IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY,
FLORIDA

CASE NO. 2012-CF-35337-A

STATE OF FLORIDA,

Plaintiff,

vs.

BRANDON LEE BRADLEY,

Defendant.
_____/

MOTION TO DECLARE SECTION 921.141(5)(b), FLORIDA STATUTES UNCONSTITUTIONAL AS WRITTEN AND AS APPLIED

The Defendant, BRANDON LEE BRADLEY, pursuant to article I, sections 2, 9, 16, 17, 21, 22 and 23 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, moves this Court to enter its order declaring section 921.141(5)(b), Florida Statutes, unconstitutional as written and/or as applied for the following reasons:

1. The "prior violent felony" aggravating factor of section 921.141(5) (b), is unconstitutionally vague and too broad to genuinely limit the class of persons eligible for the death penalty.

2. The "prior violent felony" aggravating factor of section 921.141(5)(b), Florida Statutes, has been applied in an arbitrary and inconsistent manner.

3. This unconstitutional circumstance has been and continues to be used as a basis for imposing a death sentences in this state, and as a result proportionality review by the Florida Supreme Court is arbitrary. See ***Mills* v. Moore**, 786 So.2d 532 (Fla.

2001) (Anstead, J., dissenting); ***Booker v. Dugger***, 520 So.2d 246, 249-250 (Fla. 1988); ***Herring v. State,*** 446 So.2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting in part).

4. As applied, Section 921.141(5) (b), Florida Statute, violates the Fifth, Sixth, Eighth and Fourteenth amendments to the United States Constitution and article I, sections 2. 9, 16, 17, 21, 22 and 23.

5. A death recommendation from a jury and/or a death sentence imposed by a judge following the foregoing errors specifically enumerated above over timely and specific objection denies Due Process and fundamental fairness guaranteed by International Law, *jus cogens* and binding international agreements and treaties, including but not limited to the International Covenant on Civil and Political Rights, Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, and the American Convention on Human Rights.

MEMORANDUM OF LAW

This is a capital case in which the State has filed its notice of intent, pursuant to Fla.R.Crim.P. 3.202, to seek the death penalty. Accordingly, heightened standards of due process apply. See ***Elledge v. State,*** 346 So.2d 998 (Fla. 1977) ("heightened" standard of review); ***Mills v. Maryland***, 108 S.Ct. 1860, 1866 (1988) ("In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds."); ***Proffitt v. Wainwright***, 685 F.2d 1227, 1253 (11th Cir.1982) ("Reliability in the factfinding aspect of sentencing has been a cornerstone of [the Supreme Court's death penalty] decisions."); and, ***Beck v. Alabama***, 447 U.S. 625, 638, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1988) (same principles apply to guilt determination). "Where a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is

observed." ***Gregg v. Georgia***, 428 U.S. 153, 187, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (plurality opinion) (citing cases).

A death penalty statute is unconstitutional if it has "standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing" could occur. ***Godfrey v. Georgia***, 446 U.S., 420, 428, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (plurality opinion). A capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. ***Porter v. State***, 564 So.2d 1060, 1063-64 (Fla.1990), ***Lowenfield v. Phelps***, 108 S.Ct. 546, 554 (1988); ***Zant v. Stephens***, 462 U.S. 862, 877, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1993).

Section 775.021(1), Florida Statutes, sets out the rule for construing provisions of the Florida Criminal Code:

> The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

This principle of strict construction is not merely a maxim of statutory interpretation: it is rooted in fundamental principles of due process. ***Dunn v. United States***, 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979) (rule "is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited. [Cit.] Thus, to ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not 'plainly and unmistakably' proscribed. [Cit.]"). This principle of strict construction of penal laws

applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose. ***Bifulco v. United States***, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980). It applies to Florida capital proceedings. ***Trotter v. State***, 576 So.2d 691, 694 (Fla.1990) (sentence of imprisonment aggravating circumstance).

Great care is needed in construing aggravating circumstances. In ***Maynard v. Cartwright***, 108 S.Ct. 1853, 1857-58 (1988), the Court wrote:

> The difficulty with the State's argument is that it presents a Due Process Clause approach to vagueness and fails to recognize the rationale of our cases construing and applying the Eighth Amendment. Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk. Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis. [Cit.] Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in ***Furman v. Georgia***, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

Jury instructions that violate these principles are unconstitutional.

Substantive due process and equal protection principles require a provision of law, including criminal statutes, be rationally related to its purpose. ***Reed v. Reed***, 404 U.S. 71 (1971); ***Potts v. State***, 526 So.2d 104 (Fla. 4th DCA 1987), aff'd., ***State v. Potts***, 526 So.2d 63 (Fla. 1988). The prior violent felony circumstance, as it has been interpreted, does not satisfy any of these constitutional concerns.

The first problem with the Florida Supreme Court's application of the circumstance is that it does not require the "prior" conviction be used as a basis for imposing a death sentence to be final. Even a conviction pending on appeal may be used as a

circumstance. See, e.g., ***Ruffin v. State***, 397 So.2d 277, 282-83 (Fla. 1981); ***Peek v. State***, 395 So.2d 492, 499 (Fla. 1981). Such an interpretation violates the due process and equal protection rights to an appeal and the eighth amendment narrowing requirement and proscription that death sentences "cannot be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process,'"or on "materially inaccurate" information. ***Johnson v. Mississippi***, 108 S.Ct. 1981, 1986, 1989 (1988) (reversing death sentence where sentence based on prior violent felony that was later vacated).

The second problem is the expansion to permit contemporaneous violent felony convictions to be treated as a "prior violent felony." Florida permits any conviction occurring prior to sentencing to be a "prior" violent felony, even if that crime occurs prior to the homicide. ***Lucas v. State***, 376 So.2d 1149, 1152 (Fla. 1979). While the Court has limited the contemporaneous conviction gloss on the circumstance to preclude its use where there is a single victim, ***Wasko v. State***, 505 So.2d 1314, 1317-18 (Fla. 1987), that limitation does not save the circumstance. The Court's interpretation is not related to the purpose of the circumstance -- to punish more severely those who have committed violent crimes in the past. "[T]he individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant." ***California v. Brown***, 107 S.Ct. 837, 841 (1987) (O'Connor, J., concurring). Use of a contemporaneous conviction ignores the legitimate inquiry into whether a person convicted of first degree murder has a history of violence, and exposes those who have no history of conviction for a violent felony to a greater likelihood of receiving death. The broad application of the circumstance thus fails to "genuinely narrow" the class of death eligible, is "wholly

unrelated to the blameworthiness of the particular defendant," and relies on conduct that is "irrelevant to the sentencing process." ***Zant v. Stephens***, 462 U.S. 862, 885 (1983).

Section 921.141(5) (b), Fla. Stat. authorizes imposition of the death penalty if "the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." The language is ambiguous as to whether the "previous" felony must occur prior to the crime for which the defendant is to be sentenced or prior to the sentencing. Contrary to established rules of statutory construction, where ambiguous penal statutes are construed in favor of defendants, the Florida Supreme Court resolved the ambiguity by applying this factor to defendants convicted of a violent felony prior to sentencing rather than prior to the date that the capital crime was committed. A violent felony committed contemporaneously with the capital crime supports this factor for multiple victims or a separate episode of violence. Pardo v. State, 563 So.2d 77 (Fla.1990). The Florida Supreme Court interprets "use of threat or violence" to mean "life-threatening crimes in which the perpetrator comes in direct contact with a human victim." Lewis v. State, 398 So.2d 432, 438 (Fla. 1981); Ford v. State, 374 So.2d 496 (Fla.1979). However, the State can go behind a judgment of an apparent non-violent crime to show that violence was involved. Johnson v. State, 465 So.2d 499 (Fla. 1985); Mann v. State, 453 So.2d 784 (Fla.1984). By defining what this aggravating factor means, the Florida Supreme Court creates substantive law on an *ad hoc* basis without notice, due process and in violation of the separation of powers doctrine. Further, the practice of going behind a conviction of a non-violent crime to determine that it qualifies under this provision denies the right to a unanimous jury determination beyond a reasonable doubt that violence was involved.

The details of prior "violent" felonies are presented under Section 921.141(5)(b) factor. ***Francois v. State***, 407 So.2d 885 (Fla.1981); ***Elledge v. State***, 346 So.2d 998 (Fla.1977). Such evidence is clearly prejudicial. Cf. ***Castro v. State***, 547 So.2d 111, 115 (Fla.1989) (improper admission of irrelevant collateral crimes evidence is unfairly prejudicial).

The details of other crimes often times involve considerations such as the race of the victim and accused. These considerations are interjected into the weighing process and can be used to base impose of the death penalty because there is no guidance as to what details of the prior crime may be considered. ***Robinson v. State***, 520 So.2d 1 (Fla.1988). Further, the Court permits the fact of the prior offense to be presented in hearsay form by biased witnesses. E.g., ***Dufour v. State***, (April 14, 2005). Allowing such prejudicial testimony to come before the sentencer, in hearsay form and without direction, permits the sentencer to use improper considerations to impose the death penalty. The practice violates ***Crawford v. Washington***, 541 U.S. 36 (2004) and the practice fails to genuinely limit the class of persons that are eligible for the death penalty in violation of the Eighth and Fourteenth Amendments to the United States Constitution and article 1, sections 9, 16, 17 and 22 of the Florida Constitution.

The sentencer's use of information introduced though this statutory factor is unlimited, unguided, unfettered and unrestricted. This factor fails to genuinely limit the class of persons eligible for the death penalty, which results in arbitrary and capricious imposition of the death penalty. This rationale applies to other statutory aggravating factors, which are in essence but categories through which unfairly prejudicial evidence is placed before the sentencer without meaningful restriction or guidance as to its use by

the sentencer. Because the statutory aggravating factors fail to adequately channel the discretion in recommending or imposing the death penalty, the factors are unconstitutionally vague and overly broad in violation of the Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 9 and 17 of the Florida Constitution. Harm results where considerations such as race, political affiliation, national origin, sex, and other suspect traits can be used, under the court's instructions, to impose a sentence of death in a manner avoiding meaningful detection or review.

Wherefore, the Defendant moves this Court to enter its order declaring section 921.141 and/or section 921.141(5) (b), Florida Statutes unconstitutional, and precluding their application at bar, and/or to provide other relief as the Court deems just.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-service to the Office of the State Attorney, Brevard County, Florida, this 8 day of November, 2013.

FGN: 08-2444

J. Randall Moore
Chief Assistant Public Defender
Florida Bar No. 0357847
2725 Judge Fran Jamieson Way
Building E, Second Floor
Viera, FL 32940
321-617-7373
brevardfelony@pd18.net