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 IN LIMINE RE: PROCEDURES

The Defendant, BRANDON LEE BRADLEY, moves *in limine* for this Court to make pretrial rulings concerning the following matters of procedure in order to provide fundamentally fair proceedings, Due Process, meaningful assistance of counsel and reliable determinations of fact and law by the jury and by this Court:

1. "A motion in limine ... is generally used to prevent the introduction of improper evidence, the mere mention of which at trial would be prejudicial." ***King v. State***, 468 So.2d 510, 512 (Fla. 1st DCA 1985). A motion in limine tests not only (1) threshold relevancy and (2) whether a jury could reasonably believe (the evidence), but also (3) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. ***Adkins v. Coast Line Co.***, 351 So.2d 1088 (Fla. 2d DCA 1977); see also, Section 90.403, Florida Statutes (1997) ("Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence."). Statutory authority for the matters presented in this motion in limine is found in Section 90.105, Florida Statute (1997), which in pertinent part states, "the court shall determine preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence." Additionally, Section 90.104(2), Florida Statute, provides, "In cases tried by a jury, a court shall conduct proceedings, to the

maximum extent practicable, in such a manner as to prevent inadmissible evidence from being suggested to the jury by any means."

2. In order to provide effective assistance of counsel, Due Process, a fundamentally fair proceeding and to avoid the unnecessary occurrence of error, the undersigned counsel asks for pretrial rulings on the following matters so that legal issues can be properly presented and intelligently ruled upon based on recent decisions from the United States Supreme Court, including ***Brown v. Sanders***, 546 U.S. 212 (2006); ***Miller-El v. Dretke***, 545 U.S. 231, 125 S.Ct. 2317 (2005); ***Deck v. Missouri***, 544 U.S. 622, 125 S.Ct. (2005); ***Shepard v. United States***, 544 U.S. 13 (2005); ***United States v. Booker***, 543 U.S. 220 (2005), ***Ring v. Arizona***, 536 U.S. 584 (2002), ***Apprendi v. New Jersey***, 530 U.S. 466 (2001); ***Jones v. United States***, 526 U.S. 227 (1999); ***State v. Steele***, 931 So.2d 538 (2005); ***Johnson v. State***, 904 So.2d 400, 407 (Fla. 2005) (Holding that *Ring* does not apply *retroactively*, yet acknowledging that, "In June, 2002, the United States Supreme Court held in *Ring* that a jury, not a judge, must find beyond a reasonable doubt every fact necessary to expose a defendant to a sentence of death."). The absence of pre-jury selection rulings on the following issues constitutes an arbitrary denial of Due Process, a fair trial, an impartial jury, effective assistance of counsel, and the absence of this basic procedural information otherwise renders any subsequent conviction and/or imposition of a capital sentence arbitrary, capricious and unreliable in violation of art. I, sections 2, 6, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution:

A: REFERENCE TO "NON-STATUTORY" MITIGATING CIRCUMSTANCES AND USE OF PEJORATIVE TERMS SUCH AS "CATCH-ALL" BY THE COURT, THE PARTIES OR WITNESSES

Undersigned counsel objects and submits that it is improper for the State, its witnesses or the Court to identify mitigating circumstances *to the jurors* as either "statutory" or "non-statutory" because those terms are not contained in Florida's standard jury instructions nor presented as evidence to the jury. In this regard, the role of the jury in Florida is at least of such constitutional significance that constitutional error occurs if the jury is erroneously instructed on the weighing process whereby a determination is made concerning the eligibility of a defendant for imposition of capital punishment, and ultimately whether capital punishment should be

imposed. ***Brown v. Sanders***, 546 U.S. ___, Case #04-980 (January 11, 2006); ***Espinosa v. Florida***, 505 U.S. 1079 (1992); ***Stringer v. Black***, 503 U.S. 222, 232 (1992); ***Zant v. Stephens***, 462 U.S. 862 (1983); ***Maynard v. Cartwright***, 486 U.S. 356 (1988); ***Clemons v. Mississippi***, 494 U.S. 738 (1990); ***Hodges v. Florida***, 506 U.S. 1079 (1992); ***Castro v. State***, 597 So.2d 259 (Fla. 1992).

The characterization of a valid mitigating consideration as either "statutory" or "non-statutory" is not relevant to the proper weighing of mitigating circumstances and it should not be presented as a "fact" or as argument to the jury because that description does not tend to prove nor disprove a material fact. Assuming any relevance, that information should nonetheless be excluded under § 90.403, Florida Statute, because the danger of unfair prejudice far outweighs any probative value of knowing that a particular valid mitigating consideration is not expressly set forth in §921.141(6), Florida Statute. Aggravating circumstances are expressly limited to those set forth in the statute, as expressly stated in the statute and standard jury instructions. The term "statutory mitigating circumstance" does not appear anywhere in the standard jury instructions. Instead, the statute's express inclusion of "any aspect of the defendant's character, record, or background" and "any other circumstance of the offense" converts all legitimate mitigating circumstances into statutory mitigating considerations. Any reference to §921.141(6)(h) as a "catch all" statutory factor denigrates its importance, distorts the weighing process and otherwise demeans those valid considerations that come within its scope. This distortion of the weighing process violates the Eighth and Fourteenth Amendments to the United States Constitution. Calling attention to fact that a particular valid mitigating consideration is not expressly contained in §921.141(6), Florida Statute, and/or referring to the all inclusive statutory instruction as "a catchall" consideration denies Due Process, fundamental fairness, and a reliable sentencing proceeding guaranteed by article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

B: **THE PRESENCE OF MEDIA, FAMILY MEMBERS AND UNIFORMED OFFICERS, AND SHACKLING OF THE DEFENDANT**

Trial courts must diligently avoid prejudicial influences that may distract jurors during trial. See ***Jones v. State***, 569 So.2d 1234, 1239 (Fla. 1990) ("A verdict is an intellectual task to be performed on the basis of the applicable law and facts."). The same considerations carry over

to the penalty phase of trial, where the need for reliability in the determinations is as much if not more than during the determination of guilt or innocence. This is especially so, where the eligibility of the defendant for imposition of capital punishment in Florida is determined during the penalty phase. See ***Monge v. California***, 524 U.S. 721, 732 (1998) (The penalty phase determination, "given the 'severity' and 'finality' of the sanction, is no less important than the decision about guilt."); ***Gardner v. Florida***, 430 U.S. 349, 357 (1977) (same). There is "acute need" for reliable decisionmaking when the death penalty is at issue. See ***Monge***, 524 U.S. at 732; ***Lockett v. Ohio***, 438 U.S. 586, 604 (1978) (same).

1) The presence and close proximity to the defendant of several uniformed police officers or bailiffs, and shackling and/or handcuffing the defendant even after he is found guilty of first-degree murder improperly suggests that the defendant is dangerous and otherwise detracts from the presumption of innocence to which the defendant is entitled under the Fifth and Fourteenth Amendments to the United States Constitution:

> Judicial hostility to shackling may once primarily have reflected concern for the suffering--the "tortures" and "torments"--that "very painful" chains could cause. More recently, this Court's opinions have not stressed the need to prevent physical suffering (for not all modern physical restraints are painful). Instead they have emphasized the importance of giving effect to three fundamental legal principles.
>
> First, the criminal process presumes that the defendant is innocent until proved guilty. Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process
>
> Second, the Constitution, in order to help the accused secure a meaningful defense, provides him with a right to counsel. The use of physical restraints diminishes that right. Shackles can interfere with the accused's "ability to communicate" with his lawyer Indeed, they can interfere with a defendant's ability to participate in his own defense, say by freely choosing whether to take the witness stand on his own behalf.
>
> Third, judges must seek to maintain a judicial process that is a dignified process. The courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment. And it reflects a seriousness of purpose that helps to explain the judicial system's power to inspire the confidence and to affect the behavior of a general public whose demands for justice our courts seek to serve.

> The routine use of shackles in the presence of juries would undermine these symbolic yet concrete objectives. As this Court has said, the use of shackles at trial "affront[s]" the "dignity and decorum of judicial proceedings that the judge is seeking to uphold."

Deck v. Missouri, 125 S.Ct. 2007, 2012-2014 (2005)(All citations and references omitted).

2) The presence in court of numerous uniformed law enforcement officers as spectators has the potential for reaching a point at which the presence of numerous uniformed officers negatively impacts the jury. The alleged victim was Dep. Barbara Pill, of the Brevard County Sheriff's Office. Numerous uniformed law enforcement officers are expected to attend the jury trial in this cause, which is their right, unless their presence becomes prejudicial because of the sheer number of uniformed officers in attendance. The Defendant is requesting the Court to monitor the attendance of uniformed law enforcement officers and impose appropriate restrictions to prevent any prejudicial impact or influence upon the jury.

3) Similarly, the use of cameras in the courtroom is strictly controlled by Rule of Judicial Administration 2.170, and the defendant demands strict enforcement of that rule. Any cameras used by the press should be within the area designated for cameras behind the glass/mirror at the rear of this courtroom. In that regard, Rule.2.170(d) provides, "If and when areas remote from the court facility that permit reasonable access to coverage are provided, all television camera and audio equipment shall be positioned only in such areas." (Emphasis added). This Court is asked to instruct members of the media that any interviewing by the media of witnesses, courtroom personnel, family or attorneys may not take place within the courthouse generally and never within the direct or indirect presence of any juror(s). A clear directive is also requested from this Court to control the conduct of the attorneys, witnesses and spectators during trial insofar as comments to the press that might detract from the fairness of the proceedings. The Court is asked to control the positioning of any cameras and reporters in the courtroom pursuant to Rule 2.170 and to minimize distraction and unfair prejudice that can be caused by media attention to the witnesses or family members that may be in the courthouse.

4) Florida Statutes sec. 90.616(1) provides that: (1) At the request of a party the court shall order, or upon its own motion the court may order, witnesses excluded from a proceeding so that they cannot hear the testimony of other witnesses except as provided in subsection (2).

Subsection (2)(d) provides that: in a criminal case, the victim of the crime, the victim's next of kin, the parent or guardian of a minor child victim, or a lawful representative of such person, unless, upon motion, the court determines such person's presence to be prejudicial. The Defendant moves this Court to determine pre-trial which State witnesses, within this category of people exempt from the rule, wish to be present during the trial, and to ensure that their presence will not be prejudicial.

Regarding non-witness next-of-kin: the Defendant moves this Court for to determine pre-trial which family members wish to attend court proceedings and whether their presence in the courtroom will prejudice the Defendant's right to a fair trial. The Florida Constitution grants to the next of kin of homicide victims "the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused." Art. I, sec. 16(b), Fla. Const. However, the Florida Supreme Court has noted that this provision does not provide an automatic exception to the rule of sequestration. "While in general relatives of homicide victims have the right to be present at trial, this right must yield to the defendant's right to a fair trial." Gore v. State, 599 So.2d 978, 985-86 (Fla. 1992).

C. **OBJECTIONS**

Objections must be made contemporaneously with the occurrence of error to avoid procedural default. See ***Harrell v. State***, 894 So.2d 935 (Fla. 2005). The burden is on the appellant to provide the appellate court with an adequate record for appellate review. See Fla.R.App.P. 9.200(e); ***Kirchinger v. Kirchinger***, 546 So.2d 86 (Fla. 2d DCA 1989). All grounds must be fully articulated when an objection is made in order to warn the court of the putative error and to give the court the opportunity to correct the error. See ***Occhicone v. State***, 570 So.2d 902, 906 (Fla.1990); ***Bertolotti v. Dugger***, 514 So.2d 1095, 1096 (Fla.1987) ("In order to preserve an issue for appellate review, the specific legal argument or ground upon which it is based must be presented to the trial court."); ***Starks v. State***, 627 So.2d 1194, 1197 (Fla. 3d DCA 1993). Because this case involves the possible imposition of a death sentence or a mandatory sentence of life imprisonment without parole, the undersigned is compelled to articulate all state and federal constitutional grounds for each objection, and to insist that all legal discussions between the Court and counsel be reported so that an adequate record can be maintained for full and fair appellate review. See ***Wainwright v. Sykes***, 433 U.S. 72 (1977); ***DeLap v. State***, 350

So.2d 462 (Fla.1977); Fla.R.Crim.P. 3.190(i). The defendant does not wish to waive his constitutional right to be present when such arguments and objections are made. The undersigned does not wish to make "speaking objections" in front of the jury and will attempt to refer to relevant portions of motions filed pretrial that identify the error being addressed. It is expressly asserted that, because a death penalty is unique in its finality and severity from all other types of punishment, heightened concerns of Due Process are required in order to achieve a reliable and non-arbitrary sentencing determination under article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. This basic premise is adopted as an essential, stated ground for all objections made by the defense in this case.

D. **INTERVAL BETWEEN TRIAL AND PENALTY PHASE**

In order to conduct a meaningful *voir dire* insofar as determining the availability of jurors and possible scheduling problems, to accommodate the scheduling of expert and lay witnesses and to thereby avoid the unnecessary expenditure of public funds by transporting and housing witnesses for an unnecessarily prolonged period of time, a date certain should be set for the occurrence of a penalty phase should one be necessary. This is particularly true in this case, where a number of mitigation witnesses reside outside of Brevard County. The scheduling of a date certain for penalty phase to occur prevents the needless and substantial expenditure of public funds in the event the defendant is found to be innocent or is found guilty of an offense other than first-degree murder. It is further submitted that the presentation of evidence by the attorneys and reception of the evidence and instructions by the jury will be greatly enhanced by allowing an interval between the guilt/innocence phase and the penalty phase of this jury trial.

E. **MISCELLANEOUS MATTERS OF PROCEDURE**

Undersigned counsel objects to any procedure whereby the Court comments on the in-court identification of the defendant by witnesses testifying at trial, and specifically objects to the court commenting "on the record" in the presence of the jury that any witness has identified the defendant as the subject of the witness' testimony. Florida has long forbidden this practice:

> [G]reat care should always be observed by the judge to avoid the use of any remark in the hearing of the jury that is capable, directly, or indirectly, expressly, inferentially, or by innuendo, of conveying any intimation as to

> what view he takes of the case, or that intimates his opinion as to the weight, character, or credibility of any evidence adduced. All matters of fact, and all testimony adduced, should be left to the deliberate, independent, voluntary, and unbiased judgment of the jury, wholly uninfluenced by any instruction, remarks, or intimation, either in express terms or by innuendo, from the judge, from which his view of such matters may be discerned. Any other course deprives the accused of his right to trial by jury, and is erroneous.

Lester v. State, 37 Fla. 382, 20 So. 232, 235 (Fla. 1896). Judicial comment on the evidence is expressly forbidden by statute. See Section 90.106, Florida Statutes. Courts must be sensitive to the dominant position enjoyed by the trial court, and even where a standard practice or standard jury instruction can be construed as being a judicial comment on the evidence, it should be abandoned. See ***In re Instructions in Criminal Cases***, 652 So.2d 814, 815 (Fla. 1995) (jury instruction stating "[i]nconsistent exculpatory statements can be used to affirmatively show consciousness of guilt and unlawful intent" is an improper comment on the evidence.).

A remark by the judge that a witness has identified the defendant as being the subject of his or her testimony is a judicial comment on the credibility of the witness and the weight of the evidence. Assuming that it is necessary, upon request of a party, for the Court to remark that a witness has identified the defendant in order to preserve the appellate record, that procedure can only properly be done outside the presence of jurors, either at sidebar or after the particular witness has been excused. Judicial remarks that a witness has identified the defendant should not be made before the jurors, and if they are it denies Due Process, a fair proceeding and the right to a jury trial in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16 and 22 of the Florida Constitution.

Similarly, any procedure for qualifying a witness for testifying as an expert and giving an expert opinion must occur in a way that does not cause a comment on the evidence by the Court, or by the State tendering the witness as an expert, or the Court finding that the witness is an expert.

WHEREFORE, this Court is respectfully asked to rule on the issues and matters set forth above sufficiently in advance of trial to provide effective assistance of counsel, due process and a meaningful and fair penalty proceeding in accordance with article I, sections 2, 9, 16, 17, 22, 23 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-srvice to the Office of the State Attorney, Brevard County, Florida, this 6 day of November, 2013.

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