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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 FLORIDA'S DEATH PENALTY AND SECTION 921.141, FLA. STAT., UNCONSTITUTIONAL (FAULTY APPELLATE REVIEW)**

The Defendant, BRANDON LEE BRADLEY, moves this Court to enter its order declaring Florida's death penalty, and § 921.141, Florida Statutes, unconstitutional based on the arbitrary, capricious, inconsistent, improper and faulty appellate review of the imposition of a death sentence in Florida, contrary 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. Specifically:

1. The Defendant is charged with one count of first-degree murder and related charges, and the State has filed its notice of intent to seek imposition of the death penalty in this case.

2. Every death sentence imposed in Florida is subject to appellate review pursuant to section 921.141(4), Florida Statutes, which mandates that the imposition of a death sentence shall be subject to "automatic" review by the Florida Supreme Court. The Florida Supreme Court

has held that the direct appeal of a death sentence is mandatory and not subject to waiver by the defendant. See e.g., ***Klokoc v. State***, 589 So.2d 219 (Fla. 1991).

3. The harmless error analysis used by the Florida Supreme Court to review faulty imposition of the death penalty is unconstitutional 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 because the underlying basis of the harmless analysis performed by the Florida Supreme Court rests on Section 921.141(2) & (3), Florida Statutes, a statute that creates a presumption that the death penalty is appropriate and then shifts the burden of persuasion onto the defendant to prove by a higher standard than was borne by the government that the death penalty is not justified, i.e., that the mitigation "outweigh" the aggravation. See e.g., ***Jennings v. State***, 782 So.2d 853, 863 fn. 9 (Fla. 2001) (In the absence of mitigation, the death penalty is presumed to be appropriate); ***Singleton v. State***, 783 So.2d 970, 977 (Fla. 2001) (finding that the error of failing to specifically address each mitigating circumstance was harmless error because "It is beyond a reasonable doubt that even if the remaining mitigators not discussed by the trial judge were found to exist, the mitigators would not have outweighed the aggravation in this case."). Because the death penalty is presumed appropriate in the absence of mitigation, constitutional error has become presumptively harmless unless the defendant can prove that the mitigation outweighs the aggravation.

4. The "waiver" doctrine applied by the Florida Supreme Court that deems harmful constitutional errors to have been "waived" by a defendant who did not first present the issue to the trial court in the face of overwhelming adverse controlling precedent from the Florida Supreme Court denies Due Process and results in arbitrary and capricious imposition of the death penalty in violation of 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. See e.g., ***James v. State***, 615 So.2d 668, 669 (Fla. 1993) (Claim that a standard jury instruction is unconstitutionally vague is procedurally barred unless a specific objection on that ground is made and pursued on appeal.). The Florida Supreme Court has squarely held that a trial court does not have the power to overrule a decision of the Florida Supreme Court. See e.g., ***Hoffman v. Jones***, 280 So.2d 431, 440 (Fla. 1973); ***State v. Dwyer***, 332 So.2d 333, 335 (Fla. 1976). The Florida Supreme Court has itself ruled that it does not have the power to declare Florida's death penalty unconstitutional in the face of controlling precedent from the United States Supreme Court, and that the higher court has the prerogative of overruling its own decisions. See ***Bottoson v. Moore***, 833 So.2d 693, 694 (Fla. 2002) (Florida Supreme Court is bound by decision in ***Hildwin v. Florida***, 490 U.S. 638 (1989)). The preservation requirement of making an objection in the face of controlling adverse authority requires the performance of a useless task and is therefore without a rational basis contrary to the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution.

5. The "waiver" doctrine employed by the Florida Supreme Court that requires defense counsel to submit an instruction to cure improprieties in the standard jury instructions denies Due Process and violates the separation of powers proscription in violation of article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution, article II, section 3 of the Florida Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

6. The absence of factual findings by the jury prevents a meaningful harmless error analysis from being performed and results in arbitrary, capricious, unreliable and inconsistent appellate review of death sentences by the Florida Supreme Court in violation of 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.

7. The decisions and opinions of the Florida Supreme Court concerning imposition of the death penalty create substantive law in violation of article II, section 3 of the Florida Constitution (separation of powers). The violation of state constitutional law denies Due Process 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.

8. The decisions and opinions of the Florida Supreme Court concerning construction of the death penalty statute violate the "rule of lenity" and Section 775.021(1), Florida Statutes. The violation of state statutory law in imposition of the death penalty denies Due Process 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.

9. The decisions, holdings and opinions of the Florida Supreme Court governing imposition of the death penalty vacillate and are arbitrary, capricious, inconsistent and factually and legally unreliable in violation of 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.

10. The failure of the Florida Supreme Court to apply Section 775.021(1), Fla. Stat. (the "Rule of Lenity") violates article I, sections 2, 9, 16, 17, 21 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

## **MEMORANDUM OF LAW & ARGUMENT IN SUPPORT OF THE DEFENDANT'S MOTION TO DECLARE § 921.141, FLA. STAT., UNCONSTITUTIONAL DUE TO IMPROPER APPELLATE REVIEW**

Arbitrary and capricious use of the death penalty violates article I, section 17 of the Florida Constitution and the Eighth and Fourteenth amendments to the United States Constitution. ***Furman v. Georgia***, 408 U.S. 238 (1972). Florida's current death penalty scheme, enacted in 1972, was upheld by the Florida Supreme Court in ***State v. Dixon***, 283 So.2d 1 (Fla. 1973). Promises contained in ***Dixon*** were expressly relied upon by the United States Supreme Court when Florida's capital punishment scheme was first reviewed and upheld:

> The statute provides for automatic review by the Supreme Court of Florida of all cases in which a death sentence has been imposed. § 921.141(4) (Supp. 1976-1977). The law differs from that of Georgia in that it does not require the court to conduct any specific form of review. Since, however, the trial judge must justify the imposition of a death sentence with written findings, meaningful appellate review of each such sentence is made possible and *the Supreme Court of Florida like its Georgia counterpart considers its function to be to "[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case*. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great." State v. Dixon, 283 So.2d 1, 10 (1973).

***Proffitt v. Florida*** 428 U.S. 242, 250-251 (1976) (emphasis added). The promised consistent appellate review has not occurred and ***Proffitt*** otherwise misapprehended Florida's statute.

***Proffitt***, decided in 1976, did not address all aspects of Florida's death penalty procedures and it did not affirm, for all time and against all objections, Florida's death penalty statute and capital punishment sentencing procedure. See, e.g., ***Atkins v. Virginia***, 536 U.S. 304 (2002) (capital punishment for mentally retarded offender is unconstitutional); ***Hodges v. Florida***, 506 U.S. 803 (1992) (Florida's jury instruction on CCP is unconstitutionally vague);

***Espinosa v. Florida***, 505 U.S. 1079 (1992) (Florida's jury instruction on HAC is unconstitutionally vague); ***Thompson v. Oklahoma***, 487 U.S. 815 (1988) (capital punishment for 15-year old offender is unconstitutional); ***Hitchcock v. Dugger***, 481 U.S. 393 (1987) (Florida's jury instructions in capital cases unconstitutionally limit consideration of non-statutory mitigating circumstances); ***Enmund v. Florida***, 458 U.S. 782 (1982) (imposition of the death penalty in a felony murder case in which the defendant did not kill, attempt to kill, or intend that a killing take place or that lethal force be employed is unconstitutional); ***Coker v. Georgia***, 433 U.S. 584 (1977) (capital punishment for rape of adult woman is unconstitutional); ***Gardner v. Florida***, 430 U.S. 349, 362 (1977) (due process rights violated because "death sentence was imposed, at least in part, on the basis of information which [the defendant] had no opportunity to deny or explain.").

When ***Proffitt*** was decided, the United States Supreme Court misapprehended Florida's sentencing scheme under Section 921.141, Florida Statutes. See e.g., ***Proffitt v. Florida***, 428 U.S. 242, 246 (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.") Also in ***Proffitt***, the Court expressly approved the gloss placed by the Florida Supreme Court on the statutory aggravating factor of an "especially heinous, atrocious or cruel" murder, ***Proffitt v. Florida***, 428 U.S. 242, 256 (1976), and did not address for sixteen years the constitutional error caused by the failure of the Florida Supreme Court to pass the limiting construction on to the jury until ***Sochor v. Florida***, 504 U.S. 527, 538 (1992).

So, too, the entitlement to a unanimous jury determination of the statutory aggravating factors that justify imposition of capital punishment has been neglected until just recently. The

analysis used to review capital punishment is different than first promised by the Florida Supreme Court when the United States Supreme Court reviewed ***Proffitt***. Specifically, when Florida's new death penalty was first reviewed by the United States Supreme Court, the opinion expressly noted that the Florida Supreme Court was going to review and "reweigh" the aggravating and mitigating circumstances to assure consistent application of the death penalty in Florida:

> The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, *under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed* by the Supreme Court of Florida "to determine independently whether the imposition of the ultimate penalty is warranted." *Songer v. State,* 322 So.2d 481, 484 (1975).

***Proffitt***, 428 U.S. at 252-53 (emphasis added). In practice, the Florida Supreme Court has expressly and repeatedly denounced a procedure whereby the aggravating and/or mitigating circumstances are "reweighed" on appeal. See ***Hudson v. State***, 538 So.2d 829, 831 (Fla. 1989) ("It is not within this Court's province to reweigh or reevaluate the evidence presented as to aggravating or mitigating circumstances."); ***Brown v. Wainwright***, 392 So.2d 1327, 1331 (Fla. 1981) ("Neither of our review functions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating factors."); accord; ***Bowles v. State***, 804 So.2d 1173, 1177 (Fla. 2001); ***Rogers v. State***, 783 So.2d 980, 995 (Fla 2001); ***Way v. State***, 760 So.2d 903, 918 (Fla. 2000); ***Bates v. State***, 750 So.2d 6, 17 (Fla. 1999); ***Willacy v. State***, 696 So.2d 693 (Fla. 1997); ***James v. State***, 695 So.2d 1229, 1237 (Fla. 1997).

The United States Supreme Court in ***Proffitt*** noted that the Florida Supreme Court had vacated 8 of the 21 death sentences it had reviewed to that point (1976), including ***Tedder v. State***, 322 So.2d 908 (Fla. 1975) where the importance of the jury "recommendation" was discussed. Significantly, the law has evolved to the point that the jury "recommendation" in Florida is at least equivalent to a Sixth Amendment determination of facts upon which imposition of the death penalty is based. ***Ring v. Arizona***, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Based on the court's performance in reviewing 21 cases and long before ***Ring*** was decided, the Court gave the Florida Supreme Court the benefit of any doubt and rejected the claim that the appellate review of the death penalty *would necessarily be* arbitrary:

> Nonetheless the petitioner attacks the Florida appellate review process because the role of the Supreme Court of Florida in reviewing death sentences is necessarily subjective and unpredictable. While it may be true that court has not chosen to formulate a rigid objective test as its standard of review for all cases, it does not follow that the appellate review process is ineffective or arbitrary. In fact, it is apparent that the Florida court has undertaken responsibly to perform its function of death sentence review with a maximum of rationality and consistency.

***Proffitt***, 428 U.S. at 258-59. The Defendant submits that what was assumed to be true in 1976 can be shown to be false after 30 years of documented appellate review. The decisions of the Florida Supreme Court show that appellate review of the death penalty by the Florida Supreme Court is arbitrary and capricious. The appellate review is otherwise constitutionally improper, in that the Florida Supreme Court routinely violates the separation of powers doctrine set forth in article II, section 3 of the Florida Constitution. The violation of state constitutional and statutory law in imposition of the death penalty denies Due Process under the fifth and fourteenth Amendments to the United States Constitution. See ***Whalen v. United States***, 445 U.S. 684, 689, 100 S.Ct.

1432, 1436, 63 L.Ed.2d 315 fn. 4 (1980). A state court does not provide due process when fundamental limitations on its power and authority contained in the state constitution and statutes are ignored.

### A. <u>Absence of written findings by the jury.</u>

Early on, the Florida Supreme Court acknowledged that written findings are necessary for it to provide intelligent and meaningful appellate review of imposition of the death penalty:

> The fourth step required by Fla.Stat. s 921.141, F.S.A., is that the trial judge justifies his sentence of death in writing, to provide the opportunity for meaningful review by this Court. *<u>Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant</u>*. Not only is the sentence then open to judicial review and correction, but the trial judge is required to view the issue of life or death within the framework of rules provided by the statute.

***<u>State v. Dixon</u>***, 283 So.2d 1, 8 (Fla. 1973) (emphasis added). The necessity of written findings of fact to enable meaningful appellate review is now firmly established. <u>See</u> ***<u>Jackson v. State</u>***, 767 So.2d 1156, 1159 (Fla. 2000) ("To ensure meaningful review in capital cases, trial court's must provide this Court with a thoughtful and comprehensive analysis of the mitigating evidence in the record.").

The Court has recognized that the written analysis must occur *prior* to pronouncement of sentence to assure a reasoned and thoughtful evaluation of what factors justify imposition of the death penalty. ***<u>Gibson v. State</u>***, 661 So.2d 288, 293 (Fla. 1995); ***<u>Grossman v. State</u>***, 525 So.2d 833, 841 (Fla. 1988), *cert. denied*, 489 U.S. 1071 (1989); ***<u>Van Royal v. State</u>***, 497 So.2d 625 (Fla.1986); ***<u>Bouie v. State</u>***, 559 So.2d 1113 (Fla.1990). The written analyses of trial judges reveal faulty application of the law to the facts by experienced trial judges who are presumed to know the law and who otherwise are carefully instructed via the opinions and decisions of the Florida Supreme Court:

> *<u>As this case demonstrates, our state courts continue to experience difficulty in uniformly addressing mitigating circumstances under section 921.141(3), Florida Statutes (1985), which requires "specific written findings of fact based upon [aggravating and mitigating] circumstances</u>.*" Federal caselaw additionally states that "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.... The sentencer, and the [appellate court], may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." *Eddings v. Oklahoma*, 455 U.S. 104, 114-15, 102 S.Ct. 869, 876-77, 71 L.Ed.2d 1 (1982) (emphasis and footnote omitted). We provide the following guidelines to clarify the issue.
>
> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. See Rogers v. State, 511 So.2d 526 (Fla.1987), *cert. denied,* 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence: "A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established." Fla.Std.Jury Instr. (Crim.) at 81. The court next must weigh the aggravating circumstances against the mitigating and, *<u>in order to facilitate appellate review</u>*, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight. To be sustained, the trial court's final decision in the weighing process must be supported by "sufficient competent evidence in the record." *Brown v. Wainwright*, 392 So.2d 1327, 1331 (Fla.1981). Hopefully, use of these guidelines will promote the uniform application of mitigating circumstances in reaching the individualized decision required by law.

***<u>Campbell v. State</u>***, 571 So.2d 415, 419-420 (Fla. 1990) (Footnotes omitted). Notwithstanding the guidance of the Supreme Court of Florida, experienced trial judges incorrectly applied the law concerning aggravating and mitigating circumstances. For whatever arbitrary reason that is itself a demonstration of why Florida's inconsistent appellate review is unconstitutional under the eighth and fourteenth amendments, ***<u>Campbell</u>*** was after ten years of use was modified so that trial judges are no longer required to give *any* weight to mitigating considerations even when they have been adequately proven to exist. <u>See</u> ***<u>Trease v. State</u>***, 768 So.2d 1050, 1055 (Fla. 2000) (trial court can give no weight to mitigating consideration supported by the record). However, presumably, the trial court must still in its

written sentencing order "consider" the mitigation and at least explain why it should be accorded no weight in the sentencing analysis.

The only way an appellate court can perform a meaningful and intelligent review of sentencing errors committed by the trial courts is by requiring trial judge to analyze in writing the application of aggravating and mitigating considerations used to impose the death sentence:

> This Court has repeatedly held that *all* mitigating evidence, found anywhere in the record, must be considered and weighed by the trial court in its determination of whether to impose a sentence of death. See *Robinson v. State,* 684 So.2d 175 (Fla.1996); *Farr v. State,* 621 So.2d 1368 (Fla.1993); *Santos v. State,* 591 So.2d 160 (Fla.1991); *Campbell v. State,* 571 So.2d 415 (Fla.1990); *Rogers v. State,* 511 So.2d 526 (Fla.1987). We have just recently underscored this requirement in *Reese v. State,* 694 So.2d 678 (Fla.1997), wherein we remanded for a new sentencing under circumstances almost identical to those involved herein. The policy rationale behind our holdings is very simple yet powerful:
>
> > While all judicial proceedings require fair and deliberate consideration by a trial judge, this is particularly important in a capital case because, as we have said, *death is different.*
>
> *Crump v. State,* 654 So.2d 545, 547 (Fla.1995) (citing *State v. Dixon,* 283 So.2d 1, 17 (Fla.1973)) (emphasis added). Since the ultimate penalty of death cannot be remedied if erroneously imposed, trial courts have the undelegable duty and solemn obligation to not only consider any and all mitigating evidence, but also to "expressly evaluate in [their] written order[s] each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence." *Campbell,* 571 So.2d at 419; *Ferrell v. State,* 653 So.2d 367, 371 (Fla.1995) (reaffirming *Campbell* and establishing enumerated requirements for treatment of mitigating evidence). This bedrock requirement cannot be met by treating mitigating evidence as an academic exercise which may be summarily addressed and disposed of. To satisfy Campbell:
>
> > This evaluation must determine if the statutory mitigating circumstance is supported by the evidence and if the non-statutory mitigating circumstance is truly of a mitigating nature. A mitigator is supported by evidence if it is mitigating in nature and reasonably established by the greater weight of the evidence. Once established, the mitigator is weighed against any aggravating circumstances. It is within the sentencing judge's discretion

> to determine the relative weight given to each established mitigator; however, some weight must be given to all established mitigators. *The result of this weighing process must be detailed in the written sentencing order and supported by sufficient competent evidence in the record. The absence of any of the enumerated requirements deprives this Court of the opportunity for meaningful review.*
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> *Ferrell,* 653 So.2d at 371 (emphasis added). Clearly then, the "result of this weighing process" can only satisfy *Campbell* and its progeny if it truly comprises a thoughtful and comprehensive analysis of any evidence that mitigates against the imposition of the death penalty. We do not use the word "process" lightly. If the trial court does not conduct such a deliberate inquiry and then document its findings and conclusions, this Court cannot be assured that it properly considered all mitigating evidence. In such a situation, we are precluded from meaningfully reviewing the sentencing order. *Id.* Since that is precisely the case here, we must vacate the sentence of death and remand for a proper evaluation and weighing of all nonstatutory mitigating evidence as required by *Campbell, Ferrell, Robinson,* and *Reese.*

***Walker v. State***, 707 So.2d 300, 318-319 (Fla. 1997)(all emphasis in original); *accord*, ***Hudson v. State***, 708 So.2d 256, 259 (Fla. 1998).

The same level of scrutiny does not attend the misapplication of the law by jurors when the jury determination is made as to whether a defendant should be sentenced to life imprisonment without parole or the death penalty based on the jurors' finding and weighing of aggravating and mitigating circumstances. ***Proffitt*** contemplated consistent appellate review in which the sentencer makes specific findings regarding the aggravating and mitigating circumstances. The present procedure in Florida effectively conceals the jurors' improper application of invalid aggravating circumstances and/or their rejection of valid mitigating considerations that, though adequately proved, are not considered in the sentencing process. The "bedrock" findings that provide such important insight into the judge's analysis do not exist to review the jurors' analysis.

> The recurrent problems reflected in the trial judges' written findings of fact that attended imposition of the death penalty eventually compelled the Florida Supreme Court

to implement a rule requiring that trial judges receive special training before they can preside over a capital trial. See ***In re Amendment to Fla. Rules of Judicial Admin., Rule 2.050(b)(10)***, 688 So.2d 320 (Fla.1997). Trial judges have the benefit of the decisions and opinions of the Florida Supreme Court to guide their analysis as to whether imposition of the death penalty was appropriate, yet mistakes continue. *E.g.*, ***Crook v. State***, 813 So.2d 68, 75-76 (Fla. 2002) (trial court erred in failing to consider organic brain damage and borderline mental retardation); ***Nibert v. State***, 574 So.2d 1059, 1062 (Fla. 1990). Despite their training, trial judges are yet reminded today that "evidence is mitigating if, in fairness or in the totality of the defendant's life or character, it may be considered as extenuating or reducing the degree of moral culpability for the crime committed." ***Spann v. State***, 28 FLW S293 (Fla. April 3, 2003) *Accord* ***Evans v. State***, 808 So.2d 92 (Fla.2001); ***Merck v. State***, 763 So.2d 295 (Fla. 2000); ***Bonifay v. State***, 680 So.2d 413, 416 (Fla. 1996); ***Rogers v. State***, 511 So.2d 526, 534 (Fla. 1987).

The Florida Supreme Court does not require that trial judges instruct the jury fully on the law concerning capital punishment. Trial judges are not required to instruct jurors that certain considerations are valid mitigating considerations:

> Morris additionally argues that the trial court erred in refusing to instruct the jury on specific nonstatutory mitigating circumstances. This Court has previously declined to mandate the requested jury instruction. Thus, we reject this claim of error. See, e.g., *Shellito v. State,* 701 So.2d 837, 842 (Fla.1997) (citing *Finney v. State,* 660 So.2d 674, 684 (Fla.1995))

***Morris v. State***, 811 So.2d 661, 667-668 (Fla. 2002). When trial courts must be corrected and told that non-statutory mitigating considerations such as an abusive childhood, organic brain damage and/or mental retardation are valid mitigating considerations that

cannot be rejected out of hand, there is no basis to logically conclude that jurors are not making the same errors.

Even if trial courts instructed the jury that mitigating circumstances should be considered if proved, there is yet no guarantee in the absence of written findings that jurors accept and apply valid mitigation circumstances that have been adequately proved, whether those mitigating considerations are statutory or non-statutory. This follows because trial judges, presumed to know the law and in the face of express holdings of the United States Supreme Court and the Supreme Court of Florida, routinely reject valid statutory and non-statutory mitigation and misapply statutory aggravating circumstances. These capital sentencing errors are discovered and corrected *only* because the faulty analysis is documented in the written sentencing order. *E.g.*, ***Hurst v. State***, 819 So.2d 689, 699 (Fla. 2002) ("Thus, to the extent that the trial court's sentencing order can be read as completely rejecting the possibility of good family background as a mitigating circumstance, we hold the trial court erred."); ***Crook v. State***, 813 So.2d 68, 75-76 (Fla. 2002) ("We hold that the trial court erred in rejecting the uncontroverted evidence of Crook's brain damage."); ***Mahn v. State***, 714 So.2d 391, 400 (Fla. 1998) (trial court erred in rejecting defendant's age of 19 as mitigating consideration); ***Spencer v. State***, 645 So.2d 377, 385 (Fla. 1994) (trial court erred in rejecting uncontroverted evidence of extreme mental and emotional disturbance of defendant at time of homicide); ***Nibert v. State***, 574 So.2d 1059, 1063 (Fla. 1990) ("We conclude the trial court failed to properly weigh a substantial number of statutory and nonstatutory mitigating circumstances."); ***Ross v. State***, 474 So.2d 1170, 1174 (Fla. 1985) (trial court erred in not considering in

mitigation, among other things, that defendant had drinking problems and had been drinking when he attacked the victim.).

The Florida Supreme Court initially held that the jury recommendation must be given great weight. See ***Tedder v. State***, 322 So.2d 908, 910 (Fla.1975) ("A jury recommendation under our trifurcated death penalty statute should be given great weight."). Yet, curiously, in thirty years, the Court has never taken steps to ensure that the determination of the jury is as informed and reliable as that of the trial judge. Indeed, just the opposite has occurred. The Court allows jurors to be exposed to emotional victim impact testimony without guidance in the form of a standard jury instruction, even though such evidence has no specified role under the statute insofar as determining whether a sentence of life or death is appropriate. See ***Windom v. State***, 656 So.2d 432, 438 (Fla. 1995).

When given the opportunity to make sure that jurors are fully and correctly instructed on the law concerning imposition of the death penalty, the Florida Supreme Court seems loathe to acknowledge that a reliable jury recommendation is necessary. Jury participation is treated as nothing more than a perfunctory requirement to be obtained solely because a statute requires it:

> Suarez next claims that the trial court erred in instructing the jury at the penalty phase on aggravating circumstances which have been held to constitute "doubling." Specifically, the trial judge instructed the jury on the aggravating circumstances that the murder occurred in commission of a robbery and that the crime was committed for pecuniary gain, and that the murder was committed to avoid arrest and committed to hinder the exercise of law enforcement. These two pairs of aggravating circumstances have been held to constitute improper doubling in *Provence v. State,* 337 So.2d 783 (Fla.1976), *cert. denied,* 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977), and *White v. State,* 403 So.2d 331 (Fla.1981), *cert. denied,* 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983), respectively. *However, Provence and White regarded improper doubling in the trial judge's sentencing order, and did not relate to the instructions to the penalty phase jury. The jury instructions simply give the*

*jurors a list of arguably relevant aggravating factors from which to choose in making their assessment as to whether death was the proper sentence in light of any mitigating factors presented in the case. The judge, on the other hand, must set out the factors he finds both in aggravation and in mitigation, and it is this sentencing order which is subject to review vis-a-vis doubling.*

***Suarez v. State***, 481 So.2d 1201, 1209 (Fla. 1985) (emphasis added). *Accord*, ***Teffeteller v. Dugger***, 734 So.2d 1009, 1023-1024 (Fla. 1999); ***Derrick v. State***, 641 So.2d 378 (Fla. 1994); ***Patten v. State***, 598 So.2d 60, 63 (Fla. 1992). The clear import of this reasoning is that the Florida Supreme Court does not care whether the jury is accurately and fully instructed on the law that must be applied to determine whether a sentence of life or death should be imposed. The Court's concern is solely on the trial court's determination, with the jury being left to navigate the maze of aggravating and mitigating considerations totally in the dark. There is no apparent legitimate reason to insulate the jurors from the same guidance that the court feels compelled to give the trial courts. Both the judge and the jury must correctly apply the law to reach a fair and lawful sentencing determination. It is arbitrary to ignore the impact of the jury's determination and the need for reliability in the jury determination of what an appropriate sentence should be under the law of Florida.

Further evidence of this cavalier approach to the jury "recommendation" is found in the Court's line of cases holding that there is no requirement that the same limiting constructions concerning correct application of the aggravating and mitigating circumstances, frequently passed on by that Court to correct the trial judges' misapplication of the law, also be passed on to the jurors who must use the same sentencing considerations. For instance, after Oklahoma's "especially heinous, atrocious or cruel" statutory aggravating circumstances was found to be unconstitutionally vague

by the United States Supreme Court, the Florida Supreme Court curiously rejected out of hand the notion that the same vagueness found in Oklahoma's statute contaminated Florida's *identical* circumstance and jury instruction:

> It is true that both the Florida and Oklahoma capital sentencing laws use the phrase "especially heinous, atrocious, or cruel." However, there are substantial differences between Florida's capital sentencing scheme and Oklahoma's. In Oklahoma the jury is the sentencer, while in Florida the jury gives an advisory opinion to the trial judge, who then passes sentence. The trial judge must make findings that support the determination of all aggravating and mitigating circumstances. Thus, it is possible to discern upon what facts the sentencer relied in deciding that a certain killing was heinous, atrocious, or cruel.
>
> This Court has narrowly construed the phrase "especially heinous, atrocious, or cruel" so that it has a more precise meaning than the same phrase has in Oklahoma. In *State v. Dixon,* 283 So.2d 1, 9 (Fla.1973), *cert. denied,* 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), we said:
>
> > It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim.
>
> It was because of this narrowing construction that the Supreme Court of the United States upheld the aggravating circumstance of heinous, atrocious, or cruel against a specific eighth amendment vagueness challenge in *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Indeed, this Court has continued to limit the finding of heinous, atrocious, or cruel to those conscienceless or pitiless crimes which are unnecessarily torturous to the victim. *E.g., Garron v. State,* 528 So.2d 353 (Fla.1988); *Jackson v. State,* 502 So.2d 409 (Fla.1986), *cert. denied,* 482 U.S. 920, 107 S.Ct. 3198, 96 L.Ed.2d 686 (1987); *Jackson v. State,* 498 So.2d 906 (Fla.1986); *Teffeteller v. State,* 439 So.2d 840 (Fla.1983), *cert. denied,* 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984). That *Proffitt* continues to be good law today is evident from *Maynard v. Cartwright,* wherein the majority distinguished Florida's sentencing scheme from those of Georgia and Oklahoma. *See Maynard v. Cartwright,* 108 S.Ct. at 1859.

***Smalley v. State***, 546 So.2d 720, 722 (Fla. 1989).

But ***Proffitt*** was NOT controlling insofar as the vagueness of the HAC factor. See ***Espinosa v. Florida***, 505 U.S. 1079 (1992) (Florida's jury instructions must contain limiting constructions of vague factors). The Florida Supreme Court has now grudgingly agreed that the definitions of the terms used in

the HAC factor set forth in ***State v. Dixon***, 283 So.2d 1, 9 (Fla. 1973), and its definitions of the terms of the CCP factor set forth in ***Rogers v. State***, 511 So.2d 526, 533 (Fla. 1987), must be provided to the jury. *See* ***Jackson v. State***, 648 So.2d 85, 89-90 (Fla. 1994)("We do not suggest that every court construction of an aggravating factor must be incorporated into a jury instruction defining that aggravator. However, because the CCP factor is so susceptible of misinterpretation and has been the subject of so many explanatory decisions, we cannot say that the current instruction sufficiently informs the jury of the nature of this aggravator.").

Yet, the Court does not require that the limiting constructions of subjective sentencing factors be given the jury unless compelled to do so on an ad hoc basis by the United States Supreme Court. This reluctance to require full and fair instructions to the jury continues, despite the recent elevation of Florida's "advisory" role to be at least equivalent to a Sixth Amendment determination of the factual basis upon which imposition of the death penalty rests:

> Kormondy argues that this case should be governed by *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In *Apprendi,* the United States Supreme Court held that, other than a prior conviction, any fact that increases the punishment for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. Kormondy argues that the absence of any notice of the aggravating circumstances that the State will present to the jury and the absence of specific jury findings of any aggravating circumstances offends due process and the proscription against cruel and unusual punishment under *Apprendi.*
>
> Although we have previously held that the Supreme Court's decision in *Apprendi* was not applicable to death penalty cases, the Supreme Court recently ruled in *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), that the principle of law announced in *Apprendi* had application in the death penalty context. In so holding, the Supreme Court found unconstitutional a death penalty scheme where the jury did not participate in the penalty phase of a capital trial. *That, of course, is not the situation in Florida where the trial court and the jury are cosentencers under our capital scheme*. *See Espinosa v. Florida,* 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). *While Ring makes Apprendi applicable to death penalty cases, Ring does not require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury*. *See, e.g., Bottoson v. Moore,* 833 So.2d 693 (Fla.2002), *cert. denied,* --- U.S. ----, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002); *King v. Moore,* 831 So.2d 143 (Fla.2002), *cert. denied,* --- U.S. ----, 123 S.Ct. 657, 154

L.Ed.2d 556 (2002). Because neither *Apprendi* nor *Ring* requires a finding that the Florida capital sentencing scheme is unconstitutional, we deny relief on this issue.

***Kormondy v. State***, 28 FLW S135, 139 (Fla. Feb. 13, 2003)(footnote omitted)(emphasis added).

The difference in analysis between the trial judge's sentencing determination and the jury sentencing determination renders Florida's death penalty unconstitutional. The Florida Supreme Court clearly has the power, under article V, section 2(a), Florida Constitution, as a matter of procedure, to require jurors to provide express findings of fact justifying imposition of the death penalty so that meaningful and intelligent review could occur. See ***Allen v. Butterworth***, 756 So.2d 52 (Fla. 2000). Insofar as the appellate review provided by the Florida Supreme Court, the meaningful and careful review of the sentencing determination of the jurors, as "co-sentencers," cannot occur in a vacuum. The generic "recommendation" following sparse, incomplete and misleading jury instructions that do not fully nor fairly set forth the law of capital sentencing in Florida denies Due Process and violates the essence and the express guarantee of consistent and meaningful appellate review and/or application of capital punishment.

**B. Violations of Article II, Section 3, Florida Constitution (Separation of Powers) and Fifth, Eighth and Fourteenth Amendments, United States Constitution (Due Process)**

Article II, section 3 of the Florida Constitution forbids any person from one branch of government exercising powers appertaining to the other two branches of government. The violation of this provision in the state constitution denies Due Process under the fourteenth amendment to the United States Constitution. See ***Whalen v. United States***, 445 U.S. 684, 689, 100 S.Ct. 1432, 1436, 63 L.Ed.2d 315 fn. 4 (1980). The Florida Supreme Court has invalidated legislation that encroached on its own exclusive

Constitutional duty to *establish* rules of court procedure concerning imposition of the death penalty. See ***Allen v. Butterworth***, 756 So.2d 52 (Fla. 2000). Yet, the Court has expressly rejected the claim that it violates the separation of powers doctrine by defining the operative terms of section 921.141, Florida Statutes. ***Sireci v. State***, 587 So.2d 450, 454-455 (Fla. 1991). The Court does more than simply provide narrowing constructions of vague sentencing circumstances set forth in Section 921.141, Florida Statutes - it effectively rewrites the statute.

For example, the Court expressly held that it does not have the power to delete modifiers that describe mitigating circumstances because doing so violates the separation of powers provision:

> Johnson argues various errors in the jury instructions. He contends that the trial court erred in declining to modify the standard jury instruction on the mental mitigators to eliminate adjectives such as "extreme" and "substantially." This argument rests on a fundamental misconception of Florida law. Statutory mental mitigators are distinct from those of a nonstatutory nature, and it is the latter category that Johnson's revised jury instruction attempted to recast in "statutory" terms. *This in effect asked the trial court to rewrite the statutory description of mental mitigators, which is a violation of the separation of powers doctrine*. Art. II, §§ 3, Fla. Const. Nonstatutory mental mitigators are addressed under the "catch- all" instruction, as happened here. (Citation omitted). Accordingly, there was no error.

***Johnson v. State***, 660 So.2d 637, 647 (Fla. 1995) (emphasis added); *accord*, ***Barnhill v. State***, 834 So.2d 836, 849 (Fla. 2002). In ***Barnhill***, after noting that it violates the separation of powers provision to delete the modifying term of "extreme" concerning the mental mitigating circumstance, the Court unrealistically assumed that all jurors necessarily, properly consider, under Section 921.141(6)(h), Florida Statutes (the

"catch-all" instruction), lesser levels of mental distress. The conclusion that jurors necessarily will properly consider valid mental afflictions as mitigation, though not expressly instructed that they should, is a diaphanous assumption indeed, where trial judges routinely fail to appreciate that mental or emotional distress that does not rise to the level of "extreme" is yet valid mitigation that must be considered and given independent weight.

> [I]n its written order, the trial court expressly concluded that this evidence did not support the *statutory* mitigating factor of "extreme" mental disturbance, because the disturbance here was not extreme. In addition, the trial court noted that it had considered "all other relevant testimony and argument as to *statutory* mitigating factors" (emphasis added). There is no mention of nonstatutory mitigating factors in the written order, although the trial court did mention and out-of-hand reject such factors in its oral statements at sentencing. Florida's capital sentencing statute does in fact require that emotional disturbance be "extreme." However, it clearly would be unconstitutional for the state to restrict the trial court's consideration solely to "extreme" emotional disturbances. Under the case law, *any* emotional disturbance relevant to the crime must be considered and weighed by the sentencer, no matter what the statutes say. (Citations omitted). Any other rule would render Florida's death penalty statute unconstitutional. *Lockett [v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)].

***Cheshire v. State***, 568 So.2d 9908, 912 (Fla. 1990). See ***Nibert v. State***, 574 So.2d 1059, 1062 (Fla. 1990); ***Campbell v. State***, 571 So.2d 415, 418-419 (Fla. 1990); ***Mines v. State***, 390 So.2d 332, 337 (Fla. 1980).

Again, the lack of findings by jurors creates a substantial blind spot where faulty weighing of circumstances and thus improper "recommendations" of death occur with impunity. *Cf.* ***Crook v. State***, 813 So.2d 68, (Fla. 2002) (trial judge erred in basing finding of extreme mental and emotional disturbance and substantially impaired capacity

*solely* on defendant's use of drugs and alcohol, and trial court erred in rejecting uncontroverted evidence of organic brain damage that was entitled to independent weight); ***Knowles v. State***, 632 So.2d 62, 67 (Fla. 1993) (trial court erred in rejecting statutory mental mitigating circumstances because defendant's insanity and intoxication defenses were rejected by jury).

Insofar as violation of the separation of powers, the Court concludes that it cannot parse from the standard jury instructions the terms "extreme" or "substantial" without violating the separation of powers proscription. ***Johnson***, *supra;* ***Barnhill***, *supra*. However, the Florida Supreme Court unilaterally added the substantive requirement that defendants must show unusual immaturity or senility before age can be considered a mitigating consideration. ***Echols v. State***, 484 So.2d 568, 575 (Fla. 1986) ("[I]f [age] is to be accorded any significant weight, it must be linked with some other characteristic of the defendant or the crime such as immaturity or senility."); *accord*, ***Campbell v. State***, 679 So.2d 720, 722 (Fla. 1996) ("Chronological age standing alone thus is of little import, warranting no special instruction [on age]."). Section 921.141(6)(g), Florida Statutes, provides clearly and unambiguously that "the age of the defendant" shall be a mitigating consideration. It is antagonistic reasoning to assert that the court cannot delete terms that prevent valid mitigation from being properly weighed without violating the separation of powers doctrine, but it can freely add language that substantially limits consideration of statutory mitigation without violating separation of powers.

The violation the state constitutional provision establishing and requiring the separation of powers between branches of government constitutes a denial of Due

Process under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution:

> The Court has held that the doctrine of separation of powers embodied in the Federal Constitution is not mandatory on the States. (Citations omitted). It is possible, therefore, that the Double Jeopardy Clause does not, through the Fourteenth Amendment, circumscribe the penal authority of state courts in the same manner that it limits the power of federal courts. *The Due Process Clause of the Fourteenth Amendment, however, would presumably prohibit state courts from depriving persons of liberty or property as punishment for criminal conduct except to the extent authorized by state law.*

***Whalen v. United States*,** 445 U.S. 684, 689, 100 S.Ct. 1432, 1436, 63 L.Ed.2d 315 fn. 4 (1980) (emphasis added). The error also violates the requirement of heightened Due Process and reliability that is constitutionally required to avoid arbitrary and capricious imposition of the death penalty. This aspect of appellate review of death sentences violates article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the fifth, sixth, eighth and fourteenth amendments of the United States Constitution.

**C. Violations of the "rule of lenity" and Section 775.021(1), Florida Statutes, in appellate review of imposition of the death penalty denies Due Process**

Section 775.021(1), Florida Statutes, embodies the "rule of lenity." It mandates that, in construing Florida's statutes, "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 "rule of lenity" is rooted in fundamental principles of due process guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. *Cf.* ***Dunn v. United States*,** 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979) (rule of lenity "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."). The principle of strict construction of penal laws applies to the penalties imposed as a consequence of a criminal conviction, ***Bifulco v. United States***, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980), and has been applied by Florida to its capital sentencing scheme. ***Trotter v. State*** 576 So.2d 691, 694 (Fla.1990). The rule of lenity is set forth by the Florida legislature as a rule of statutory construction.

In conducting its appellate review of imposition of the death penalty, the Florida Supreme Court has ignored this statutory requirement. For instance, Section 921.141(5)(b), Florida Statutes, states, "The defendant was *previously* convicted of another capital felony or of a felony involving the use or threat of violence to the person." (Emphasis added). The "prior violent felony" circumstance has been broadly construed in violation of the rule of lenity. A strict construction in favor of the accused requires that the ambiguous term "previously" should be construed to mean that only convictions of violent felonies that occurred prior to a homicide qualify as an aggravating circumstance. The appellate decisions have instead rewritten the statute and adopted a construction favorable to the state, ruling that the factor applies to violent felonies committed contemporaneous to the homicide if more than one victim is involved. See ***Wasko v. State***, 505 So.2d 1314, 1318 (Fla.1987)(contemporaneous convictions for violent felonies committed on one victim during a homicide do not qualify as prior violent felonies); ***Pardo v. State***, 563 So.2d 77 (Fla. 1990), 563 So.2d 77 (Fla. 1990) ("contemporaneous conviction of a violent felony may qualify as an aggravating circumstance so long as the two crimes involved multiple victims or separate episodes."). The Court allows consideration of violent crimes committed *after* the homicide for which the defendant is

being sentenced. See ***Knight v. State***, 746 So.2d 423, 434 (Fla. 1998) (aggravating factor of a previous conviction of a violent felony applies "even when the crimes underlying the conviction occurred after the crime for which the defendant is being sentenced."). At one point, the Florida Supreme Court ruled that the existence of this statutory aggravating factor excluded the statutory mitigating consideration of no prior history of significant criminal history. ***Wasko v. State***, 505 So.2d 1314, 1317 (Fla. 1987). This is in direct contradiction to strictly applying penal statutes and construing ambiguity in favor of the defendant.

Similarly, Section 921.141(5)(g), Florida Statutes, states, "The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws." The "hinder government function or enforcement of law" factor was apparently intended to apply to political assassinations or terrorist acts. *See* Barnard, Death Penalty, (1988 Survey of Florida Law), 13 Nova L. Rev. 907, 926 (1989). It has been judicially construed to apply where the sole or dominant motive for the homicide was to eliminate a witness, despite the absence of such language in the statute, *See* ***White v. State***, 415 So.2d 719 (Fla. 1982). Despite the ruling of ***Espinosa v. Florida***, *supra*, that requires limiting constructions to be passed on to juries, the Florida Supreme Court does not require the limiting construction of this aggravating factor that it imposes on trial courts to be passed on to the jury:

> To the extent that Sweet attempts to raise this issue as an ineffective assistance of appellate counsel claim, we deny relief. This Court has upheld the constitutionality of the standard jury instruction for the avoid arrest aggravator. See, e.g., *Davis v. State,* 698 So.2d 1182, 1192 (Fla.1997) (rejecting defendant's argument that this Court's construction of avoid arrest aggravator be incorporated into jury instruction because standard jury instruction was legally adequate); *Whitton v. State,* 649 So.2d 861, 867 n. 10 (Fla.1994) (concluding that standard jury instruction

for avoid arrest aggravator was not vague and did not require a limiting instruction in order to make this aggravator constitutionally sound).

***Sweet v. Moore***, 822 So.2d 1269, 1274-1275 (Fla. 2002).

The violation the "rule of lenity" embodied in the state statutes constitutes a denial of Due Process under the fifth, sixth, eighth and fourteenth Amendments to the United States Constitution. ***Whalen v. United States***, 445 U.S. 684, 689 fn. 4 (1980) (emphasis added). The error also violates the requirement of heightened Due Process and reliability that is constitutionally required to avoid arbitrary and capricious imposition of the death penalty. This aspect of appellate review of death sentences violates article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the fifth, sixth, eighth and fourteenth amendments of the United States Constitution.

**D. Appellate review of imposition of the death penalty is arbitrary, capricious, inconsistent and unreliable, as shown by the inconsistent holdings, opinions, vacillating standards, and dicta found in decisions spanning 30 years of appellate review.**

In ***State v. Dixon***, 283 So.2d 1, 8 (Fla. 1973), the Florida Supreme Court "guaranteed" consistent application of the death penalty following its appellate review of imposition of death sentences. That guarantee was relied expressly upon by the United States Supreme Court when Florida's death penalty was initially upheld. ***Proffitt v. Florida***, 428 U.S. at 250-251). When ***Proffitt*** was decided, the Florida Supreme Court had reviewed only 21 death sentences. The following examples demonstrate that the "consistent" application guarantee given by the Florida Supreme Court has utterly failed and that appellate review by the Florida Supreme Court of death sentences imposed over the 30 years since ***Proffitt*** is so unreliable, inconsistent, arbitrary, and whimsical that

violations of 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 are conclusively evident:

**I. The Florida Supreme Court has inconsistently applied statutory aggravating circumstances in the same case based on the same facts:**

> ***Raulerson (I) v. State***, 358 So.2d 826, 835 (Fla. 1978) (HAC upheld); ***Raulerson (II) v. State***, 420 So.2d 567, 571-572 (Fla. 1982) ("We have held that killings similar to this one were not heinous, atrocious or cruel." HAC rejected)
>
> ***King (I) v. State***, 390 So.2d 315, 320 (Fla. 1980) ("great risk" aggravator upheld where King "should have reasonably foreseen that the blaze would pose a great risk to the neighbors, as well as the firefighters and the police who would respond to the call."); ***King (II) v. State***, 514 So.2d 354, 380 (Fla. 1987) ("great risk" aggravator rejected, where "this is a far cry from one where this factor [great risk] could properly be found.")
>
> ***Proffitt (I) v. State***, 315 So.2d 461 (Fla. 1975) (HAC upheld where sleeping man stabbed to death while in own home - death penalty appropriate); ***Proffitt (II) v. State***, 510 So.2d 896, 897 (Fla. 1987) (HAC not found by trial court following new penalty phase despite same facts - proportionality review requires life sentence)
>
> ***Songer (I) v. State***, 322 So.2d 481, 484 (Fla. 1975) (death penalty appropriate where two aggravating circumstances exist and no *"statutory"* mitigation exists.); ***Songer (II) v. State***, 365 So.2d 696 (Fla. 1978) (death penalty appropriate where two aggravating circumstances exist and nothing exists in mitigation); ***Songer (III) v. State***, 544 So.2d 1010, 1011 (Fla. 1989) ("This case may represent the least aggravated and most mitigated case to undergo proportionality analysis." - proportionality review requires life sentence.).

**II. The Florida Supreme Court has ruled inconsistently on the same material facts & issues:**

**Weighing of mitigation by trial judge**:

> *Campbell v. State*, 571 So.2d 415, 419-420 (Fla.1990) ("Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found

cannot be dismissed as having no weight."); ***Trease v. State***, 768 So.2d 1050, 1055 (Fla. 2000) ("We hereby recede from our opinion in Campbell to the extent it disallows trial courts from according no weight to a mitigating factor.").

**Re-weighing by Florida Supreme Court:**

***Raulerson v. State***, 358 So.2d 826, 835 (Fla. 1978) ("In reviewing the aggravating and mitigating circumstances, the nature of the murder and the circumstances under which it was committed, **we hold that the aggravating circumstances outweigh the mitigating circumstances** and the penalty of death is the proper sentence.") (emphasis added) - - - ***Hudson v. State***, 538 So.2d 829, 831 (Fla. 1989) ("It is not within this Court's province to reweigh or reevaluate the evidence presented as to aggravating or mitigating circumstances."); ***Brown v. Wainwright***, 392 So.2d 1327, 1331 (Fla. 1981) ("Neither of our review functions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating factors."); ***Bell v. State***, 841 So.2d 329, 336 (Fla. 2002) ("We conclude that the trial court abused its discretion in assigning little weight to this mitigator.")

**Section 921.141(5)(b), Florida Statutes**

***Meeks v. State***, 339 So.2d 186, 190 (Fla. 1976) ("it is true that contemporaneous convictions do not qualify as an aggravating circumstance Vel non under Section 921.141(5)(b), Florida Statutes."); ***King v. State***, 390 So.2d 315, 320-321 (Fla. 1980) ("The legislative intent is clear that any violent crime for which there was a conviction at the time of sentencing should be considered as an aggravating circumstance."); ***Wasko v. State***, 505 So.2d 1314, 1318 (Fla.1987)(contemporaneous convictions for violent felonies committed on one victim during a homicide do not qualify as prior violent felonies); ***Pardo v. State***, 563 So.2d 77 (Fla. 1990), 563 So.2d 77 (Fla. 1990) ("contemporaneous conviction of a violent felony may qualify as an aggravating circumstance so long as the two crimes involved multiple victims or separate episodes.").

**Section 921.141(5)(c), Fla. Stat. -**

***Alvord v. State***, 322 So.2d 533, 540 (Fla. 1975) (Great risk of death to many persons factor upheld where three persons strangled to death in separate bedrooms of a house.); ***White v. State***, 403 So.2d 331, 333 (Fla. 1981) (Great risk of death to many persons rejected where six people among eight people shot died in separate bedrooms of a house).

**Section 921.141(5)(h), Florida Statutes**

***Simmons v. State***, 419 So.2d 316, 319 (Fla. 1982) ("The finding that the victim was murdered in his own home offers no support for the [HAC] finding."); ***Perry v. State***, 522 So.2d 817, 821 (Fla. 1988) ("We note also that the vicious attack was within the supposed safety of Mrs. Miller's home, a factor we have previously held adds to the atrocity of the crime."); ***Troedel v. State***, 462 So.2d 392, 398 (Fla. 1984) ("the fact that the victims were killed in their own home sets the crime apart from the norm."); ***Proffitt (I) v. State***, 315 So.2d 461 (Fla. 1975) (HAC upheld where sleeping man stabbed to death while in own home); ***Proffitt (II) v. State***, 510 So.2d 896, 897 (Fla. 1987) (HAC not found by trial court following new penalty phase)-

***Pope v. State***, 441 So.2d 1073, 1077-78 (Fla. 1983) ("instructions in 1981 were revised to state only that 'the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel.' No further definitions of the terms are offered, nor is the defendant's mindset ever at issue."); ***Richardson v. State***, 604 So.2d 1107, 1109 (Fla. 1992) (for HAC to apply, "the crime must be *both* conscienceless or pitiless *and* unnecessarily torturous to the victim.")(emphasis in original); ***Cox v. State***, 819 So.2d 705, 720 (Fla. 2002) ("The appellant's primary contention here is that '[i]t is well-settled that the aggravator does not apply unless it is clear that the defendant intended to cause unnecessary and prolonged suffering.' This declaration, however, is incorrect." - HAC allowed); ***Mills v. State***, 476 So.2d 172, 178 (Fla. 1989) (HAC rejected where "Whether death is immediate or whether the victim lingers and suffers is pure fortuity. The intent and method employed by the wrongdoers is what needs to be examined."); ***Donaldson v. State***, 772 So.2d 177, 187 (Fla. 1998) (HAC disallowed where "the evidence in this case does not establish that the defendant intended to cause them unnecesssary pain or prolonged suffering."); ***Bowles v. State***, 804 So.2d 1173, 1177 (Fla. 2001) ("there is no necessary intent element to the [HAC] aggravating circumstance."); ***Omelus v. State***, 584 So.2d 563, 566 (Fla. 1991) ("where there is no evidence of knowledge of how the murder would be accomplished, we find the heinous, atrocious, or cruel aggravating factor cannot be applied vicariously."); ***Barnhill v. State***, 834 So.2d 849, 859 (Fla. 2002) ("HAC focuses on the means and manner in which the death is inflicted and the immediate circumstances surrounding the death, rather than the intent or motivation of the defendant, where a victim experiences the torturous anxiety and fear of impending death." - HAC upheld): ***Teffeteller v. State***, 439 So.2d 840, 846 (Fla. 1983) ("The fact that the victim lived for a couple of hours in undoubted pain and knew that death was imminent, horrible as that prospect may have been, does not set this senseless murder apart from the norm of capital felonies." - HAC rejected);

**Section 921.141(5)(i) , Florida Statutes:**

***Provenzano v. State***, 497 So.2d 1177, 1183 (Fla. 1986) ("Heightened premeditation necessary for this circumstance does not have to be directed toward the specific victim.")(CCP upheld); ***Amoros v. State***, 531 So.2d 1256 (Fla. 1988) ("We reject the supposition that Amoros' threat to the girlfriend can be transferred to the victim under these circumstances.") (CCP rejected). ***Herring v. State***, 446 So.2d 1049, 1057 (Fla. 1984) ("In the instant case, the evidence does reflect that appellant first shot the clerk in response to what appellant believed was a threatening movement by the clerk and then shot him a second time after the clerk had fallen to the floor. The facts of this case are sufficient to show the heightened premeditation required for the application of this aggravating circumstances as it has been defined."); ***Farinas v. State***, 569 So.2d 425, 431 (Fla. 1990) ("We therefore reject the argument that because Farinas approached the victim after firing the first shot and then un-jammed his gun three times before firing the fatal shots to the back of the victim's head afforded him time to contemplate his actions, thereby establishing heightened premeditation."); ***Phillips v. State***, 476 So.2d 195, 197 (Fla. 1985) ("In order for all of the shots to be fired, appellant had to reload his revolver, affording him time to contemplate his actions and choose to kill his victim. These facts are sufficient to show the heightened premeditation for imposition of the aggravating factor."); ***Rogers v. State***, 511 So.2d 526, 533 (Fla. 1987) ("Since we conclude that "calculation" consists of a careful plan or pre-arranged design, we recede from our holding in Herring v. State, 446 So.2d 1049, 1057 (Fla. 1984), to the extent that it dealt with this question."); ***Swafford v. State***, 533 So.2d 270, 277 (Fla. 1988) ("This [CCP] aggravating factor can be found when the evidence shows such reloading (citation omitted), because reloading demonstrates more time for reflection and therefore 'heightened premeditation.' *See* Herring v. State, 447 So.2d 1049, 1057 (Fla. 1984)."); ***Hamilton v. State***, 678 So.2d 1228, 1231 (Fla. 1996) (trial court's express finding of heightened premeditation and CCP based on reloading shotgun rejected).

**Section 921.141(6)(a), Florida Statutes:**

***Ruffin v. State***, 397 So.2d 277, 283 (Fla. 1981) ("We hold that in determining the existence or absence of the no significant prior criminal activity, 'prior' means prior to the sentence of the defendant and does not mean prior to the commission of the murder for which he is being sentenced."); ***Scull v. State***, 533 So.2d 1133, 1142 (Fla. 1988) ("we do not believe that a 'history' of prior criminal conduct can be established by contemporaneous crimes, and we recede from language in *Ruffin* to the contrary."); ***Wasko v. State***, 505 So.2d 1314, 1317 (Fla. 1987) (With regard to no significant history of prior criminal activity and having a conviction of a prior violent felony, "These two circumstances are

mutually exclusive."); ***Bello v. State***, 547 So.2d 914, 917-918 (Fla. 1989) ("the trial judge also expressly ruled that the mitigating circumstance of no significant history of prior criminal activity was inapplicable because of the finding of the aggravating circumstance of conviction of a prior violent felony, which was based on the conviction for contemporaneously crimes. . . . the failure to find that mitigator was error in this case")

**Section 921.141(6)(g), Florida Statutes:**

***State v. Dixon***, 283 So.2d 1, (Fla. 1973) ("Thus, the Legislature has chosen to provide for consideration of the age of the defendant - whether youthful, middle aged, or aged - in mitigation. The meaning of the Legislature is not vague, and we cannot say that such a consideration is unreasonable per se."); ***Peek v. State***, 395 So.2d 492, 498 (Fla. 1980) ("There is no per se rule which pinpoints a particular age as an automatic factor in mitigation."); ***Ellis v. State***, 622 So.2d 991, 1001 (Fla. 1993) ("Whenever a murder is committed by one who at the time is a minor, the mitigating factor of age must be found and weighed, but the weight can be diminished by other evidence showing unusual maturity.");***Cooper v. State***, 492 So.2d 11059, 1062-63 (Fla. 1986) (trial court did not err in rejecting age of 18 as mitigating considerations, where defendant "was legally and adult," mature and understood the distinction between right and wrong.); ***Bell v. State***, 841 So.2d 329, 336 (Fla. 2002) ("We conclude that the trial court abused its discretion in assigning little weight to this mitigator [age].")

**"Doubling" & jury instructions:**

***Provence v. State***, 337 So.2d 783, 786 (Fla. 1976) (error to find both murder committed for pecuniary gain and murder committed during the commission of a robbery, where both aggravating factors address the same aspect of the crime); ***Suarez v. State***, 481 So.2d 1201, 1209 (Fla. 1985) (proper for judge to instruct jury on both aggravating circumstances of murder committed during commission of a robbery and murder committed for pecuniary gain without an "anti-doubling" instruction to jury because judge writes the sentencing order, whereas jurors just select reasons from list given them by judge); ***Castro v. State***, 597 So.2d 259, 261 (Fla. 1992) ("A limiting instruction properly advises the jury that should it find both aggravating factors present, it must consider the two factors as one, and thus the instruction should have been given."); ***Barnhill v. State***, 834 So.2d 836, 852 (Fla. 2002) (trial court erred in separately considering both murder for pecuniary gain and murder during the commission of a robbery); ***Teffeteller v. Dugger***, 734 So.2d 1008, 1024 (Fla. 1999) ("The jury instructions simply give the jurors a list of arguably relevant aggravating factors from which to choose in making their assessment as to whether death was the proper sentence in light of any mitigating factors

presented in the case. The judge, on the other hand, must set out the factors he finds both in aggravation and in mitigation, and it is this sentencing order which is subject to review vis-a-vis doubling.")

***James v. State***, 695 So.2d 1229, 1236 (Fla. 1997) ("The trial judge is required to give only the 'catch-all' instruction on mitigating evidence and nothing more."); ***Barnhill v. State***, 834 So.2d 836, 849 Fla. 2002) ("Neither the defense nor the State may waive an instruction so long as there is evidence to support it."); ***Spann v. State***, 28 FLW S293, 295 (Fla. April 3, 2003) ("It is well established that a competent defendant may waive his right to present mitigating evidence in the penalty phase of his first-degree murder trial."); ***Echols v. State***, 484 So.2d 568, 575 (Fla. 1986) (No error in refusing to instruct jury that "age of the defendant at the time of the crime" is a mitigating consideration.)

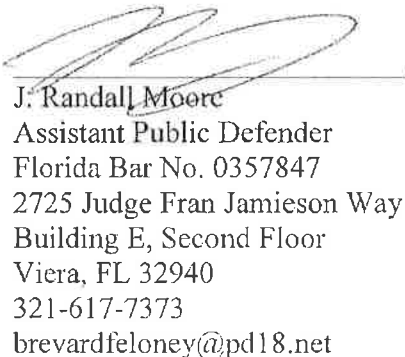
***Cooper v. State***, 336 So.2d 1133, 1139 (Fla. 1976) ("the Legislature chose to list the mitigating circumstances which it judged to be reliable for determining the appropriateness of a death penalty for 'the most aggravated and unmitigated of serious crimes,' and *we are not free to expand on the list*."); ***Robinson v. State***, 684 So.2d 175, 177 (Fla. 1996) ("[T]he trial judge must carefully analyze all the possible statutory *and nonstatutory mitigating factors* against the established aggravators to ensure that death is appropriate.")(emphasis added).

WHEREFORE, this Court is respectfully asked to declare Section 921.141, Florida Statutes, unconstitutional under the above-referenced constitutional provisions.

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: 002414



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