December 7, 2005

The Supreme Court of Florida
Supreme Court Building
500 South Duval Street
Tallahassee, FL 32399-1925

Dear Justices:

I am a prosecutor who has been handling death penalty cases for over 18 years. I have been a prosecutor for 23 years. I read the 2 proposals in the Florida Bar News of December 1, 2005, concerning changing jury instructions. I am bothered by a couple of things.

In Proposal One, which purports to amend the instructions under current law, the Court seeks to change the burden of proof with regard to aggravating circumstances, even though Section 921.141(2)(b), Florida Statutes, does not contain a change to justify this. The law has been, and it remains, that, if the State proves sufficient aggravating circumstances to justify imposition of the death penalty, the jury's job is to see whether sufficient mitigating circumstances exist *which outweigh* the aggravating circumstances. As I will point out again below, I know of no authority for the Court to write a jury instruction which is not in line with legislative enactments.

In Proposal Two, which seeks to change current Florida law, I am curious how the Court can consider changing jury instructions in an area where the legislature has not changed the law. The first problem I have is with the proposed amendment to Rule 3.140, where the Court seeks to change the Grand Jury system and have the Grand Jury list aggravating factors in the Indictment. This is a totally unrealistic view of death penalty cases. We, as prosecutors, take an oath to do justice. We cannot know enough about a defendant within 21 days of his arrest in a homicide case to know whether the case is a death penalty case or not. If we are truly to abide by our oaths we cannot make this very important decision that fast.

Since we are averaging two and a half to three years to get a capital case to trial, we are often in a better position months down the road to determine whether a case is truly a death penalty case, and just what the aggravating factors are that will apply. To expect us to know this type of information in time to present it to a Grand Jury is not practical.

The second proposal which jumped out at me was also in Proposal Two and it seeks to take away the aggravating factor that the defendant has previously been convicted of a capital offense or a felony involving the use of threat of violence. Don't we want someone who has committed a prior first degree murder to have that murder used against them if they commit a second murder. I think we certainly do. Unless the legislature takes this out of Section 921.141, the Court has no authority to take this out of the jury instructions.

The Court also seeks in Proposal Two to require unanimity in the penalty phase. The U.S. Supreme Court has never had a problem with Florida's capital sentencing scheme which requires less than unanimous verdicts. In fact, if the Court will look to Western Europe, especially England, where our system evolved from they have required less than unanimous verdicts to convict for many years. This is the direction we need to move in. On more than one occasion I have had 11 - 1 verdicts for guilt, held up by some misguided juror who does not understand or choose to follow the law. This results in unneeded and unnecessary expense to try the cases over.

I invite you to reply to my comments.

I hereby certify that a true and correct copy of the foregoing has been sent by U.S. Mail, first class postage prepaid, to the Honorable O.H. Eaton, Jr., committee chair, 101 Bush Boulevard, Sanford, Florida 32773 this 5th day of December, 2005.

Sincerely,

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