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 § 921.141 (1), FLORIDA STATUTES UNCONSTITUTIONAL AND IN THE ALTERNATIVE TO BAR THE STATE'S USE OF HEARSAY EVIDENCE AT PENALTY PHASE

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 (1), Florida Statutes unconstitutional and barring the state from using hearsay evidence at the penalty phase proceedings. In support of this motion, the defense would state:

1. The Defendant has been indicted for First degree premeditated murder. The State has filed its notice pursuant to Fla.R.Crim.P. 3.202 that it intends to seek the death penalty in this case. Therefore, 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 fact-finding 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).

2. An unconstitutional death penalty statute and use of hearsay by the state at capital sentencing violates article 1, sections 2 (basic rights), 9 (due process), 16 (rights of accused), 17 (cruel or unusual punishment), 21 (access to courts), and 22 (trial by jury) of the Florida Constitution, and the fifth (due process), sixth (confrontation, jury trial), eighth (cruel and unusual punishment), and fourteenth (due process and incorporation) amendments to the United States Constitution.

3. Section 921.141(1), Florida Statutes, which governs capital sentencing hearings, states in pertinent part (emphasis added):

> ... In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

4. The Confrontation Clauses of the state and federal constitutions secure to criminal defendants the right to confront and cross-examine the state's witnesses. They generally bar the state's use of hearsay unless the evidence fits a firmly rooted hearsay exception or is accompanied by particularized guarantees of trustworthiness. Idaho v. Wright, 497 U.S. 805 (1990), Ohio v. Roberts, 448 U.S. 56 (1980); however, the Roberts reliability test was subsequently overruled in Crawford vs. Washington, 541 U.S. 36 (2004)

5. The Confrontation Clauses apply to trial-like sentencing proceedings under Specht v. Patterson, 386 U.S. 605 (1967). In Specht, the Court ruled that a defendant had the right to confront and cross-examine witnesses against him at trial-like jury sentencing proceedings under the Colorado Sex Offenders Act. The Court reached this result notwithstanding that in Williams v. New York, 337 U.S. 241 (1948), it had declined to apply the Confrontation Clause to capital sentencing proceeding by a judge. Subsequently, in Gardner v. Florida, 430 U.S. 349 (1977), the Court made clear that it no longer approved of Williams.

6. Accordingly, in Engle v. State, 438 So.2d 803, 813-14 (Fla.1983), the court ruled that Specht required reversal of the death sentence where judge had considered a co-defendant's hearsay statement in making the sentencing decision, noting:

> The sixth amendment right of an accused to confront the witnesses against him is a funda mental right which is made obligatory on the states by the due process of law clause of the fourteenth amendment to the United States Constitution. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). The primary interest secured by, and the Major reason underlying the confrontation clause, is the right of cross-examination. Pointer v. Texas. This right of confrontation protected by cross-examination is a right that has been applied to the sentencing process. Specht v. Patterson.

7. The Florida Supreme Court failed to provide clarity in Rhodes v. State, 547 So. 2d 1201 (Fla. 1989). There the state presented the capital sentencing jury with evidence about an offense committed by the defendant in Nevada. A police captain played a taped interview of the Nevada victim, and gave hearsay testimony about the statement. The Court ruled that the Confrontation Clause barred the State's use of the taped statement. Id. 1204. But the court then ruled that the State could use the captain's hearsay testimony regarding the victim's statement, concluding that, because the defendant could cross-examine the captain, his hearsay testimony was admissible. Thus the Court determined that capital sentencing is the sort of trial proceeding to which the Clause applies, but misunderstood the nature of the defendant's right to confront the source of the information against him. See also Waterhouse v. State, 596 So.2d 1008 (Fla.), cert. denied, 113 S.Ct. 418 (1992) (citing Rhodes).

8. Thus Rhodes reached the inconsistent conclusion that, although it applies to capital proceedings, the Confrontation Clause is not violated by testimony founded on hearsay provided by persons whom the defendant cannot confront. Hence Florida applies a flawed version of the Confrontation Clause. Florida's rule is directly contrary to the plain meaning of the Sixth Amendment: the defendant has the right to confront the government's witnesses in court. The Florida Supreme Court has suggested no reason to believe that the hearsay testimony was so reliable as to make confrontation and cross-examination unnecessary. Cf. Idaho v. Wright.

9 In Crawford vs. Washington, 541 U.S. 36 (2004), the United States Supreme Court held that testimonial hearsay is excludable at trial under the confrontation clause unless the declarant

is unavailable to testify at trial and the defendant has had a prior opportunity to cross-examine the declarant. More recently, in United States v. Mills, 2006 WL 2381329(C.D. Cal.) Aug. 17, 2006, the Court held that the constitutional right to confrontation applies to both phases of federal capital sentencing under the Federal Death Penalty Act. In Mills, the Court references several state appellate court opinions which have applied the Confrontation Clause to their penalty phase proceedings without noting any controversy regarding its application. Listed among these numerous decisions is Perez v. State, 919 So.2d 347, 368 (Fla. 2005). Although the Florida Supreme Court in Perez rejected a blanket Crawford attack seeking to have the Court declare 921.141(1) unconstitutional, the Court recognized that:

> pursuant to Crawford ..., out-of-court statements by witnesses that are testimonial in nature are barred under the Confrontation Clause, unless witnesses are unavailable and the defendant had a prior opportunity to cross-examine them.

Id at 368. Significantly, the Court did not reject Perez' Crawford objection to the admissibility of hearsay in penalty phase proceedings by ruling that Crawford does not apply to such proceedings, as would be expected if the Court believed that Crawford does not apply to penalty phase trials. Instead, the Court rejected Perez' Crawford argument - that testimonial hearsay was improperly admitted at his penalty phase proceeding - by ruling that Perez had not made any specific hearsay objections during his penalty phase proceedings. In Mills, the United States Supreme Court expressed its understanding that Florida is among those states that have recognized a capital defendant's right to the full protection of the Sixth amendment and the applicability of Crawford in Capital sentencing proceedings. Prior to Crawford, the Florida Supreme Court expressed the uncontroverted proposition that the Sixth Amendment right of confrontation applies to all three phases of the capital trial. Rodriguez v. State, 753 So.2d 29, 43(Fla. 2000).

10. The Florida Supreme Court in Rodgers v. State, 948 So.2d 655, 663(Fla. 2006) held that the requirements of Crawford, and a defendant's rights under the Confrontation Clause,

apply to the guilt phase, the penalty phase and sentencing proceedings. See Franklin v. State, 965 So.2d 79, 88 (Fla. 2007).

11. In view of the foregoing, Crawford and Perez and Rogers and Franklin require the entry of an order barring the use by the State, at the penalty phase proceeding in the above-styled cause, of any testimonial hearsay.

WHEREFORE, the defense moves that this Court enter its order declaring section 921.141(1) unconstitutional; alternatively, the Defendant requests the Court enter its order barring the state's use of hearsay at sentencing and granting whatever further relief 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.

FBN: 0012414

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