IN THE SUPREME COURT OF FLORIDA
NO. SC05-1890

IN RE: STANDARD JURY
INSTRUCTIONS IN CRIMINAL
CASES –PENALTY PHASE OF
CAPITAL CASES

COMMENTS OF THE TWENTY STATE ATTORNEYS ACTING TOGETHER THROUGH THE FLORIDA PROSECUTING ATTORNEYS ASSOCIATION

COMES NOW, THE FLORIDA PROSECUTING ATTORNEYS ASSOCIATION [FPAA], representing the elected State Attorneys for the twenty judicial circuits of Florida, and files these comments to the Florida Supreme Court's Criminal Court Steering Committee's amendments to Florida Standard Jury Instructions – Penalty Phase of Capital Cases, 2.03, as published in the December 1, 2005 edition of the Florida Bar News, stating as follows:

1. The Criminal Court Steering Committee, Chairman, Judge O. H. Eaton, Jr., has proposed that the standard jury instructions given in capital cases be amended in various ways. The report offered by Judge Eaton presents the committee's basis for the requested changes. It is worthwhile to note that these amendments were not presented by this Court's Standard Jury Instructions in Criminal Cases Committee. Although the Standard Jury Instructions in Criminal Cases Committee has also proposed a few changes, those changes are addressed in a separate Comment filed by the FPAA. The FPAA disagrees

with much of the reasoning offered by the Steering Committee and will address those attempts to justify these far-ranging changes in conjunction with the discussion of each proposed change. The FPAA would submit this Court has continually upheld the propriety and constitutionality of the present Standard Jury Instructions. It is the FPAA's position that any changes in the standard instructions will open a Pandora's box of unnecessary litigation. There are presently more than sufficient procedural safeguards in the capital sentencing process to fully protect a capital defendant's right to a fair sentencing hearing. As previously stated by former Justice Kogan, "There's an old maxim: If it ain't broke don't fix it, and it ain't broke." Blankenship, Gerald Kogan - Chief Justice of the Supreme Court of Florida, 70 Fla.Bar.J. Vol. 9, p.13, 18-19 (Oct. 1996).

2. However, if this Court believes that amendments to the instructions are needed the State Attorneys propose the following revisions to the Steering Committee's proposals:

Proposal One – Amended Instruction Under Current Law – 7.11 Penalty Proceedings – Capital Cases

a. The first paragraph, which is to be amended, would read as follows after the amendment:

> Ladies and gentlemen of the jury, it is now your duty to advise the court as to what punishment should be imposed upon the defendant for the crime of First Degree Murder. You must follow the law that will

> now be given to you and render an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty or whether sufficient aggravating circumstances exist that outweigh any mitigating circumstances found to exist. As you have been told, the final decision as to what punishment shall be imposed is my responsibility; however, the law requires that you render an advisory sentence **as to** what punishment should be imposed upon the defendant. ~~**aggravating circumstances found to exist.**~~ I must give your recommendation great weight in determining what sentence to impose. It is only under rare circumstances that I would impose a sentence other than the sentence you recommend. Your advisory sentence should be based upon the evidence ~~[~~that you have heard while trying the guilt or innocence of the defendant and evidence that has been presented to you in these proceedings~~].~~

First, the FPAA has made some corrections that are in bold above because they are necessary to correct typographical or grammatical errors in the amendment.

Second, the FPAA submits that the requested instruction dilutes the fact that the statutory scheme in Florida requires the trial court to make an independent determination of what the ultimate sentence should be. Despite the fact that the jury sentence is repeatedly called an “advisory” sentence, this proposal suggests that the judge’s evaluation is significantly dependent upon the jury’s recommendation. This conclusion is bolstered by the statements of the Steering Committee in the cover letter to the Clerk (page 4) where the

committee indicates that "it would be most helpful" for judges to know jurors' thought processes when the judge is "deciding the weight to be given to each circumstance." In fact, Florida law has consistently required the opposite as reiterated in this Court's recent opinion in State v. Steele, 30 Fla.L.Weekly S677, 679 (Fla. Oct. 12, 2005), where it was noted that "that the trial court must independently determine the existence of aggravating circumstances, and the weight to be given each." See also Lambrix v. Singletary, 520 U.S. 518, 531-534, 117 S.Ct. 1517 (1997), an opinion of the United States Supreme Court citing Eutzy v. State, 458 So.2d 755 (Fla. 1984) and Tedder v. State, 322 So.2d 908 (Fla. 1975). The FPAA submits that in particular the "rare circumstances" language dilutes the trial court's responsibilities and can be found nowhere in the Florida statute. Furthermore, this Court has held that such an instruction need not be given to the jury. See Floyd v. State, 850 So.2d 383 (Fla. 2002).

The FPAA also suggests that the added language in the instruction which discusses the "great weight" to be given the recommendation should not be personalized with the use of "I," and recommends that if this Court were to decide that additional instructions should be given to the jury as to how their recommendation is considered by the court, that instruction should be as follows:

> "Although the recommendation of the jury as to the penalty is advisory in nature and is not binding, the jury recommendation must be given great weight and deference by the Court in determining what punishment to impose".

This instruction would comport with Tedder v. State, supra.

b. The next amendment states:

> Each ~~The~~ aggravating circumstance~~s~~ must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision. ~~that you may consider are limited to any of the following that are established by the evidence:~~ The aggravating circumstances that you may consider are limited to any of the following that you find are established by the evidence beyond a reasonable doubt:

The FPAA submits that it is redundant to tell the jury twice in consecutive sentences that the aggravating circumstances must be established beyond a reasonable doubt, and as such the first sentence beginning with "Each…" is unnecessary.

c. The Steering Committee adds to the instruction the new aggravating factor which was added by the Legislature this past year: "the capital felony was committed by a person designated as a sexual predator or a person previously designated as a sexual predator who had the sexual-predator designation removed." This is a correct statement of the law and the FPAA agrees that it must be added to the standard jury instructions.

d. The next revision suggested by the Steering Committee is the following:

> Should you find sufficient aggravating circumstances do exist to justify recommending the imposition of the death penalty, it will then be your duty to determine whether the aggravating circumstances outweigh the mitigating circumstances that you find exist. ~~that outweigh the aggravating circumstances.~~

The FPAA submits that without apparent justification, the proposal reverses the current statutory language regarding the jury's duty to weigh aggravating factors versus mitigating factors relative to each other. Whereas the current instructions correctly track the statute in stating that the jury must determine "whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances," s. 921.141(2), Fla. Stat., the proposal at multiple points would have the jury instructed that they must determine "whether sufficient aggravating circumstances exist that outweigh any mitigating circumstances found to exist." (It should be noted that the proposal leaves the current language in place the first time the issue is mentioned, during the introductory paragraph given before the penalty phase commences, but reverses the language every time thereafter, given after the taking of evidence and argument, essentially giving the jury inconsistent guidance.) This Court on numerous occasions has rejected the argument that the present instructions

improperly shifts the burden to the defense. See Knight v. State, 30 Fla.L.Weekly S768 (Fla. November 3, 2005); Cooper v. State, 856 So. 2d 969 (2003); Freeman v. State, 761 So.2d 1055, 1067 (Fla.2000); Robinson v. State, 574 So.2d 108 (Fla. 1991); Stewart v. State, 549 So.2d 171 (Fla. 1989); Arango v. State, 411 So.2d 172 (Fla. 1982). Although the FPAA believes that there is no need for a change to the standard jury instruction, the FPAA recognizes that it is the State's burden to ultimately establish that the death penalty is appropriate. Thus, if this Court is inclined to change the standard instruction to make it clear to the jury then the FPAA has no objection to this change.

e. The Steering Committee next adds changes to the standard instructions regarding the discussion of the mitigating circumstances. First, it informs the jury what the burden of proof is for mitigating circumstances. The FPAA does not believe this change is necessary because the jury is later instructed that "A mitigating circumstance need not be proven beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it established." The proposed instruction is redundant and serves no purpose. No reason for this additional instruction is given by the Steering Committee.

Second, in its discussion of the mitigating circumstances, the proposal adds the following mitigating circumstance that the jury can consider:

> 9. All other evidence presented during the trial or penalty phase proceeding which you find to be mitigating.

The FPAA very strongly opposes this proposal. This would allow the jurors to consider various types of evidence which this Court has found not to be mitigation under Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978), because it does not constitute evidence that relates to any aspect of the defendant's character or record or any of the circumstances of the offense which the defendant proffers as a basis for a sentence less then death. For example, the jury should not be permitted to consider that neither the victim, Campbell v. State, 679 So.2d 720 (Fla. 1996), or the victim's family want death, Jackson v. State, 498 So.2d 406 (Fla. 1986); Floyd v. State, 497 So. 2d 1211 (Fla. 1986); or defense witnesses' expression of their personal opinions concerning the appropriateness of the death penalty, Thompson v. State, 619 So.2d 261 (Fla. 1993); the deterrent effect of the death penalty, the merits of the cost of the death penalty, or the description of the manner of the defendant's death, Shriner v. State, 386 So.2d 525 (Fla. 1980); Porter v. State, 429 So.2d 293 (Fla. 1983); Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985); Hitchcock v. State, 578 So.2d 685 (Fla. 1990) vacated on other grounds Hitchcock v.

Florida, 505 U.S. 1215, 112 S.Ct. 3020 (1992), Hitchcock v. State, 614 So.2d 483 (Fla. 1993); Johnson v. State, 660 So.2d 637 (Fla. 1995); or the State's offer of life imprisonment in return for guilty plea, Hitchcock v. State, supra or other plea negotiations. Happ v. State, 596 So.2d 991 (Fla. 1992); Donaldson v. State, 722 So.2d 177 (Fla. 1998). Thus to permit this instruction would inject into the jury deliberations evidence that is not legally relevant to their consideration of the appropriate penalty. In addition, this would add a statutory mitigating factor that is not in the statute. As this Court has stated in State v. Steele, supra, it is the Legislature, not this Court which makes substantive changes to the death penalty statute. The Steering Committee offers no reasons for this change and the FPAA strongly urges that this Court reject this amendment.

f. The amended instructions also include the following proposed instruction on victim impact evidence:

> You have heard evidence about the impact of this homicide on the (family) (friends) (community) of (decedent). This evidence may be considered by you to determine the victim's uniqueness as an individual human being and the resultant loss by (decedent's) death. However, the law does not allow you to weigh this evidence as an aggravating circumstance. Your recommendation to the Court must be based on the aggravating circumstances and the mitigating circumstances upon which you have been instructed.

The FPAA agrees that there should be an instruction on how to consider victim impact evidence, but prefers the following instruction approved by this Court in Farina v. State, 801 So.2d 44 (Fla. 2001):

> Victim impact evidence cannot be considered as an aggravating circumstance, but should only be considered insofar as it demonstrates the victim's uniqueness as an individual human being and the resultant loss to the community and its members by her death.

Adopting an instruction that this Court has already approved will avoid one area of litigation. Furthermore the instruction suggested by the Steering Committee is incorrect as it essentially instructs the jury to disregard the victim impact testimony which this Court in Rimmer v. State, 825 So.2d 304 (Fla. 2000) held could still be considered as evidence in the case, just that it could not be considered as establishing either an aggravating or mitigating circumstance.

g. The Steering Committee proposes that the standard instructions on Weighing the Evidence, Expert Witnesses, Defendant Not Testifying, and Rules for Deliberation should only be given to a new penalty phase jury. The present instructions require that the reasonable doubt instruction be given before a new penalty phase jury as well. The FPAA submits that all of these instructions should be a part of any penalty phase before a jury, even if it is the same as the guilt phase. Experience has shown each circuit is different, and judges within a circuit are different, such that penalty phases sometimes begin as soon as a

week after the guilt phase and sometimes months. These instructions are important and the parties should not have to rely on whether the jury remembers that instructions that were given to them weeks earlier in the guilt phase.

The FPAA suggests that an introductory statement be given prior to the instructions such as those that are given in the guilt phase. Otherwise, the instructions are incomplete. For example prior to the reasonable doubt instruction the jury should be told that "Whenever the words "reasonable doubt" are used you must consider the following:." However, the FPAA believes it is again redundant to tell the jury that the State has the burden to prove each aggravating circumstance beyond a reasonable doubt as suggested by the Steering Committee in this portion of the revised instructions. The FPAA strongly suggests that prior to the Weighing of the Evidence instruction and the Expert Witnesses instruction there should be an introduction which states: "It is up to you to decide what evidence is reliable. You should use your common sense in deciding which is the best evidence, and which should not be relied upon in considering your recommendation. You may find some of the evidence not reliable, or less reliable than other evidence." In addition, the proposed instructions include only an instruction for when the defendant does not testify. Although it does not follow the standard instruction that is given in

the guilt phase, the FPAA has no objection to its form. However, the FPAA submits that the standard instruction for a Defendant Testifying should be given when the defendant does testify in the penalty phase. No reason has been given by the Steering Committee for eliminating that standard instruction. Finally the proposed instruction on Rules for Deliberation leaves out standard instruction number 7, which is given when applicable: "It is entirely proper for a lawyer to talk to a witness about what testimony the witness would give if called to the courtroom. The witness should not be discredited by talking to a lawyer about [his] [her] testimony." The FPAA suggests that it may be more appropriate to place this instruction within the Weighing the Evidence instruction, but it should be given when applicable.

h. The next change proposed by the Steering Committee again reverses the burden of proof. The FPAA's reiterates its objections to that change. However, there are additional amendments that the FPAA has very strong objections to. They are set forth below in bold:

> The sentence that you recommend to the court must be based upon the facts as you find them from the evidence and the law. If, after weighing the aggravating and mitigating circumstances, you determine that the aggravating factors found to exist **sufficiently** outweigh the mitigating factors; or, in the absence of mitigating factors, if you find that the aggravating factors alone are sufficient, you may exercise your option to recommend that a death sentence be imposed rather than a sentence of life in prison without the possibility of parole. **However,**

> **regardless of your findings with respect to aggravating and mitigating circumstances you are never required to recommend a sentence of death.** ~~You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations.~~

First, the FPAA submits that again, the Steering Committee's proposal adds requirements that are not in the statute. The statute requires that the aggravators must be sufficient to warrant imposition of the death penalty. If so there must be sufficient mitigating factors to outweigh the aggravating circumstances. The statute does not require for the imposition of the death penalty that the aggravating factors must sufficiently outweigh the mitigating circumstances. The term "sufficiently" does not add anything to the instructions and if anything it will confuse the jury as to what the law requires.

Secondly, the FPAA fervently objects to that the portion of this instruction that is bolded that states "However, regardless of your findings with respect to aggravating and mitigating circumstances you are never required to recommend a sentence of death." This instruction does nothing but promotes a jury pardon or nullification. Although this Court has stated that a jury is never required to recommend the death penalty regardless of whether the aggravating factors outweigh the mitigating factors, see, e.g., Henyard v. State, 689 So.2d 239 (Fla. 1996); Brooks v. State, 762 So.2d 879 (Fla. 2000); Franqui v. State,

804 So.2d 1185 (Fla. 2001); Cox v. State, 819 So.2d 705 (Fla. 2002); Floyd v. State, 850 So.2d 383 (Fla. 2002), as stated by Justice Wells in his concurring opinion in Franqui v. State, supra, 804 So.2d at 1199 (Wells, J., concurring), such a statement was never intended to be a standard jury instruction. In fact, this Court and the United States Supreme Court have consistently stated that it is proper to refuse to instruct the jury on mere mercy, or that life could be recommended even though there are no mitigating circumstances. See Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190 (1990). Mendyk v. State, 545 So.2d 846 (Fla. 1989); Dufour v. State, 495 So.2d 154 (Fla. 1986); Kennedy v. State, 455 So.2d 351 (Fla. 1984); Lemon v. State, 456 So.2d 885 (Fla. 1984). This Court has specifically held that the trial court was not required to give an instruction on a jury's pardon power. Foster v. State, 614 So.2d 455 (Fla. 1992). To give such an instruction as suggested by the Steering Committee has the potential to promote the type of arbitrariness in the determination of the death penalty that the United States Supreme Court has condemned and found was not present in our statute in Proffit v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976). In Dougan v. State, 595 So.2d 1, 4 (Fla. 1992) this Court specifically rejected the giving of such an instruction on the basis that it could lead to arbitrariness in the imposition of the death penalty.

The Steering Committee in its letter to the Clerk states as justification for this change that the proposal "tracks the Supreme Court of Florida's opinions in Henyard v. State, supra, and Franqui v. State, supra." Inspection of those two cases suggests this is **not** the case. Henyard and Franqui both involve similar misstatements by the trial court and a prosecutor to the jury that if they found sufficient aggravators they were required to impose death. Neither case resulted in reversal, both errors being ruled harmless. The Steering Committee apparently perceives footnote #5 in Franqui v. State, 804 So.2d at 1193 n.5, as requesting this change. However, not only does the footnote merely ask a different committee to "consider" the matter, but the example of a pattern federal instruction is just that– "we note, for example." The proposal effectively substitutes one absolute for another, where neither is actually appropriate. The Steering Committee either ignored, or does not agree with, but in either case utterly failed to mention, the insight offered by Justice Wells in his Franqui concurrence:

> I believe the majority confuses federal and Florida law by its reference to the [federal] pattern jury instructions. Under Florida law it is not proper for a trial judge to "admonish" a jury as does this federal instruction. Under Florida law the trial judge is required to be much more neutral than in the federal instruction.
> 804 So.2d at 1199. (Wells, J., concurring).

The FPAA submits that a misstatement of the law by the prosecutor or the judge does not require a jury instruction. In fact, this Court rejected as a curative instruction in Franqui v. State, supra, 804 So.2d at 1194, the very instruction that the Steering Committee is requesting that this Court approve should be given in every case. Thus, this Court would be overruling prior precedent by adopting this instruction, and the FPAA very strongly submits that this Court should reject it. The FPAA would also note that the Standard Jury Instructions in Criminal Cases Committee's proposal for a similar instruction limits it's use to those circumstances where an improper statement of law has been given by counsel.

i. The next amendment proposed by the Steering Committee is one that describes the process of weighing the aggravating and mitigating circumstances. The FPAA submits that such an instruction is not necessary and will only engender more litigation. The Steering Committee has not set forth why this change is needed. Similarly, the Steering Committee has added the language concerning the length of deliberations. This is also unnecessary, with no explanation as to why a change is needed. It also might produce more litigation. Thus, the FPAA opposes these changes.

j. The Steering Committee's proposed language relating to special verdict forms relates to verdict forms which would require the jurors to state

what aggravating factors the jurors found and by what vote. Similarly, the forms would require the jurors to state what mitigating factors the jurors found and by what vote. The FPAA strongly submits that the submission of any verdict forms would be improper under the current statutory scheme. As stated by this Court in State v. Steele, 30 Fla.L.Weekly S677 (Fla. Oct. 12, 2005):

> Even if they did not impose an additional substantive burden, specific jury findings on aggravators without guidance about their effect on the imposition of a sentence could unduly influence the trial court's own determination of how to sentence the defendant. Under section 921.141(3), Florida Statutes, the trial court must independently determine the existence of aggravating and mitigating circumstances, and the weight to be given each. See Blackwelder v. State, 851 So.2d 650, 653 (Fla.2003) (reminding judges of their duty to independently weigh aggravating and mitigating circumstances and noting that a "sentencing order should reflect the trial judge's independent judgment about the existence of aggravating and mitigating factors and the weight each should receive"); Bouie v. State, 559 So.2d 1113, 1116 (Fla.1990) (holding that a trial court order must reflect the independent determination of the existence and weight of aggravating and mitigating circumstances). Our current system fosters independence because the trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely. Individual jury findings on aggravating factors would contradict this settled practice. Even assuming such a requirement was properly the province of the trial court, jury instructions about specific findings would have to be accompanied by clear directions about their effect, if any, on the trial court's own findings in determining the sentence. Such directions are more appropriately

crafted in a rules proceeding than in an individual capital case.
Id. at. 679.
*   *   *

Moreover, any special verdict on aggravators would have to be accompanied by clear instructions on how these changes affect the jury's role in rendering its advisory sentence and the trial court's role in determining whether to impose a sentence of death. To maintain consistency in our capital sentencing procedures, any changes should be made systematically.[FN3] Therefore, unless and until a material change occurs in section 921.141, the decisional law, the applicable rules of procedure, or the standard instructions and verdict form, a trial court departs from the essential requirements of

> law in requiring a special verdict form that details the jurors' votes on specific aggravating circumstances. Id. at 680.

Although this Court noted in FN3 that the present amendments to the jury instructions were before the Court, it is still clear that without legislative changes to the present statute, it would not be proper to require the jurors to fill out a special verdict form as to aggravating and mitigating circumstances because as it was noted by this Court such would interfere with the judge's independent determination of what the sentence should be. Furthermore, the proposed verdict forms are not "accompanied by clear directions, about their effect, if any, on the trial court's own findings in determining sentence." State v. Steele, supra, at 679. Finally, it should be noted that there cannot be a special verdict form for the mitigating factors because that might preclude a juror from considering something that was legally relevant to mitigation but overlooked by the court and therefore not included in the verdict form. That would inevitably lead to a challenge of the defendant's sentence based on that preclusion of consideration of relevant mitigating circumstances under Lockett v. Ohio, supra. Thus, the FPAA submits that this Court should reject the proposal for special verdict forms in the penalty phase.

k. The proposal also includes a new verdict form for First-Degree Murder which requires that jurors state how many of them found

premeditation, how many of them found felony murder, and if found, list the felony. As with the special verdict form for the penalty phase, the FPAA submits that this form is unnecessary and will create confusion among the jurors. This Court and the United States Supreme Court have repeatedly rejected the claim that a special verdict form is necessary. See Brown v. State, 473 So.2d 1260 (Fla. 1985); Buford v. State, 492 So.2d 355 (Fla. 1985). In Schad v. Arizona, 501 U.S. 624, 645, 111 S.Ct. 2491 (1991), the United States Supreme Court held that the Constitution did not require the jury to come to a unanimous decision on the theory of first-degree murder and that separate verdict forms for felony and premeditated murder were not required. This Court has rejected the claim that the Supreme Court decisions in Ring v. Arizona, 536 U.S. 584, 122 S.Ct 2428 (2002) and Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000), have overruled the decision in Schad. See Mansfield v. State, 911 So.2d 1160, 1178 –1179 (Fla. 2005).

It is unclear what the purpose would be of requiring the jury to specify by a number how they found the defendant guilty of first-degree murder. The letter to the Clerk from the Steering Committee indicates that the request is based on the problem that occurred in Fitzpatrick v. State, 859 So.2d 486 (Fla. 2003). In that case there was a general verdict on First-Degree Murder based on both premeditation and felony murder, with the underlying felony being

burglary. The problem occurred when the burglary was found to be legally inadequate pursuant to Delgado v. State, 776 So.2d 233 (Fla. 2000). This Court held that because it could not determine whether the guilty verdict was based on felony murder or premeditated murder, the case would be reversed – even though there was evidence to support the premeditated murder theory. The Steering Committee suggests that the general verdict is more problematic if the evidence presented on one of these theories is weak. However, in Monlyn v. State, 894 So.2d 832, 837 (Fla. 2004), this Court held that the Fitzpatrick result is mandated only where the general verdict rests on multiple bases and one of them is legally inadequate. This Court stated that legal and factual insufficiency are not the same, such that an argument of factual or evidentiary insufficiency does not require invocation of the principle that a general verdict must be reversed if one of the bases of conviction is factually insufficient.

Furthermore, the factual basis for which the jury found the defendant guilty of First-Degree Murder should have no bearing on whether the death penalty is appropriate as the trial court must exercise its own independent judgment on sentencing. Requiring such a verdict form will be confusing to jurors, especially where there are multiple felonies involved and alternative ways to commit the felony. The FPAA recognizes that although there have been some cases in which a trial court has given such a verdict form, this Court

should not encourage the practice by individual courts, the same way that it rejected the used of special verdict forms for the penalty phase in State v. Steele, supra. There is no statute that requires that the jury make this determination and to impose such a requirement would substantially alter the present statutes, something that this Court recognized in State v. Steele only the Legislature could do.

Proposal Two

a. The Steering Committee offers a second proposal that involves numerous drastic changes to the death penalty process and would require new legislation in addition to changes to the rules and instructions. The proposal also includes the following amendment to Fla.R.Crim.P. 3.140(d):

> (5) Capital Cases. The prosecuting attorney shall determine whether to seek the death penalty in a capital case prior to submitting the case to the Grand Jury. Except for prior record, the Grand Jury shall list in the indictment all aggravating circumstances it finds to exist.

The FPAA submits that this amendment must be rejected for a number of reasons. First, it interjects requirements on the State that are not in s. 921.141, Fla. Stat. For many years this Court has held that there is no requirement for the State to notify the defendant of the aggravating factors, as such can be found in the statute. See, e.g., Hitchcock v. State, 413 So.2d 741 (Fla. 1982);

Kormody v. State, 845 So.2d 41 (Fla. 2003). Although this Court held in State v. Steele, supra, that it is not a departure from the essential requirements of the law for a trial court to require the State to provide notice of aggravating factors, this Court recognized that "under current law the trial court cannot prohibit the State from relying on an aggravator that was either undisclosed or disclosed beyond the deadline." 30 Fla.L.Weekly at S678. This amendment would require the State, through, the Grand Jury, to provide a list of aggravating factors. No sanction is provided (and the FPAA is not suggesting that one should be) for the failure to include a factor. This will of course engender litigation in situations where the State overlooks or later discovers an aggravating factor or the existence of an aggravating factor that occurred after the indictment (such as a subsequent conviction for a prior violent felony). It may also require re-empaneling grand juries before trial to re-indict so that aggravating factors can be added.

Secondly, it conflicts with Fla.R.Crim.P. 3.202(a) which provides that the State should file a notice of its intent to seek the death penalty within 45 days from the date of arraignment in order to take advantage of the provisions of that rule. When that rule was initially adopted, it gave the State only 10 days after arraignment to file its notice. After the State filed for rehearing on the basis that 10 days was insufficient time for the State to make an informed

decision, this Court granted rehearing and extended the time period to the present 45 days. See Amendments to Florida Rule of Criminal Procedure 3.220, 674 So.2d 83 (Fla. 1995). Clearly, there is insufficient time under this proposed rule for the State to properly determine whether it will seek the death penalty prior to indictment, which under Fla.R.Crim.P. 3.133(b)(1) needs to be within 21 days after arrest in order to avoid an adversary preliminary hearing, or under Fla.R.Crim.P. 3.134, 33 days or 40 days with good cause to avoid a defendant being released on his or her own recognizance. The FPAA submits that the decision to seek the death penalty should not be taken lightly and this rule would only promote a decision to do so without having sufficient time to investigate all the aggravating and mitigating circumstances that may apply. This Court must reject this proposed amendment to Fla.R.Crim.P. 3.140.

b. In this proposal which is entitled "Proposed Amendment to s. 921.141, Fla. Stat. – Changing the Current Florida Scheme," the Steering Committee proposes a new statute that requires the jury's participation only in determining if one of the enumerated aggravating circumstances had been proved beyond a reasonable doubt by the jury. After that determination, the mitigation would be presented to the trial judge for the determination of the appropriate penalty. The proposed jury instructions that accompany this amendment would eliminate the aggravating factor of a conviction for a prior

violent felony and prohibit the admissibility of hearsay. Whatever merit these proposals may have, this Court is not the appropriate place for comments about them. Rather, as stated in State v. Steele, supra, substantive changes to s. 921.141 belong with the Legislature. Thus, the State Attorneys will not express an opinion regarding such changes in this Comment.

Wherefore, the State Attorneys of the Twenty Judicial Circuits of Florida, by and through the Florida Prosecuting Attorneys Association, respectfully request that this Court consider and adopt the Comments set forth herein.

Respectfully submitted,

By: ______________________________

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forgoing has been served on the Honorable O. H. Eaton, Jr., Committee Chair, 101 Bush Blvd., Sanford, Florida, 32773 on this the ___ day of December, 2005 by U.S. Mail.

By: ________________________________
ARTHUR I. JACOBS
General Counsel

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Comment complies with the font requirements of Fla.R.App.P. 9.210(c)(2).

By: ________________________________
ARTHUR I. JACOBS
General Counsel