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IN THE SUPREME COURT OF FLORIDA

SC17-583

In Re: Standard Criminal Jury
Instructions in Capital Cases
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COMMENTS OF ATTORNEY ROBERT BERRY

RECEIVED, 05/30/2017 05:18:29 PM, Clerk, Supreme Court

1. I, Robert R. Berry, am a member of the Florida Bar. I am Florida Board Certified as both a criminal trial attorney and criminal appellate attorney.

2. I am employed by CCRC-North but these comments are made in my individual capacity as a private citizen and are not intended to represent the views of CCRC-North or CCRC in general.

3. I only wish to point out the proposed jury instructions are structurally flawed because aggravating factors, though elements of the offense, are still improperly shifted to the penalty phase, where there is a lowered burden of proof. By continuing to have those issues litigated in the penalty phase, it is my view there is a fatal flaw in the legislative scheme that is advanced by these proposed instructions. There should either be a guilt phase of the trial where the aggravators are tried with the other elements of premeditated or felony murder or there should be three phases to a death case: 1) the 1st degree murder *simpliciter* phase, 2) the aggravators phase -- with the same rules of evidence as in part 1, and 3) the weighing

of aggravators and mitigators phase – where there may be some basis to relax evidentiary rules.

4. . The traditional model for the criminal trial and sentencing process is straightforward enough: 1) a trier of fact hears evidence governed by a pre-determined set of evidentiary rules and decides whether the elements alleged by the State have been proven beyond a reasonable doubt; if that burden of proof is satisfied, then 2) the authority charged with sentencing weighs the good and bad about the convicted citizen against the underlying offense and fashions an appropriate sentence after weighing those considerations.

5. This is the process for every type of criminal proceeding in Florida with the exception of capital cases. In attempting to contort its legislation to try and satisfy judicial rulings over the years, Florida has concocted a truly unique process. In part one, there is a determination made by the trier of fact regarding whether the state has proven beyond a reasonable doubt the defendant committed a premeditated murder or a felony murder *simpliciter*. From an evidentiary standpoint, that process is governed by Chapter 90, Florida Statutes (the Florida Evidence Code). If the State clears that hurdle, then in part two the jury then determines whether an "aggravating factor" (that the court's now view as the equivalent of an element) has been proven beyond a reasonable doubt. This determination regarding a "factor" (still not a true "element" for these purposes) is governed not by Chapter 90, but rather some

undefined, but definitely relaxed, standard of admissibility. If the aggravating factors are truly elements and not some factor/element hybrid, this lessening of the State's evidentiary obligation should be anathema.

6. If the aggravators are indeed elements, they must be shifted to their proper place in the guilt phase, where they would be litigated along with the other elements of the offense. Justice Scalia, concurring in *Ring*, said 17 years ago the "logical place" for the aggravators was in the guilt phase. *Ring v. Arizona*, 536 U.S. at 612, 613 (2000)(Scalia, concurring). Most all of Florida's aggravators can be tried in the guilt phase without prejudicing the defendant. The others (for example prior felonies) can be litigated in a separate proceeding as this Court held in *State v. Johnson*, 994 So.2d 960 (Fla. 2008)(Defendant may elect to have separate proceeding on prior convictions for DUI). By way of comparison and example, the facts going to the issue of whether a murder was committed in a way meeting the criteria for heinous, atrocious, or cruel; or whether the crime was committed in a cold, calculated, and premeditated manner; or the victim was less than 12 years of age; or was committed for pecuniary gain can all be tried within the normal guilt phase. In contrast, the prior felony or status as a sex offender or the existence of an injunction might provide the defendant with the option of a separate proceeding ala *Johnson*, should they choose to litigate the issue. Most won't in the absence of an issue of misidentification.

7. In short the perpetuation of this current litigation scheme postpones the day when the Court needs to confront the meaning of the rulings finding aggravators are elements of the offense. The Court needs to decide whether there are elements, non-elements, and a third category of factual determinations that inhabit a netherworld between the two that are treated as constitutionally significant in only selective contexts. This decision needs to be made fully recognizing the fact an equal if not greater level of due process is required in capital cases. *Lockett v. Ohio*, 438 U.S. 586 (1978). Drafting new jury instructions while ignoring the need to remedy the systemic flaw in our capital trial process invites years of more litigation that will ultimately be resolved along the lines I have outlined.

CONCLUSION

As a person engaged in death penalty litigation, perpetuation of the status quo memorialized in these instructions presents a target rich environment. As a private citizen who happens to practice law and has who has an ethical obligation to leave the system better than I found it I would respectfully suggest everyone stop, take a deep breath and fix this now rather than later.

Respectfully,

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