STATEMENT OF STANDING

This Court has invited comment on proposed changes to Florida's standard capital jury instructions. Undersigned counsel now represents people facing capital punishment in Florida and respectfully offers these comments.

COMMENTS

Generally: The proposed revisions do not fix the biggest problem with Florida's capital sentencing procedures and instructions. Two statutes are at issue. One defines the offense of first-degree murder in Florida. The second requires a jury sentencing recommendation and, when a death sentence is imposed, a separate factual finding by the judge. Neither the current standard jury instructions nor the proposed changes thereto address the blue elephant in the courtroom, a/k/a ***Ring v. Arizona***, 536 U.S. 584 (2002). Myopic focus solely on the genuine narrowing requirement compelled by the Eighth Amendment demeans the significance of basic Due Process rights guaranteed by the Fifth, Sixth and Fourteenth Amendments. It is time for courts to exercise their constitutional authority to fix this problem.

Specific comments: A court is responsible for enforcing the requirements of our state and federal constitutions. This duty includes ensuring that fair jury instructions are used in proceedings that make the rights to Due Process and a fair jury trial meaningful. A legislature cannot relieve a court of its duty to protect

constitutional rights. Further, a legislature does not have to place such requirements in statutes or otherwise give permission for these fundamental rights to be recognized and enforced by the courts.

It is now beyond cavil that a jury must make the statutorily-required findings of fact that authorize imposition of punishment. ***Cunningham v. California***, 594 U.S. ___ (January 22, 2007). This result does not depend on permission or directions contained in legislation because the right to a jury trial is embedded in our state and federal constitutions. Assume for the moment that Florida's capital sentencing statute is constitutional. Courts are yet obligated to construct jury instructions and to implement procedures that protect our fundamental constitutional rights.

The propriety of Florida's jury instructions is a pure legal question that should be neutrally assessed. The application of established principles of constitutional law leads to only one intellectually honest conclusion. It is time for courts to require standard jury instructions and procedures that fulfill the constitutional rights to a unanimous jury determination beyond a reasonable doubt of the factual determinations that statutorily authorize imposition of capital punishment. Continued hesitation and deference to others will result in retrials of capital cases where valid objections are being overruled by confused and hamstrung trial judges. See ***State v. Steele***, 921 So.2d 538 (Fla. 2005).

The simple question that must be answered is what factual findings are required by Florida's statutes that authorize imposition of a death sentence. The "recommendation" aside, our statute expressly requires that the judge in writing find that "sufficient aggravating circumstances exist as enumerated in section (5)" when a death sentence is imposed. § 921.141(3), Fla. Stat. (2005). The reasoning in ***Ring***, *supra*, and ***Cunningham***, *supra*, explain why this factual determination must *first* be made by jury and only *then* by the judge to satisfy the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16(a) and 22 of the Florida Constitution.

MEMORANDUM OF LAW

The basic undisputed facts: A 12-person jury[1] now determines whether a person is guilty of first-degree murder based on § 782.04(1), Fla. Stat. (2005). Our standard jury instructions track this statute and require that the jury unanimously find certain factual elements beyond a reasonable doubt before a defendant may be

[1] There is no need to determine whether due process alone requires a 12-person jury to unanimously decide guilt in a capital case because Florida law already requires it. Section 913.10, Florida Statute; Fla.R.Crim.P. 3.440. See ***Jones v. State***, 92 So.2d 261, 261 (Fla. 1956) ("In this state, the verdict of the jury must be unanimous."); ***Motion to call Circuit Judges to Bench***, 8 Fla. 459, 482 (1859) (same). Neither ***Johnson v. Louisiana***, 406 U.S. 356 (1972), nor ***Apodaca v. Oregon***, 406 U.S. 404(1972), hold that a non-unanimous verdict is acceptable in a *capital* case. The United States Supreme Court has otherwise recognized that procedural Due Process has special force in capital cases due to the unique finality

found guilty of first-degree murder. See Fla. Std. Jury Instr. (Crim) 7.2 & 7.3.

A first-degree murder conviction alone does not authorize imposition of a death sentence in Florida because § 921.141(3), Fla. Stat. (2005), requires that a when a death sentence is imposed the trial judge *shall* make an express finding in writing that "sufficient aggravating circumstances exist as enumerated in section (5)" to justify a death sentence. Only the existence of "sufficient aggravating circumstances" makes a defendant eligible for the death penalty. The Constitutional questions raised are whether the judge *alone* can make that express factual finding, and whether the jury must find each statutory aggravating factor(s) that make up "sufficient aggravating circumstances."

Application of the law to the facts:

Minimal due process requirements imposed under the Fourteenth Amendment to the United States Constitution and otherwise commanded by the Florida Constitution guarantee a jury trial to criminal defendants. ***Cunningham v. California***, 594 U.S. ___, (January 22, 2007); ***Ring v. Arizona***, 536 U.S. 584 (2002); See ***United States v. Gaudin***, 515 U.S. 506, 511 (1995) ("Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged."); ***Duncan v. Louisiana***, 391

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and severity of that penalty. E.g., ***Beck v. Alabama***, 447 U.S. 625, 637-638 (1980).

U.S. 145, 156 (1968) (recognizing the importance of interposing independent jurors between a criminal defendant and punishment at the hands of a "compliant, biased, or eccentric judge"); See also ***In re Winship***, 397 U.S. 358, 363 (1970) ("The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error."); ***State v. Overfelt***, 457 So.2d 1385 (Fla. 1984).

Courts instruct jurors and implement procedures to accommodate these fundamental rights in the total absence of statutory language saying that such instructions must be given. These due process requirements are not driven by the Eighth Amendment, which in the context of imposition of capital punishment requires primarily that the class of persons eligible for capital punishment be genuinely narrowed. ***Zant v. Stephens***, 462 U.S. 862, 877 (1993); ***Lowenfield v. Phelps***, 484 U.S. 231 (1988). It is the prerogative of the legislatures to determine how people become eligible for capital punishment and it is certainly not the function of the judiciary to agree or disagree unless there is no rational basis for it. A court can neither rewrite nor ignore the plain language contained in a statute because article II, section 3 of the Florida Constitution forbids it. See ***Am. Home Assurance Co. v. Plaza Materials Corp***, 908 So.2d 360, 376 (Fla. 2005) (Cantero, J., concurring in part and dissenting in part) ("[W]here the language is clear, courts need no other aids for determining legislative intent.").

To meet the "genuine narrowing" requirement that arose after ***Furman v. Georgia***, 408 U.S. 238 (1972), some states enacted statutes that authorize the death penalty if a unanimous jury finds the existence of "one or more" aggravating circumstances. E.g., Arizona[2]; Kansas[3]. Florida, however, enacted a statute that expressly requires a finding of the existence of "sufficient aggravating circumstances as enumerated in section (5)." § 921.141(3), Fla. Stat. (2005). Thus, while the determination of the existence of one valid aggravating circumstance satisfies both the Eighth Amendment and Due Process in some States, it does *not* necessarily[4] provide Due Process in Florida. Thus, the existence of a valid conviction for a prior violent felony may satisfy the Eighth

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[2] Ariz.Rev.Stat.Ann. § 13-703(E) (Supp.2005) ("In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds **one or more** of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency.") (Emphasis added).

[3] K.S.A. § 21-4624(e) ("If, by unanimous vote, the jury finds beyond a reasonable doubt that **one or more** of the aggravating circumstances enumerated in K.S.A. 21-4625 ··· exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise the defendant shall be sentenced as provided by law." (Emphasis added).

[4] The only way the determination of the existence of one valid aggravating circumstance in Florida may comport with Due Process is if the jury unanimously recommends imposition of capital punishment. This necessarily results from a

Amendment and Due Process when "one or more aggravating circumstances" renders a defendant convicted of first-degree capital murder eligible for the death penalty, but it does NOT necessarily satisfy the Sixth and Fourteenth Amendment rights in Florida. This distinction between Due Process requirements and the Eighth Amendment "genuine narrowing" requirements must be appreciated.

First, our statute requires the existence of "sufficient aggravating *circumstances*" to justify imposition of capital punishment. Plainly read, that means more than one. Any ambiguity should be construed in favor of that construction pursuant to § 775.021, Fla. Stat. (2005). But even if the statute is not viewed as necessarily requiring more than one aggravating circumstance, it is yet absolutely clear that the finding that makes a defendant eligible for capital punishment is that "*sufficient* aggravating circumstances exist as enumerated in section (5)." Thus, the existence of only one aggravating circumstance may or not be sufficient. The current presumption employed to review the erroneous findings of aggravating circumstances, where the Court "presumes" that the death penalty is justified in the presence of a single aggravating circumstance but no mitigation, is erroneous because one aggravating circumstance may not be "sufficient" in the eyes of the jury even without mitigation.

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unanimous jury finding that "sufficient aggravating circumstances exist" to justify imposition of capital punishment.

Any remaining question that ***Ring*** must some day control in Florida is now answered by ***Cunningham***, *supra*, in which a 6-3 majority of the Court speaking through Justice Ginsberg explained the following:

> As this Court's decisions instruct, the Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant. *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S.584 (2002); *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005). "[T]he relevant 'statutory maximum,'" this Court has clarified, "is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely*, 542 U.S., at 303-304 (emphasis in original).

Cunningham, slip opinion at p.1-2. After a jury found Cunningham guilty of continuous sexual abuse of a child under 14, the judge could have imposed a sentence under its determinant sentencing guidelines ("DSL") that established three tiers of punishment. In order to sentence Cunningham above the second tier, the judge was required by statute to find *one or more* additional facts in aggravation, which he did. Slip opinion at p.2. The United States Supreme Court held that the sentence violated the Sixth and Fourteenth Amendments and stated, "our decisions from *Apprendi* to *Booker* point to the middle term specified in California's statutes, not the upper term, as the relevant statutory maximum. Because the DSL

authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendments precedent." ***Cunningham***, slip opinion at 21.

That reasoning controls here. First-degree murder is defined by § 782.04(1), Fla. Stat. (2005). It matters not that it is labeled a "capital" felony[5] in the statute because an additional factual finding is required when a death sentence is imposed. Cf. ***United State v. Booker***, 543 U.S. 220 (2005) ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt."). Our statute clearly and expressly requires that additional factual finding:

> **921.141. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence**
>
> **(1) Separate proceedings on issue of penalty. --**Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding *to determine whether the defendant should be sentenced to death* or life imprisonment as authorized by s. 775.082. The proceeding *shall be conducted* by the trial judge before the trial jury as soon as practicable. * * *

[5] There are several examples of statutes deeming an offense to be "capital" when as a matter of law it is not. For instance, § 794.011(2)(a), Fla. Stat. (2005) specifies that a sexual battery is a capital felony, but as a matter of Constitutional law it is not. So, too, a defendant who is less than 18 years of age who commits first-degree murder has likewise committed a "capital" felony but as a matter of Constitutional law it is not. ***Roper v. Simmons***, 543 U.S. 551 (2005). See also, ***Atkins v. Virginia***, 536 U.S. 304 (2006) (Mental retardation).

> **(3) Findings in support of sentence of death. --** Notwithstanding the recommendation of a majority of the jury, *the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:*
>
> *(a) That sufficient aggravating circumstances exist as enumerated in subsection* (5), and
>
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.
>
> *In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6)* and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

§ 921.141(1) & (3), Fla. Stat. (2005) (All emphasis added).

This statute establishes conclusively that it is not the existence of "one or more" aggravating circumstances that renders a defendant eligible for a death sentence but instead the written finding made by the judge that "sufficient aggravating circumstances exist." "Genuine narrowing" aside, unless that plain language is simply ignored, for a death sentence in Florida to comport with the statute and the Sixth and Fourteenth Amendments that additional factual finding of

"sufficient aggravating circumstances" must *first* be made by a unanimous jury based on proof beyond a reasonable doubt because that is what makes a defendant eligible for capital punishment by statute. ***Cunningham***, *supra*, ***Ring***, *supra*; ***Apprendi v. New Jersey***, 530 U.S. 466 (2000).

Under our statute as written, each aggravating circumstance used to find the "sufficient aggravating circumstances" required by § 921.141(3), Fla. Stat. (2005), must also be independently found by a unanimous jury and proved beyond a reasonable doubt. In ***State v. Dixon***, 283 So.2d 1 (Fla. 1973), the Florida Supreme Court required as a matter of due process[6] that any statutory aggravating circumstance used to impose capital punishment be proved beyond a reasonable doubt. See ***Hernandez-Alberto v. State***, 889 So.2d 721, 734 (Fla. 2004) ("In a criminal prosecution the State always has the burden of proof, and in the sentencing context the State bears that burden by proving the existence of each aggravating circumstance beyond a reasonable doubt."), *citing* ***Clark v. State***, 443 So.2d 973, 976 (Fla. 1983) ("The burden is upon the state in the sentencing

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[6] The Court in ***Dixon*** explained that these factors are tantamount to elements of the offense that define the crime that may be punished by the death penalty and thereafter held that a death sentence cannot sustained in the absence of any valid aggravating circumstance. See ***Banda v. State***, 536 So.2d 221, 225 (Fla. 1998) ("The death penalty is not permissible under the law of Florida where, as here, no valid aggravating factors exist"); accord ***Buckner v. State***, 714 So.2d 384, 390 (Fla.1998); ***Elam v. State***, 636 So.2d 1312, 1314-15 (Fla. 1994); ***Thompson v. State***, 565 So.2d 1311 (Fla. 1990).

portion of a capital felony trial to prove every aggravating circumstance beyond a reasonable doubt.").

Applying the foregoing analyses, if the jury does not find each of the factors that constitute "sufficient" factors, it violates Due Process and the right to a jury trial. It also violates Double Jeopardy for the judge to find and use a statutory aggravating circumstance to impose the death penalty after a jury has rejected its existence as being insufficiently proved. Florida's death penalty has passed scrutiny by the United States Supreme Court. E.g., ***Hildwin v. Florida***, 490 U.S. 638 (1989) (Per Curiam); ***Spaziano v. Florida***, 468 U.S. 447 (1984); ***Proffitt v. Florida***, 428 U.S. 242 (1976). It has failed, too. E.g. - ***Espinosa v. Florida***, 505 U.S. 1079 (1992); ***Sochor v. Florida***, 504 U. 527 (1992); ***Enmund v. Florida***, 524 U.S. 94 (1982); ***Gardner v. Florida***, 430 U.S. 349 (1977).

History teaches us that correcting jury instructions to conform to precedent from the United States Supreme Court is not overruling a prior decision of that Court. ***Maynard v. Cartwright***, 486 U.S. 356 (1988); ***Espinosa v. Florida***, 505 U.S. 1079 (1992); ***Hitchcock v. Florida***, 505 U.S. 1215 (1992). *Cf.* ***Cherry v. State***, 781 So.2d 1040, 1053 (Fla. 2000) ("While our case law now holds that it is error for the trial court not to give a limiting instruction when one is requested, *see* *Castro v. State*, 597 So.2d 259, 261 (Fla. 1992), at the time of Cherry's trial there

was no error in the jury considering two aggravators based on the same aspect of the crime so long as the trial court did not improperly double those aggravators in its sentencing order. *See* Suarez v. State, 481 So.2d 1201 (Fla. 1985).").

Valid instructions must require that a unanimous jury *first* make the required factual finding of the existence of sufficient aggravating circumstances to justify imposition of a death sentence beyond a reasonable doubt. A legislature can certainly enact a law that requires a judge to make that finding in order to impose the death penalty. However, the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16(a), 17 and 22 of the Florida Constitution require that the factual finding *first* be made by a unanimous 12-person jury based on proof beyond a reasonable doubt. The complexity of the Eighth Amendment jurisprudence is obfuscating and overshadowing basic requirements of Due Process.

Not at issue is whether Florida should have capital punishment or a jury sentencing recommendation. Those determinations were made in duly-enacted statutes. What is at issue is whether our procedures and instructions regulating imposition of capital punishment under those statutes comport with the minimum requirements of our constitutions. It is time for courts to construct and require the use of valid jury instructions and procedures. Doing so does not depend on obtaining the permission of the Legislature.

CONCLUSION

Either § 921.141, Fla. Stat. (2005) should immediately be declared unconstitutional or standard jury instructions must be adopted that enforce that statute in a way that it comports with Due Process and the right to a jury trial. Valid instructions must direct that before a sentencing recommendation can be made by the jury or a death sentence imposed by the judge, the jury must first unanimously find that sufficient aggravating circumstances exist to justify imposition of capital punishment beyond a reasonable doubt, and that each aggravating circumstance relied upon by the jury to make that determination must be set forth by a unanimous jury. The recommendation process by the jury and the sentencing process by the judge should then be described separately.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing was sent by U.S. Mail to the

Honorable O.H. Eaton, Jr., Committee Chair, at 101 Bush Boulevard, Sanford, Florida 32771, this 24th day of January, 2007.

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Larry B. Henderson
Assistant Public Defender
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CERTIFICATE OF FONT

I CERTIFY that the size and style of type used in this document is proportionally spaced 14 pt. Times New Roman.

_____
Larry B. Henderson
Assistant Public Defender
Fla. Bar #0353973

IN THE SUPREME COURT OF FLORIDA

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

CASE # SC05-1890

_____/

COMMENTS BY LARRY B. HENDERSON
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