

will do so at some risk. There is no assurance whatsoever that one trial judge will adopt the same burdens of proof and instructions as another trial judge, and it is distinctly possible that defendants will be tried in various jurisdictions throughout the State under different burdens of proof and different jury instructions. While this may all be resolved one day by the Court of Appeals, the uncertainty which will exist in the meantime, and the uneven application of the death penalty statute which is likely to occur, will hardly be conducive to the kind of fair and evenhanded administration of a capital punishment law which the Supreme Court has set forth as the constitutional objective which must be pursued by a valid statutory scheme. 22

Having expressed these very grave concerns about the uncertainties which may prevail in determining the appropriate burdens of proof, we must note that the Supreme Court in its opinion in Proffitt v. Florida, supra, did observe that "the directions given to judge and jury by the Florida statute are sufficiently clear and persuasive to enable the aggravating circumstances to be weighed against the mitigating ones." This represented the Court's response to several related contentions, one of which was that the statute failed to assign any specific weight to the various aggravating and mitigating circumstances to be considered and weighed. While the Court's general observation might be read as reflecting a lack of constitutional concern over the absence of statutorily identified burdens of proof, we cannot say with any real confidence that such is the case. To the extent that any burden of proof question was squarely presented to and considered by the Supreme Court, it was against the background of prior decisions of the Florida Supreme Court articulating to some extent the burden of proof standards and the adoption by Rule of the Supreme Court of Florida of pattern jury instructions. This background would clearly undercut any argument that capital punishment in Florida was imposed in an uneven and inequitable manner because of inconsistencies and uncertainties with respect to the burden of proof question. 23

CONCLUSION

Without question Senate Bill 106, patterned as it is so closely on the Florida statute, would meet the basic Supreme Court tests of constitutionality and does afford the three principal requirements specified by the Court:

1. a bifurcated sentencing proceeding;
2. a procedure permitting the sentencing authority to focus on the circumstances of the offense