

existence of one or more aggravating circumstances beyond a reasonable doubt, by clear and convincing evidence, by substantial evidence, by a preponderance of the evidence, or by some other standard. Similarly, the statute does not deal with the burden of proof applicable to a determination of whether one or more mitigating circumstances are present. Finally, assuming one or more aggravating circumstances are demonstrated, by whatever burden of proof is applied, and one or more mitigating circumstances are established, by whatever burden of proof is applied, the statute fails to tell us what standards should be applied in weighing the aggravating against the mitigating circumstances.

In this respect Senate Bill 106 shares a defect present in the Florida statute, upheld as facially constitutional in Proffitt v. Florida, *supra*. The Supreme Court of Florida in State v. Dixon, 283 So.2d 1, 9 (1973) partially answered the burden of proof question under the Florida law as follows:

"The aggravating circumstances of Fla. Stat. Sec. 921.141(6) actually define those crimes - when read in conjunction with Fla. Stat. Section 782.04(1) and 794.01(1) - to which the death penalty is applicable in the absence of mitigating circumstances. As such they must be proved beyond a reasonable doubt before being considered by judge or jury."

The Court in Dixon went on to describe the process of weighing aggravating and mitigating circumstances without truly defining the quantum or weight of evidence or burden on either of the parties to prove or disprove the existence of mitigating circumstances or to show that they do or do not outweigh any aggravating circumstances found to exist. 20 It may well be that the Maryland Court of Appeals would follow the holding in State v. Dixon that aggravating circumstances must be proved beyond a reasonable doubt, and we consider such a result likely if not certain. While we incline towards the view that the burden of proof with respect to mitigating circumstances and the weighing process will be some lesser standard, we cannot predict with any degree of certainty just what standard the Maryland Court of Appeals may ultimately require. 21 Just as we are left to speculate, so too will trial court judges, as they preside over capital punishment trials - at least until the first occasion on which the Court of Appeals addresses the question. Until that question is definitively resolved, as it should have been in Senate Bill 106, trial court judges will proceed to fashion jury instructions which they believe to be appropriate and will apply the burdens and standards which they believe are applicable to their own sentencing decision, but they