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(2)&(3), FLORIDA STATUTES, UNCONSTITUTIONAL (MITIGATION MUST "OUTWEIGH" AGGRAVATION

The Defendant, BRANDON LEE BRADLEY, pursuant to article I, sections 2, 9, 16, 17, 22 and 23 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution moves this Court to declare Florida's death penalty unconstitutional based on the following:

1. This Defendant has been indicted for one count of first-degree murder.
2. The State of Florida has filed notice pursuant to Fla.R.Crim.P. 3.202 that it seeks imposition of the death penalty in this case.
3. The Defendant has fundamental interests in both life and liberty that are protected by the Fourteenth Amendment to the United States Constitution. As such, statutes interfering with those fundamental rights must be narrowly drawn to achieve a legitimate state interest. Further, minimum substantive due process under the Fifth and Fourteenth Amendments to the United States Constitution, require that statutes be rational. Sections 921.141(2) and (3), Florida Statute, fail both tests and thus violate the Fifth and Fourteenth Amendments to the United States Constitution.
4. The procedure mandated by Section 921.141, Florida Statute, is neither unclear

nor ambiguous. The provisions of Section 921.141(2) and (3), Florida Statutes, are integral components of the procedure in Florida for imposition of capital punishment and for determining whether a sentence of capital punishment or life imprisonment without possibility of parole is imposed following a conviction for first-degree murder. As such, the unconstitutionality of these provisions renders the entire Florida death penalty statute unconstitutional.

5. The procedure for imposition of capital punishment in Florida is set forth in §921.141, Florida Statute (2001), as follows:

> **(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. . . .
>
> **(2) Advisory sentence by the jury.**--After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.
>
> **(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.

6. At present, the substance of §921.141, Florida Statute, is provided to the jury through Florida's Standard Jury instructions as follows:

> The State and the defendant may now present evidence relative to the nature of the crime and the character of the defendant. You are instructed that [this evidence when considered with the evidence you have already heard] [this evidence] is presented in order that you might determine, first, **whether sufficient aggravating circumstances exist that would justify the imposition of the death**

penalty and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any. At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation that you may consider.

* * *

As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge; however, it is your duty to follow the law that will now be given you by the court and render to the court an **advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist**.

* * *

If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole. **Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances**

* * *

The sentence that you recommend to the court must be based upon the facts as you find them from the evidence and the law. **You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations**.

Florida Standard Jury Instructions in Criminal Cases, 7.11. Penalty Proceedings, Capital Cases (Emphasis added).

7. The foregoing language in the statute and standard jury instructions creates a *de facto* presumption that death is the appropriate sentence that must be rebutted by the defendant contrary to the right to a jury trial, fundamental fairness and Due Process under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, §§2, 9, 16,

17, 22 and 23 of the Florida Constitution, as set forth with more particularity in the memorandum of law set forth in this motion and as may be argued *ore tenus*.

8. Requiring that "*sufficient* mitigating circumstances exist which *outweigh* the aggravating considerations found to exist") in order to receive a sentence of life imprisonment in accordance with Section 921.141, Florida Statues and the Standard Jury Instructions places a *higher* burden of persuasion on the defendant than was on the State initially to support imposition of the death penalty. This denies the right to a jury trial, fundamental fairness and Due Process under article I, §§2, 9, 16, 17 and 22 of the Florida Constitution and the fifth, sixth, eighth and fourteenth Amendments to the United States Constitution, as set forth with more particularity in the memorandum of law set forth in this motion and as may be argued *ore tenus*.

9. The Florida Supreme Court uses the statutory-standard (requiring the mitigation to outweigh the aggravation) in applying its harmless error analysis to determine whether preserved error prejudiced the defendant. Because the Supreme Court of Florida uses this erroneous statutory standard, the appellate review provided by the Florida Supreme Court denied Due Process and renders imposition of capital punishment in Florida arbitrary, capricious and unreliable in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, §§ 2, 9, 16, 17 and 22 of the Florida Constitution.

10. Because the statute is unambiguous in its language and the express requirement that sufficient mitigating circumstances must exist to outweigh the aggravating circumstances in order for the defendant to receive a life sentence, the courts cannot cure the defect in the plain language of the statute. Doing so effectively rewrites the unambiguous statute contrary to the Separation of Powers provision of Florida's Constitution set forth in article II, §3 of the Florida

Constitution.

11. A violation of Florida's Separation of Powers provision constitutes a violation of Due Process under the Fourteenth Amendment to the United States Constitution.

12. In further support and elaboration of the foregoing, the Accused relies on the following memorandum of law and any further argument that may be offered *ore tenus*:

MEMORANDUM OF LAW

Heightened standards of due process apply to imposition of the death penalty due to the severity, uniqueness and finality of that sanction. ***Elledge v. State***, 346 So.2d 998 (Fla.1977); ***Beck v. Alabama***, 447 U.S. 625, 638, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1988). See ***Burger v. Kemp***, 483 U.S. 776, 785 (1987) (A court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case."). The Florida Supreme Court requires that timely, specific objections be presented to the trial court in order to preserve constitutional errors for later correction. This requirement exists even when the Florida Supreme Court has previously repeatedly rejected the identical issue. ***Harrell v. State***, 894 So.2d 935 (Fla. 2005). See e.g., ***Hodges v. State***, 619 So.2d 272, 273 (Fla. 1993) (erroneous CCP instruction not preserved for appeal due to absence of timely objection). Therefore, the Accused hereby expressly contests the constitutionality of §921.141, Florida Statutes, and the respective standard jury instructions, based on violations of the state and federal constitutions as set forth below.

The statute and jury instructions direct the judge and jury to perform the following analysis and to use the following legal standard to determine whether a sentence of life imprisonment or the death penalty should be imposed:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to ***outweigh*** the aggravating circumstances.

§921.141(3), Florida Statutes (emphasis added). The "outweigh" standard of persuasion violates Due Process under article I, §§2, 9, 16, 17, 22 and 23 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Though it is not expressly stated, the statute first creates a *de facto* presumption that death is the appropriate sanction due to the initial determination as to the propriety of the death penalty occurring in the absence of any consideration of mitigating circumstances. The statute then creates a higher burden to justify imposition of life imprisonment than existed when the presumptively correct sentence of capital punishment was determined to exist. This language lacks any rational basis and otherwise is too broad to satisfy the Due Process Clause of the Fourteenth Amendment..

Because the statutory language is unambiguous in its requirement that the mitigation must outweigh the aggravation, the constitutional defect cannot be cured by judicial fiat or rules of statutory construction. This is so because the language of the statute is not ambiguous. 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."). The power of a court to construe away constitutional infirmity is limited. "Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature." ***Salina v. United States***, 522 U.S. 52, 59-60 (1985). The maxim cannot apply where the statute itself is unambiguous. ***United States v. Oakland Cannabis Buyers' Cooperative***, 532

U.S. 483, 494 (2001). Citing the foregoing language and applying these cases, the Kansas Supreme Court found the Kansas death penalty statute to be unconstitutional because K.S.A. 21-4624(e) unambiguously required imposition of a death sentence unless it was shown that the mitigation outweighed the aggravation. ***Kansas v. Marsh***, 278 Kan. 520, 102 P.3rd 445 (2004). The Court previously ruled that the "mitigation outweigh the aggravation" standard failed to adequately channel the sentencer's discretion, where a state of equipoise could exist if the aggravation and mitigation weighed the same, yet a death sentence would be required under the statute. ***Kansas v. Kleypas***, 272 Kan. 894, 40 P.3d 139 (2001).

Insofar as the "mitigation must outweigh" the aggravation language, it is patent that a death sentence is to be imposed when the reasons for imposition of capital punishment are no more weighty than are the reasons for imposition of a life sentence. There is no rational reason for a death penalty to be imposed when a life sentence is just as appropriate, and the statute thus lacks any rational basis and denies substantive due process in violation of the Fifth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16 and 22 of the Florida Constitution. Further, the statute interferes with the fundamental right to life and liberty protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Because the statutory language is not narrowly drawn to accommodate only the State's interest and otherwise allows the government to kill a citizen when the reasons to do so are no more weighty than are the reasons for imprisoning the citizen for life, the statute is unconstitutional.

Florida's statute first creates a presumption that death is appropriate where statutory aggravating circumstances are analyzed without any contemporaneous consideration of the

mitigation that may exist. The contention that the statute and standard jury instructions create an unlawful presumption that the death penalty is justified in the absence of any mitigating circumstances was not specifically addressed when Florida's death penalty was initially upheld by the United States Supreme Court, and it is apparent that the United States Supreme Court misapprehended Florida law. *See* ***Proffitt v. Florida***, 96 S.Ct. 461, 466-467 (1976) ("Under the state law that decision [of whether to impose a sentence of death or life imprisonment] turned on *whether certain statutory aggravating circumstances outweighed any statutory mitigating circumstances* found to exist.") (Emphasis added). In fact and practice, the focus in Florida is not on whether the statutory aggravating factors outweigh the mitigating circumstances as perceived by the United States Supreme Court, but instead on whether the mitigating circumstances rebut the presumption that death is the appropriate sentence if aggravating circumstances exist. For example, not only is the jury repeatedly and unequivocally told that the mitigation must outweigh the aggravation for a sentence of life imprisonment to be imposed, the Supreme Court of Florida applies that standard to determine the existence of "harmless error" even when the error is properly preserved. See ***Card v. State***, 803 So.2d 613, 627 (Fla. 2000) (Harmless for trial court to overlook mitigating evidence because "we conclude that the mitigating evidence would not outweigh the strong case for aggravation."); ***Hill v. State***, 642 So.2d 1071, 1074 (Fla. 1994) (holding that in undertaking a harmless error analysis after striking an aggravator, the Court must determine whether a reasonable possibility exists that the evidence in mitigation is sufficient to outweigh the remaining aggravating circumstances.); ***Bryant v. State***, 910 So.2d 810 (Fla. 2005) (same).

Contrary to clear and unambiguous language of §921.141, the Florida Supreme Court has

unequivocally held that a death sentence is NOT compelled even when the aggravation outweighs the mitigation, and in fact has repeatedly, squarely held that a life sentence is properly imposed even where the aggravation outweighs the mitigation:

> During jury selection, the prosecutor misstated Florida law by advising the prospective jurors that if "the evidence in aggravation outweighs the evidence in mitigation, the law says that you *must* recommend that Mr. Cox die." (Emphasis supplied.) The substance of this statement was repeated five times to the jury, four times during voir dire and once during closing argument. It is unmistakable that these statements are improper characterizations of Florida law regarding the weighing of mitigators and aggravators, as we have declared many times that "a jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors." Henyard v. State, 689 So.2d 239, 249-50 (Fla. 1996); *see also* Gregg v. Georgia, 428 U.S. 153, 203, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (holding that a jury can dispense mercy, even where the death penalty is deserved); Alvord v. State, 322 So.2d 533, 540 (Fla. 1975).

Cox v. State, 819 So.2d 705, 717 (Fla. 2002). Yet, the Florida Supreme Court has also clearly recognized that the statute and standard jury instructions create a presumption that, in the absence of mitigating circumstances, death is *presumed* to be the appropriate sentence. See ***Davis v. State***, 703 So.2d 1055, 1060-61 (Fla. 1997) ("Where there are one or more valid aggravating factors that support a death sentence and no mitigating circumstances to weigh against the aggravating factors, *death is presumed to be the appropriate penalty.*"); ***Elledge v. State***, 706 So.2d 1340, 1346 (Fla.1997) (no error where trial judge stated "*death is presumed to be the proper penalty* when one or more aggravating circumstances are found unless they are outweighed by one or more mitigating circumstances."); ***Valle v. State***, 474 So.2d 796, 806 (Fla. 1985) ("When one or more of the aggravating circumstances is found, death is *presumed to be the proper sentence* unless it or they are overridden by one or more of the mitigating circumstances[.]"); ***Burr v. State***, 466 So.2d 1051, 1054 (Fla. 1985) ("There were several

aggravating *circumstances and no mitigating circumstances, so* death was to be presumed the appropriate penalty."); ***Blanco v. State***, 452 So.2d 520, 526 (Fla.1984) ("Where there are one or more valid aggravating factors that support a death sentence and no mitigating circumstances to weigh against the aggravating factors, *death is presumed to be the appropriate penalty.*"); ***Funchess v. State***, 449 So.2d 1283 (Fla.1984) (objection to trial judge instructing jury that death is presumed to be the proper sentence_unless aggravation is overridden by mitigation without merit); ***White v. State***, 446 So.2d 1031, 1037 (Fla. 1984) ("When there are one or more valid aggravating factors which support a death sentence, in the absence of any mitigating factor(s) which might override the aggravating factors, *death is presumed to be the appropriate penalty.*"); ***Sims v. State***, 444 So.2d 922, 926 (Fla.1983) ("Where there are some aggravating and no mitigating circumstances, *death is presumed to be the appropriate punishment.*"); ***Jackson v. Wainwright***, 421 So.2d 1385, 1389 (Fla. 1982) ("The court instructed the jury that should mitigating circumstances outweigh the presumed fact, they were not bound by the presumption. The instruction of the trial court was not improper, so the failure of counsel to challenge the instruction on direct appeal did not deprive defendant of effective assistance of appellate counsel."); ***Christopher v. State***, 407 So.2d 198, 203 (Fla. 1981) ("We also held in [*State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973)] that when one or more aggravating circumstances are found, the *death penalty is presumed proper* unless the aggravating circumstance or circumstances are overridden by one or more of the mitigating circumstances."); ***Smith v. State***, 407 So.2d 894, 903 (Fla. 1981) ("As we noted in [*State v.* Dixon, 283 So.2d 1, 9 (Fla. 1973)], when one or more of the aggravating circumstances is found, *death is presumed to be the proper sentence* unless it or they are overridden by one or more of the mitigating circumstances[.]");

Zeigler v. State, 402 So.2d 365, 375 (Fla. 1981) ("When one or more of the aggravating circumstances is found, *death is presumed to be the proper sentence*[.]"); ***White v. State***, 403 So.2d 331, 340 (Fla. 1981) ("Death is presumed to be the proper penalty when one or more aggravating circumstances are found unless they are outweighed by one or more mitigating circumstances."); ***Jacobs v. State***, 396 So.2d 1113, 1119 (Fla. 1981) ("When one or more of the aggravating circumstances is found, *death is presumed to be the proper sentence* unless it or they are overridden by one or more of the mitigating circumstances[.]"); ***Shriner v. State***, 386 So.2d 525, 534 (Fla. 1980) ("We have here two valid aggravating circumstances counterbalanced by no mitigating circumstances. *Since death is presumed in this situation*, improper consideration of a nonstatutory factor does not render the sentence invalid") *(footnote omitted); **Lewis v. State**, 377 So.2d 640,647 (Fla. 1979) (Adkins, J., dissenting) ("At least one aggravating circumstance was* properly found by the court. Therefore, *death should be presumed to be the proper sentence* unless the aggravating circumstance is overridden by one or more of the mitigating circumstances."); ***Stone v. State***, 378 So.2d 765, 772 (Fla., 1979) ("Inasmuch as the trial court found these other aggravating circumstances, and no mitigating circumstances, *death is presumed to be the proper sentence.*"); ***Ford v. State***, 374 So.2d 496, 503 (Fla. 1979) ("Consequently, even though there was error in assessment of some of the statutory aggravating factors, there being no mitigating factors present *death is presumed to be the appropriate penalty.*"); ***Spenkelink v. State***, 372 So.2d 65, 66 (Fla. 1979)(England, J., concurring) ("We have repeatedly held that "(w)hen one or more of the aggravating circumstances is found, *death is presumed to be the proper sentence* unless it or they are overridden by one or more of the mitigating circumstances . . . ."); ***Holmes v. State***, 374 So.2d 944, 950 (Fla. 1979) ("When one or

more of the aggravating circumstances is found, *death is presumed to be the proper sentence* unless it or they are overridden by one or more of the mitigating circumstances[.]"); ***Foster v. State***, 369 So.2d 928, 931 (Fla. 1979) ("When one or more of the aggravating circumstances is found, *death is presumed to be the proper sentence* unless it or they are overridden by one or more of the mitigating circumstances[.]"); ***LeDuc v. State***, 365 So.2d 149, 152 (Fla. 1978) ("The case of State v. Dixon, 283 So.2d 1 (Fla.1973), established that when one or more aggravating circumstances is found, *death is presumed to be the proper sentence* in the absence of any mitigating circumstances."); ***Buckrem v. State***, 355 So.2d 111, 113 (Fla. 1978) ("When one or more of the aggravating circumstances is found, *death is presumed to be the proper sentence* unless it or they are overridden by one or more of the mitigating circumstances[.]"); ***Alford v. State***, 307 So.2d 433, 444 (Fla. 1975) ("When one or more of the aggravating circumstances is found, *death is presumed to be the proper sentence* unless it or they are overridden by one or more of the mitigating circumstances[.]"); ***State v. Dixon***, 283 So.2d 1, 9 (Fla. 1973) ("When one or more of the aggravating circumstances is found, *death is presumed to be the proper sentence* unless it or they are overridden by one or more of the mitigating circumstances[.]"). (Emphasis added to all)

The fact that neither the statute nor the standard jury instructions use the word "presumption" has no significance when the recognized effect of the statute and standard jury instruction is to create a presumption that death is the proper sentence once an aggravating circumstance has been established. The ability of a defendant to "rebut" that presumption does not make the statute and jury instructions constitutional where the standard to rebut the presumption that death is the appropriate sentence is that the weight of the mitigation exceed that

of the aggravation. This heightened standard is clearly articulated in §921.141, Florida Statutes and repeatedly given to the jury in the standard jury instructions. That is the standard used and approved by trial judges in imposing the death penalty. E.g., ***Armstrong v. State***, 642 So.2d 7340, 739 (Fla. 1994) (approving the wording of the trial judge's sentencing order imposing a death sentence because "there are sufficient aggravating circumstances existing to justify the sentence of death, and this Court after weighing the aggravating and mitigating circumstances, being of the additional opinion that no mitigating circumstances exist to outweigh the aggravating circumstances.").

The right to a jury trial under the Sixth Amendment and the rights to fundamental fairness and Due Process under the Fifth and Fourteenth Amendments require that the State bear the ultimate burden of persuasion that imposition of capital punishment is justified.

> The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S., at 364, 90 S.Ct., at 1073. This "bedrock, 'axiomatic and elementary' [constitutional] principle," *id.*, at 363, 90 S.Ct., at 1072, prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime. *Sandstrom v. Montana*, *supra*, at 520-524, 99 S.Ct., at 2457-2459; *Patterson v. New York*, 432 U.S. 197, 210, 215, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977); *Mullaney v. Wilbur*, 421 U.S. 684, 698-701, 95 S.Ct. 1881, 1889-1890, 44 L.Ed.2d 508 (1975); see also *Morissette v. United States*, 342 U.S. 246, 274-275, 72 S.Ct. 240, 255, 96 L.Ed 288 (1952). The prohibition protects the "fundamental value determination of our society," given voice in Justice Harlan's concurrence in *Winship*, that "it is far worse to convict an innocent man than to let a guilty man go free." 397 U.S., at 372, 90 S.Ct., at 1077. See *Speiser v. Randall*, 357 U.S. 513, 525-526, 78 S.Ct. 1332, 1341-1342, 2 L.Ed.2d 1460 (1958). The question before the Court in this case is almost identical to that before the Court in *Sandstrom*: "whether the challenged jury instruction had the effect of relieving the State of the burden of proof enunciated in *Winship* on the critical question of ... state of mind," 442 U.S., at 521, 99 S.Ct., at 2458, by creating a mandatory presumption of intent upon proof by the State of other elements of the offense.

Francis v. Franklin, 105 S.Ct. 1965, 1970 (1985).

Functionally, Florida's statute and standard jury instruction are equivalent to the procedure condemned in ***Mullaney v. Wilbur***, 95 S.Ct. 1881 (1975). ***Mullaney*** ruled that the procedure in Maine denied Due Process where the State had only to prove that an intentional and unlawful homicide occurred, and the defendant then bore the burden of proving "by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation" to avoid punishment for committing murder as opposed to manslaughter. ***Mullaney***, 95 S.Ct. at 1883. The United States Supreme Court ruled that it is fair to cast the burden of producing evidence on the defendant to place an ultimate fact in issue, but consistent with ***In re Winship***, 397 U.S. 358 (1970), Due Process and the right to a jury trial require that the State ultimately bear the burden of persuasion beyond a reasonable doubt. "The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty." ***Mullaney***, 95 S.Ct. 15 1889.

> Winship is concerned with substance rather than this kind of formalism. The rationale of that case requires an analysis that looks to the "operation and effect of the law as applied and enforced by the state," (citation omitted), and to the interests of both the State and the defendant as affected by the allocation of the burden of proof.

Mullaney, 95 S.Ct. 1890.

The importance of the State bearing the burden of persuasion beyond a reasonable doubt of the ultimate issue in question was explained in both ***Mullaney*** and ***In re Winship***, 397 U.S. 358 (1970). The requirement is a component of fundamental fairness that serves as a cornerstone for public acceptance of the outcome of the trial:

> "The requirement of proof beyond a reasonable doubt has (a) vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. . . 'Moreover, the use of the reasonable-doubt standard is indispensable to the command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." 397 U.S., at 363, 364, 90 S.Ct., at 1072.

Mullaney, 95 S.Ct., at 1890. Additionally, due to the uniqueness of the severity and finality of capital punishment, Due Process compels heightened scrutiny of the procedural fairness and reliability that attends the imposition of the death penalty:

> Even assuming, however, that the proceeding on the prior conviction allegation has the "hallmarks" of a trial that we identified in *Bullington*, a critical component of our reasoning in that case was the capital sentencing context. The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. "It is of vital importance" that the decisions made in that context "be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). *Because the death penalty is unique "in both its severity and its finality,"* id., at 357, 97 S.Ct., at 1204, *we have recognized an acute need for reliability in capital sentencing proceedings.* See *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); see also *Strickland v. Washington*, 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ("[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding").

Monge v. California, 524 U.S. 721, 118 S.Ct. 2246, 2252 (1998) (emphasis added). The Florida Supreme Court has also expressly acknowledged the constitutional requirement of reliable fact-finding and heightened due process concerns in the context of capital punishment. See ***Arvelaez***

v. Butterworth, 738 So.2d 326, 326-27 (Fla.1999) ("We acknowledge we have a constitutional responsibility to ensure the death penalty is administered in a fair, consistent *and reliable manner* . . . ") (emphasis added). The reliability of a death sentence is constitutionally deficient if the burden of persuasion as to the propriety of the imposition of the death penalty is less than the burden required to obtain a life sentence.

By mandating that the mitigating circumstances "outweigh" the aggravating circumstances, §921.141(3), Fla.Stat., Florida's capital sentencing procedure creates a higher threshold for imposition of a life sentence than existed for imposition of the death penalty Due Process requires that the ultimate burden of persuasion be on the State to prove the propriety of the death penalty in light of all of the considerations that govern its imposition, not just those considerations that justify its imposition. Specifically, the language of the statute and standard jury instructions create a presumption that death is appropriate when an aggravating circumstance is proved to exist, without any consideration of the mitigating considerations surrounding the facts of the crime or the individual characteristics of the defendant. This determination, made without consideration of mitigation, becomes a presumption that can only be rebutted by more evidence than was required for the State to persuade the jury that the death penalty is appropriate.

More specifically, the State only has the burden of persuading the jury that the death penalty is appropriate in the absence of any mitigating considerations. Under Florida law and the standard jury instructions, the jury must first determine whether "sufficient" aggravating circumstances exist for imposition of the death penalty (again, expressly *without* considering mitigating circumstances). Implicit in that statute and instructions is the fact that two or three or

more statutory aggravating circumstances may have to exist before they are deemed "sufficient" for imposition of capital punishment. It is only after the jury and/or judge have determined that there are "sufficient" aggravating circumstances for imposing the death penalty that the inquiry shifts to determine whether "sufficient mitigating circumstances exist that *outweigh the aggravating circumstances.*" Thus, in order to then persuade the jury and/or judge that a life sentence is appropriate, the judge and jury must determine that the mitigation is weightier than all of the aggravation – a higher burden that was on the State initially.

The Florida Supreme Court has often summarily rejected, in summarized form and without analysis, arguments that Florida's death penalty is unconstitutional because the "burden is shifted" to the defendant to prove that a life sentence is appropriate. See ***Elledge v. State***, 911 So.2d 57 (Fla. 2005) (holding without analysis that, "this Court has repeatedly rejected claims that the standard jury instruction impermissibly shifts the burden to the defense to prove that death is not the appropriate sentence"); ***Rodriguez v. State***, 919 So.2d 1252 (Fla. 2005) ("We have also repeatedly rejected claims that the standard jury instruction impermissibly shifts the burden to the defense to prove that death is not the appropriate sentence. *See*, *e.g.*, *Sweet v. Moore*, 822 So.2d 1269, 1274 (Fla. 2002); *Carroll v. State*, 815 So.2d 601, 622-23 (Fla. 2002); *San Martin v. State*, 705 So.2d 1337, 1350 (Fla. 1997) (concluding that weighing provisions in Florida's death penalty statute requiring the jury to determine '[w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist' and the standard jury instruction thereon did not unconstitutionally shift the burden to the defendant to prove why he should not be given a death sentence.")); ***Asay v. Moore***, 828 So.2d 985, 993 (Fla. 2002) (holding that issue waived, and in dicta stating "This Court has repeatedly rejected the

argument that the standard jury instruction shifted the burden to the defense. See, e.g., ***San Martin v. State***, 705 So.2d 1337, 1350 (Fla. 1997); ***Shellito v. State***, 701 So.2d 837, 842 (Fla. 1997); ***Sweet v. Moore***, 822 So.2d 1269, 1274 (Fla. 2002) (holding that issue waived, and in dicta stating that argument repeatedly rejected in ***Carroll***, ***Rutherford***, ***Downs***, ***San Martin*** and ***Shellito***); ***Cox v. State***, 819 So.2d 705, 725 (Fla. 2002) ("Finally, this Court 'has repeatedly held that there is no merit to the burden shifting claim.' ***Freeman v. State***, 761 So.2d 1055, 1067 (Fla. 2000); *see also* ***Shellito v. State***, 701 So.2d 837, 842-43 (Fla. 1997); ***Carroll v. State***, 815 So.2d 601, 623 (Fla. 2002) (holding that issue waived, and in dicta stating "that the burden shifting argument is without merit" citing ***Rutherford*** and ***Demps v. Dugger***); ***Rutherford v. Moore***, 774 So.2d 637, 644 (Fla. 2000) (holding that standard jury instructions improperly shift the burden to the defendant to prove that death is inappropriate has been previously rejected, citing ***Downs*** and ***Demps v. Dugger***, 714 So.2d 365, 368 fn. 8 (Fla. 1998)); ***Downs v. State***, 740 So.2d 509, 510 fn 4 & 5 (Fla. 1999) (holding that issue is waived); ***San Martin v. State***, 705 So.2d 1337, 1350 (Fla. 1997) (holding that issue not preserved, and in dicta stating claim rejected by ***Walton v. Arizona*** and ***Arango***); ***Freeman v. State***, 761 So.2d 1055, 1067 (Fla. 2000) (held that burden shifting not preserved, and in dicta said it was without merit anyway); ***Demps v. Dugger***, 714 So.2d 365, 368 (Fla. 1998) (held that issue was waived, dicta noting that issue without merit, citing ***Shellito***); ***Shellito v. State***, 701 So.2d 837, 842-43 (Fla. 1997) (holding that standard jury instructions do not improperly shift the burden of proof, citing ***Walton v. Arizona*** and ***Robinson***); ***Robinson v. State***, 574 So.2d 108, 113 fn.7 (Fla. 1991) (generic rejection of issue claiming trial court erred in refusing to give requested instruction to eliminate shifting of burden of proof, citing ***Arango***); ***Preston v. State***, 531 So.2d 154, 160 (Fla. 1988) (holding that issue

was waived, and in dicta stating "when viewed as a whole, the instructions given by the court did not shift the burden of proof to the defendant. *See* ***Arango v. State***, 411 So.2d 172 (Fla.), *cert. denied*, 457 U.S. 1140, 102 S.Ct. 2973 73 L.Ed.2d 1360 (1982)).

The foregoing cases from the Florida Supreme Court that do not directly analyze but otherwise "reject" a "burden shifting" argument can be traced directly to ***Arango v. State***, 411 So.2d 172, 174 (Fla. 1982), *cert. denied*, 457 U.S. 1140 (1982). The fact that the United States Supreme Court denied certiorari review is meaningless because the denial of certiorari review does not approve the analysis or result of a decision. See ***Hughes Tool Company v. Trans World Airlines, Inc.***, 409 U.S. 363 (1973) (A denial of certiorari neither approves nor disapproves the decision sought to be reviewed.); ***Maryland v. Baltimore Radio Show***, 338 U.S. 912, 919 (1956) (same). The reasoning/analysis in ***Arango*** is wrong and it otherwise does not control all issues presented here.

Specifically, in ***Arango v. State***, 411 So.2d 172 (Fla. 1982), the Florida Supreme Court identified, analyzed and resolved a "burden shifting" issue as follows:

> Appellant next maintains that the instructions given to the jury impermissibly allocated the constitutionally prescribed burden of proof. At one point in the proceedings, the judge stated that if the jury found the existence of an aggravating circumstance, it had "the duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances." This instruction, appellant argues, violates the due process clause as interpreted in *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), and *State v. Dixon*, 283 So.2d 1 (Fla. 1973), *cert denied*, 416 U.S. 9843, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).
>
> In Mullaney the Supreme Court held that a Maine law requiring the defendant to negate the existence of malice aforethought in order to reduce his crime from homicide to manslaughter did not comport with due process. Such a rule, the Court wrote, is repugnant to the fourteenth amendment guarantee that the prosecution bear the burden of proving beyond a reasonable doubt every element of an offense. In *Dixon* we held that the aggravating circumstances of section

> 921.141(6), Florida Statutes (1973), were like elements of a capital felony in that they state must establish them. In the present case, the jury instruction, if given alone, may have conflicted with the principles of law enunciated in Mullaney and Dixon. *A careful reading of the transcript, however, reveals that the burden of proof never shifted. The jury was first told that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed. Then they were instructed that such a sentence could only be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.* These standard jury instructions taken as a whole show that no reversible error was committed.

Arango v. State, 411 So.2d 172, 174 (Fla. 1982) (emphasis added). The material facts necessary for the Court's holding in ***Arango*** reflect that the trial judge there instructed that jury that a death sentence "could only be given if the state showed the aggravating circumstances outweighed the mitigating circumstances." Neither the standard jury instructions nor § 921.141, Florida Statutes, comport with the instruction that was actually given in ***Arango***. Yet, the Florida Supreme Court repeatedly recognizes that the statutory standard is unconstitutional. See ***Alvord v. State***, 322 So.2d 533, 540 (Fla.1975) ("No defendant can be sentenced to capital punishment unless the aggravating factors outweigh the mitigating factors."); ***Bottoson v. Moore***, 833 So.2d 693, 702 (Fla. 2002) ("The jury was instructed that in order to recommend a sentence of death it must find that aggravating circumstances exist and that the aggravating circumstances found to exist must outweigh any mitigating circumstances.") (Quince, J., concurring); ***Bottoson v. Moore***, 833 So.2d 693, 721 (Fla. 2002) ("In Florida, *just as in Arizona,* the death penalty cannot be imposed unless and until a *trial court* makes the additional findings of fact both that the aggravating circumstances exist and that the aggravators outweigh the mitigators.") (Pariente, J., concurring). However, the Court does not have the power to rewrite the statutory language and create a different standard because doing so violates article II, §3 of the Florida Constitution.

The holding in ***Arango*** cannot be applied outside the context of the material facts of that case. As written by the Florida Legislature and as applied through the standard jury instructions, §921.141, Florida Statutes, is unconstitutional under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and, article I, §§ 2, 9, 16, 17 and 22 of the Florida Constitution and the holdings of ***In Re Winship***, 397 U.S. 358 (1970) and ***Mullaney v. Wilbur***, 421 U.S. 684 (1975). The standard violates the requirement that the State prove beyond and to the exclusion of every reasonable doubt that the death penalty is warranted. See ***Cage v. Louisiana***, 498 U.S. 39 (1990) and ***Sandstrom v. Montana***, 442 U.S. 510 (1979). The statutory language casts the burden of persuasion on the defendant and denies due process. ***Francis v. Franklin***, 471 U.S. 307 (1985); ***In re: Winship***, 397 U.S. 358 (1970); ***Mullaney v. Wilbur***, 421 U.S. 684 (1975). The courts cannot cure the defect that is expressly and clearly stated in § 921.141, Florida Statutes, without rewriting the statute in violation of the separation of powers proscription in art. II, §3 of the Florida Constitution. Imposition of the death penalty in direct of the state constitutional requirement of separation of powers denies Due Process and the 14th Amendment to the United States Constitution.

Simply said, § 921.141(2) & (3), Florida Statutes, are unconstitutional under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16, 17, 22 and 23 of the Florida Constitution. These clear and unambiguous provisions authorize imposition of capital punishment when the reasons for doing so are no more compelling than are the reasons for imposition of a life sentence.

WHEREFORE, for the reasons stated in the Motion, the accompanying Memorandum and as may be further explained by counsel during the hearing of this Motion, this Court is

respectfully asked to declare §§ 921.141(2) & (3) unconstitutional. Should the Court grant the Defendant's motion, Florida would be left without a viable procedure for imposing capital punishment, and therefore this Court is asked to immediately sentence this defendant to life imprisonment, with no possibility of parole.

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 6 day of November, 2013.

FSH: 00124/14

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