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)(d) FLORIDA STATUTES UNCONSTITUTIONAL AS WRITTEN AND 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 to declare sections 921.141(5)(d) Florida Statutes unconstitutional. In support of this motion, the defense would state:

1. Section 921.141(5), Florida Statutes sets out the aggravating circumstances that authorize imposition of capital punishment in Florida after a defendant has been convicted of either first-degree premeditated murder or first-degree felony murder. In that regard, Section 921.141(5)(d) provides as follows:

> (5) **AGGRAVATING CIRCUMSTANCES.** Aggravating circumstances shall be limited to the following:
>
> (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, aggravated child abuse, abuse of an elderly or disabled adult resulting in great bodily harm, permanent disability,

or permanent disfigurement, arson, burglary, kidnapping, aircraft piracy or unlawful throwing, placing, or discharging of a destructive device or bomb.

2. This statutory aggravating factor is unconstitutional because it does not genuinely limit the class of persons eligible for the death penalty and is otherwise without a rational basis because it creates an unlawful presumption of death for the least aggravated form of first-degree murder.

3. As applied, section 921.141(5)(d), Florida Statute as applied in Florida violates article I, sections 2, 9, 16(a), 17, 21, 22 and 23 of the Florida Constitution, and the Fifth, Sixth, Eight and Fourteenth Amendments to the United States Constitution.

4. A death recommendation from a jury and/or a death sentence imposed by a judge using this aggravating factor 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 prosecution is asking this Court to impose 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).

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).

Instead of genuinely narrowing the class of persons eligible for the death penalty, the felony murder circumstance automatically expands the class of those eligible for the death penalty. Cf. ***Collins v. Lockhart***, 754 F.2d 258, 264 (8th Cir. 1985) ("We see no escape from the conclusion that an aggravating circumstance which merely repeats an element of the underlying crime cannot perform this narrowing function."). The felony murder circumstance repeats an element of the offense of felony murder, and creates an unlawful presumption that death is an appropriate sentence. See ***Jackson v. State***, 502 So.2d 409, 413 (Fla. 1986) ("When there are one or more valid factors in aggravation and none in mitigation, death is presumed to be the appropriate penalty"); compare ***Jackson v. Dugger***, 837 F.2d 1469, 1473 (11th Cir. 1988) ("Such a presumption, if employed at the level of the sentencer, vitiates the individualized sentencing determination required by the Eighth Amendment"). Felony murder is the least aggravated form of first-degree murder since it does not entail a premeditated design to kill another unlawfully. Hence, the felony murder aggravating circumstance creates a presumption of death for the least aggravated form of first-degree murder. It does the opposite of what the Constitution requires of an aggravating circumstance. An accidental killing during an enumerated felony converts a non-criminal act into a first-degree murder and automatically authorizes imposition of capital punishment. The circumstance thus does not serve the

constitutionally mandated channeling function required by the Eighth Amendment. *See* ***Zant***, *supra*..

The felony murder aggravating circumstance, when applied to unpremeditated murder turns a mitigating circumstance into an aggravating circumstance. Lack of premeditation is a mitigating circumstance. *See* ***Lockett v. Ohio***, 438 U.S. 586, 608, 98 S.Ct. 2954, 57 L. Ed. 2d 973 (1978) (death sentence set aside where state death penalty statute did not provide for full consideration of, *inter alia*, mitigating factor of lack of intent to cause death). Because it prevents consideration of lack of intent to kill as mitigation, the felony murder circumstance violates ***Hitchcock v. Dugger***, 107 S.Ct. 1821 (1987) (Florida death penalty statute improperly limited full consideration of mitigating circumstances).

In ***Lowenfield v. Phelps***, 108 S.Ct. 546 (1988), the Court rejected a challenge to the portion of the Louisiana death penalty statute which called for the death penalty for a premeditated murder committed during the course of a violent felony, but in doing so distinguished Florida's statutory scheme. Louisiana's statute, the Court held, narrows the class of death eligible by narrowing the statutory definition of capital offenses. Id. at 555. Florida, on the other hand, defines first degree murder broadly and uses only aggravating factors to narrow the class of death eligible. Further, ***Lowenfield*** did not involve a ***Lockett/Hitchcock*** argument such as that made at bar.

Section 921.141(5)(d), and the standard instruction the sentencing jury is required to follow, as shown above, do not meet the constitutional requirement of narrowing the class of persons eligible for the death penalty, and in fact has the opposite effect. See

Barnard, "Death Penalty," 13 Nova L.Rev. 907, 917-22 (1989). The Florida felony murder circumstance is unconstitutional.

WHEREFORE, the defendant moves that this Court enter its order declaring section 921.141(5) (d), Florida Statutes unconstitutional as written and as applied.

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 9 day of November, 2013.

FBN: 0013414

for

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