

The biggest downside of bifurcating the final instructions is that it will result in longer trials by drawing out charge conferences in an attempt to determine the appropriate time for the various instructions and subjecting jurors to repetitious instructions, which may place undue emphasis on those already given.

For all of these reasons, FACDL suggests that this Court adopt the proposed amendments to rules 3.390(b) and 3.400(b), but not proposed rule 3.390(a).

(4) Juror note-taking.

The Committee on Standard Jury Instructions in Criminal Cases has drafted the following standard jury instruction regarding note-taking by jurors in criminal cases:

> To be given during preliminary instructions:
> You will be permitted to take notes during the testimony. I want to emphasize that none of you are required to take notes. Indeed, you should not do so if you think that note taking may distract your attention from the evidence or testimony of the witnesses in the case. On the other hand, if you think that taking notes might better focus your attention on the witnesses and the evidence, or might better help you to recall what went on during the trial, please feel free to take notes. Whether or not you take notes, you should rely on your memory of the evidence and you should not be unduly influenced by the notes of other jurors. Notes are not entitled to any greater weight than each juror=s memory of the evidence. Your notes must remain either in the courtroom or in the jury room. Please identify your notes in some fashion as they will be left in the jury box during short recesses, or secured in the jury room overnight. At no time will anyone, including me, look at any of your notes. At the end of the trial, after you have finished your deliberations and after your verdict has been announced in open court, I will ask that each of you give your notes to the bailiff. Thereafter, I will insure that your notes are destroyed so that no one ever has access to them.
>
> NOTE TO JUDGE:
> If note taking is to be permitted, consider providing similar pads and

> pens/pencils to the jurors. Consider also the security of any notes, such as providing envelopes or file folders for the jurors to identify and enclose their notes. Consider also explaining to jurors the manner in which their notes will be destroyed. Consider also whether or not there will be any post-verdict involvement by the jury, such as a penalty phase, and whether notes should or should not be preserved by the court for that second proceeding whenever it occurs.
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> To be given during closing instructions:
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> You have been allowed to take notes during the testimony. If you have done so, you may take those notes with you to the jury room. You should not consider these notes as binding or conclusive, whether they are your notes or the notes of another juror. Any notes are to be used as an aid to the memory of the note taker and not as a substitute for it. It is your recollection of the evidence that must control. Whether or not you have taken notes, you should rely on your memory of the evidence. You should not be unduly influenced by the notes of other jurors. Notes are not entitled to any greater weight than each juror=s memory of the evidence. You should disregard anything contrary to your recollection that may appear from your own notes or those of another juror. You should not give greater weight to a particular piece of evidence solely because it is referred to in a note taken by a juror. As I have previously told you, after your verdict has been announced in open court your notes will be collected and destroyed.

FACDL urges the Court to refrain from adopting a standard jury instruction regarding juror note-taking in criminal cases. FACDL notes the Florida Legislature has enacted a provision allowing jurors in a civil trial to take notes. *See* ' 40.50(2), Fla. Stat. No similar provision was made for note-taking in criminal cases. *See Mosher v. Anderson*, 817 So. 2d 812, 816 (Fla. 2000) (AUnder the doctrine of >*expressio unius est exclusio alterius*,= the mention of one thing implies the exclusion of another.@). Moreover, section 40.50(2) is limited to trials that are Alikely to exceed 5 days.@ Hence, FACDL submits that any similar procedure in criminal cases should also be limited to trials that are likely to exceed 5 days.

There are several reasons why FACDL is opposed to juror note-taking in criminal cases. First, jurors who take notes may become distracted from the evidence and witnesses. Jurors, busily taking notes, may miss important testimony. Moreover, note-taking jurors may not pay sufficient attention to witnesses= behavior, which is important in assessing credibility.

Second, there is a concern that the best note takers (or the only note taker) may dominate jury deliberations. In fact, it is possible that a dishonest juror could sway the verdict by falsifying notes.

Finally, there is a potential that jurors will attach too much significance to their notes merely because they are in writing, and attach too little significance to their own independent memory. Jurors, who are not trained or experienced in note-taking, may accentuate irrelevancies in their notes and ignore the more substantial issues and evidence.

For all of these reasons, FACDL urges the Court to refrain from adopting the proposed instruction permitting note-taking by jurors in criminal cases.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

Adrienne Frischberg Promoff, 44 West Flagler Street, Suite 2100, Miami, FL 33130-6807; Aubrey George Rudd, 7901 Southwest 67th Ave., Suite 206, South Miami, FL 33143-4538; George Euripedes Tragos, 600 Cleveland Street, Suite 700, Clearwater 33755-4158; Honorable Winifred J. Sharp, Fifth District Court of Appeal, 300 South Beach Street, Daytona Beach, FL 32114-5002; Honorable Dedee Costello, P. O. Box 1089, Panama City, FL 32402; Honorable Chris W. Altenbernd, Second District Court of Appeal, 1700 N. Tampa Street, Suite 300, Tampa, FL 33602; and Honorable O.H. Eaton, Seminole County Courthouse, 301 North Park Avenue, Sanford 32771-1243 by mail delivery this 1st day of November, 2005.

Respectfully submitted,

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