IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY,
FLORIDA

CASE NO. 2012-CF-35337-A

STATE OF FLORIDA,

Plaintiff,

vs.

BRANDON LEE BRADLEY,

Defendant.
_____/

MOTION TO DECLARE SECTION 921.141(5)(e), FLORIDA STATUTES UNCONSTITUTIONAL AS WRITTEN AND APPLIED

The Defendant, BRANDON LEE BRADLEY pursuant to 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, moves for an order declaring Section 921.141(5)(e), Florida Statutes, unconstitutional. For cause, the Defendant states:

1. The Defendant has been indicted for first-degree premeditated murder and the State of Florida has filed notice pursuant to Fla.R.Crim.P. 3.202 that it seeks imposition of the death penalty.

2. Eligibility for capital punishment in Florida requires a conviction for first-degree murder under §782.04, Fla.Stat., and "sufficient aggravating circumstances" of *only* those factors listed in §921.141(5), Fla.Stat., that justify imposition of capital punishment. §921.141, Fla.Stat..

3. "An aggravating circumstance must genuinely limit the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." ***Zant v. Stephens***, 462 U.S. 862, 877 (1983). A statutory aggravating factor that does not genuinely limit the class of persons eligible for the death

penalty or one that fails to reasonably justify imposition of the death penalty as compared to others convicted of first-degree murder, or one that authorizes the sentencer to impose the death penalty based on the exercise of a constitutional right by the defendant is unconstitutional under the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. ***Brown v. Sanders***, 546 U.S. 212; 126 S.Ct. 884 (2006); ***Zant v. Stephens***, supra.

4. One of the aggravating circumstances set forth in §921.141(5), Fla.Stat., states, "The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." §921.141(5) (e), Fla.Stat.. This factor, sometimes referred to as the "witness elimination" factor, allows various considerations to be used in the determination of whether defendants are eligible for capital punishment and to be weighed in the determination of whether capital punishment should be imposed.

5. The use of the this aggravating circumstance by the judge to impose capital punishment in Florida violates the right to a jury trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Florida Constitution, because this factor, individually and in conjunction with other aggravating circumstances, increases the punishment that may be imposed on the defendant after the jury determines that a first-degree murder has been committed as set forth in the accompanying memorandum of law and as may be further argued during the hearing of this motion.

6. Because the substance of this factor is controlled by the Florida Supreme Court on an *ad hoc* basis, this factor violates the separation of powers proscription contained in article II, section 3 of the Florida Constitution, which in turn violates the Fourteenth Amendment to the United States Constitution as set forth with more particularity in the accompanying memorandum of law and as may be further argued when this motion is heard.

7. Because this factor is arbitrarily and capriciously used to determine the eligibility of defendants to receive capital punishment and to determine whether capital punishment should be imposed, this factor violates the Eighth and Fourteenth Amendments to the United States Constitution and article I, section 17 of the Florida Constitution, as set forth with more particularity in the accompanying memorandum of law and as may be further argued when this motion is heard.

8. Because this factor is applied in a manner that punishes a defendant for exercising fundamental constitutional rights, this factor violates the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 4, 16, 17 and 22 of the Florida Constitution, as set forth with more particularity in the accompanying memorandum of law and as may be further argued when this motion is heard.

9. A death recommendation from a jury and/or a death sentence imposed by a judge using this aggravating circumstance over timely and specific objections as articulated in the accompanying memorandum of law denies Due Process, fundamental fairness, a reliable sentence and basic rights guaranteed by the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 4, 16, 17 and 22 of the Florida Constitution, International Law, *jus cogens* and binding international agreements and treaties, including but not limited to the International Covenant on Civil and Political Rights, Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, and the American Convention on Human Rights.

MEMORANDUM OF LAW

The state and federal constitutions guarantee *minimum* protections that must be provided by the States whenever a citizen is prosecuted by the government. Specifically, the Fifth Amendment to the United States Constitution directs:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

These rights apply to Florida and this Defendant. ***Malloy v. Hogan***, 378 U.S. 1 (1964). Rights associated with the Fifth Amendment not expressly mentioned but which are necessary to make the right to due process of law meaningful, such as the right to be present during critical stages of a trial, also apply here. See ***Israel v. State***, 837 So.2d 381 (Fla. 2002), citing ***Snyder v. Massachusetts***, 291 U.S. 97 (1937). The right to indictment by a grand jury is also implicated in that there can be no more "infamous" crime than a capital crime. But see, ***Hurtado v. California***, 110 U.S. 516 (1884). To the extent that Florida's constitution guarantees indictment for a capital crime, the denial of that State right denies due process of law in violation of the Fourteenth Amendment to the United States Constitution.

The Sixth Amendment to the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Sixth Amendment to the United States Constitution applies to Florida and to this Defendant through operation of the Fourteenth Amendment to the United States Constitution. These rights "are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without 'due process of law,'" Amdt. 14, and the guarantee that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,' Amdt. 6. Taken together, these rights indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." ***Apprendi v. New Jersey***, 530 U.S. 466, 476-477 (2000) (Citations omitted). See ***Gideon v. Wainwright***, 372 U.S. 335 (1963) (right to counsel); ***Crawford v. Washington***, 541 U.S. 36 (2004) (right to confront adverse witnesses); ***Waller v. Georgia***, 467 U.S. 39, 44-48 (1984) (right to public trial); ***Ring v. Arizona***, 536 U.S. 584 (2002) (right to jury determination of facts authorizing imposition of the death penalty); ***In re Winship***, 397 U.S. 358 (1970) (burden on the State to prove guilt beyond a reasonable doubt); ***Duncan v. Louisiana***, 391 U.S. 145 (1968) (same); ***Mullaney v. Wilbur***, 421 U.S. 684 (1975).

The Eighth Amendment to the United States Constitution provides "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Eighth Amendment applies to Florida and this Defendant through article I, section 17 of the Florida Constitution. See also, ***Cooper Industries, Inc. v. Leatherman Tool Group, Inc.***, 532 U.S. 424, 433-434 (2001) ("Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion. That Clause makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual

punishments applicable to the States. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (*per curiam*).") (Footnote omitted).

The Eighth Amendment precludes excessive forms of punishment, e.g., ***Roper v. Simmons***, 543 U.S 551 (2005) (death penalty for person less than 18 years old unconstitutional); ***Atkins v. Virginia***, 536 U.S. 304 (2002) (death penalty impermissible for mentally retarded); ***Enmund v. Florida***, 458 U.S. 782, 787, 801 (1982) (Eighth and Fourteenth Amendments prohibit death penalty for one who neither took life, attempted to take life, nor intended to take life); ***Louisiana ex rel. Francis v. Resweber***, 329 U.S. 459, 463 (1947) ("The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence."), and cruel and unusual punishments such as arbitrary and capricious imposition of capital punishment. ***Furman v. Georgia***, 408 U.S. 238 (1972).

The Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fourteenth Amendments applies the basic constitutional guarantees to the States, including Florida, and otherwise compels that State's provide minimal due process protections to all citizens prosecuted by the government, including this Defendant.

The Florida Constitution confers rights under article I, sections 2, 9, 15(a), 16, 17 and 22, and article II, section 3. To the extent that the State of Florida violates the express mandates of its own constitution, the Due Process Clause the Fourteenth Amendment to the United States Constitution is violated. Specifically, article I, section 2 of the Florida Constitution states:

> All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion, national origin, or physical disability.

Article I, section 9 of the Florida Constitution provides that "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself." Article I, section 15(a), Florida Constitution, provides that "No person shall be tried for a capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court, except persons on active duty in the militia when tried by courts martial." Article I, section 16(a) of the Florida Constitution states:

> In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by an impartial jury nit he county were the crime was committed. If the county is not known, the indictment or information may charge venue in two or more counties conjunctively and proof that the crime was committed in that area shall be sufficient; but before pleading the accused may elect in which of those counties the trial will take place. Venue for prosecution of crimes committed beyond the boundaries of the state shall be fixed by law.

Article I, section 17 of the Florida Constitution as amended now guarantees the same protections contained in the Eighth Amendment to the United States Constitution. Article I, section 22 of the Florida Constitution specifies that, "The right of trail by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law." In that regard, Section 913.13, Florida Statutes, expressly states that, "Twelve persons shall

constitute a jury to try all capital cases, and six persons shall constitute a jury to try all other criminal cases." Thus, in Florida there is a due process right to a unanimous guilty verdict by a 12-member person before a defendant may be convicted of a capital crime.

Finally, article II, section 3 of the Florida Constitution prohibits a person in one branch of government from exercising powers belonging to another branch of government. If the substance of Florida's death penalty scheme is coming from the Supreme Court of Florida rather the from the Florida Legislature, this constitutional provision is being denied, and a violation of the Fourteenth Amendment to the United States Constitution occurs. See ***Barnhill v. State***, 834 So.2d 836, 849 (Fla. 2002) (judge cannot delete the term "extreme" from the jury instruction regarding a homicide committed while under "extreme mental or emotional distress" due to separation of powers rule).

Florida's statutory death penalty scheme:

The Florida Legislature passed laws in the wake of ***Furman v. Georgia***, 408 U.S. 238 (1977) trying to accommodate the citizens' constitutional rights and yet establish a valid death penalty scheme. Some states, such as Louisiana, enacted statutes that make defendants eligible for capital punishment when the jury finds beyond a reasonable doubt that only one statutory aggravating circumstance exists. E.g., ***Lowenfeld v. Phelps***, 284 U.S. 231, 244 (1988) (Approving La.Code Crim.Proc.Ann., Art. 905.3 (West 1984), which states, "A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed.").

Florida's capital sentencing scheme,[1] however, is substantially different. It requires the existence of a predicate conviction by a 12-person jury for first-degree murder under §782.04, Fla.Stat., and then requires that "*sufficient* aggravating circumstances" exist[2] before a person is eligible for capital punishment. The determination of whether a death sentence is imposed depends on a weighing process of the factors contained in §921.141(5), Fla.Stat., against the factors set forth in §921.141(6), Fla.Stat.. A Florida jury, however, does not render any finding that "sufficient aggravating circumstances" exist for imposition of capital punishment, nor is the jury required to make a unanimous finding as to the existence of other statutory aggravating circumstances, including whether §921.141(5)(e), Fla.Stat., exists. This denies the right to a jury trial.

More specifically, the power to enact substantive legislation is vested solely in the Florida Legislature. "The legislative power of the state shall be vested in a legislature of the State of Florida, consisting of a senate composed of one senator elected from each senatorial district and a house of

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[1] Florida's sentencing scheme based on Section 921.141, Fla.Stat. (1973), received initial approval in ***Proffitt v. Florida***, 428 U.S. 242 (1976). Since then, several unconstitutional practices implemented under that statute have been more fully appreciated and expressly condemned by the United State Supreme Court. E.g., ***Espinosa v. Florida***, 505 U.S. 1079, 1082 (1992) ("We merely hold that, if a weighing State decides to place capital sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances."); ***Hitchcock v. Dugger***, 481 U.S. 393, 398 (1987) ("We think it could not be clearer that . . . the proceedings did not comport with the requirements of *Skipper v. South Carolina*, *Eddings v. Oklahoma*, and *Lockett v. Ohio*) (Citations omitted); ***Gardner v. Florida***, 430 U.S. 349, 362 (1977) (We conclude that petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain.").

[2] In Florida, "[t]he *only* matters that may be considered in aggravation are those set out in the death penalty statute." ***Zack v. State***, 911 So.2d 1190, 1208 (Fla. 2005) (Emphasis added); See §921.141(5), Fla.Stat. (2005) ("Aggravating circumstances *shall* be limited to the following"). In Florida, the aggravating circumstances set forth in §921.141(5), Fla.Stat., actually "define" the crimes for which capital punishment may be imposed. ***State v. Dixon***, 283 So.2d 1, 10 (Fla.1973). See ***Zant v. Stephens***, 462 U.S. 862, 878 (1983) ("statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.").

representatives composed of one member elected from each representative district." Article III, section I, Florida Constitution. Article II, section 3 of the Florida Constitution guarantees that, "The power of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Thus, it is for elected Florida legislators, in the ordinary exercise of their investigative and legislative functions, to enact clear, unambiguous statutory aggravating factors that comport with article I, section 17 of the Florida Constitution and/or the eighth and fourteenth amendments to the United States Constitution. When the meaning and substance of Florida's death penalty scheme is provided by Justices of the Supreme Court of Florida on an *ad hoc* basis while reviewing imposition of the death penalty in specific cases, the separation of powers clause is violated. The individual aggravating circumstances so given substance by the Court violate requirements of fair notice and input by the electorate in violation of article I, sections 2, 9, 16 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth amendments to the United States Constitution.

Even after being found guilty of first-degree murder, a defendant is *not* eligible for the death penalty in Florida unless "*sufficient* aggravating circumstances" exist. Unlike some states where eligibility for the death penalty is based on a unanimous jury finding of a single aggravating factor, Florida expressly requires that "*sufficient* aggravating circumstances" exist before a death penalty may be imposed. Therefore, each statutory aggravating circumstance upon which imposition of capital punishment rests is but a component of whether a defendant is "eligible" for capital punishment in Florida. A jury could reasonably find that one or more aggravating circumstances are not "sufficient" to justify imposition of capital punishment. Under the statute, a defendant is entitled to a unanimous jury determination beyond a reasonable doubt

as to whether "*sufficient* aggravating circumstances" exist that legally and factually authorize capital punishment because that is the class of persons eligible for capital punishment. The Florida Supreme Court expressly recognized that the jury may not reach a unanimous decision as to the existence of aggravating circumstances (and thus implicitly a unanimous decision as to the eligibility of the defendant for capital punishment) yet that Court forbids the use of a verdict form that would accommodate the Sixth Amendment right to the unanimous jury determination as to the eligibility of a defendant for capital punishment as apparently mandated by ***Ring v. Arizona***:

> Under the law, therefore, the jury may recommend a sentence of death so long as a majority concludes that at least one aggravating circumstance exists. Nothing in the statute, the standard jury instructions, or the standard verdict form, however, requires a majority of the jury to agree on *which* aggravating circumstances exist. Under the current law, for example, the jury may recommend a sentence of death where four jurors believe that only the "avoiding a lawful arrest" aggravator applies, *see* § 921.141(5)(e), while three others believe that only the "committed for pecuniary gain" aggravator applies, *see* §291.141(5)(f), because seven jurors believe that at least one aggravator applies. The order in this case, however, requires a majority vote for at least one particular aggravator. This requirement imposes on the capital sentencing process an extra statutory requirement. Unless and until a majority of this Court concludes that *Ring* applies in Florida, *and* that it requires a jury's majority (or unanimous) conclusion that a particular aggravator applies, or until the Legislature amends the statute (see our discussion at section C below), the court's order imposes a substantive burden on the state not found in the statute and not constitutionally required.

State v. Steele, 921 So.2d 538 (Fla. 2005). It is up to the judiciary to safeguard the due process rights of citizens. It is up to the Legislature to pass constitutional legislation. Neither branch of government is fulfilling its obligations in the context of capital punishment in Florida.

Specifically, the Florida Legislature, in the exercise of its constitutional power, enacted interrelated statutes that established Florida's death penalty scheme. The scheme requires first

that there be a conviction of a "capital" offense. For that to occur, a 12-person jury must unanimously find beyond any reasonable doubt that a defendant committed first-degree murder.[3] The Florida Legislature defines first-degree murder as:

> **782.04. Murder**
>
> (1)(a) The unlawful killing of a human being:
>
> 1. When perpetrated from a premeditated design to effect the death of the person killed or any human being;
>
> 2. When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any: a. Trafficking offense prohibited by § 893.135(1), b. Arson, c. Sexual battery, d. Robbery, e. Burglary, f. Kidnapping, g. Escape, h. Aggravated child abuse, i. Aggravated abuse of an elderly person or disabled adult, j. Aircraft piracy, k. Unlawful throwing, placing, or discharging of a destructive device or bomb, *l.* Carjacking, m. Home-invasion robbery, n. Aggravated stalking, *o.* Murder of another human being, p. Resisting an officer with violence to his or her person, q. Felony that is an act of terrorism or is in furtherance of an act of terrorism; or
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> 3. Which resulted from the unlawful distribution of any substance controlled under § 893.03(1), cocaine as described in § 893.03(2)(a)4., or opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user,
>
> is murder in the first degree and constitutes a capital felony, punishable as provided in § 775.082.
>
> (b) In all cases under this section, the procedure set forth in §921.141 shall be followed in order to determine sentence of death or life imprisonment.

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[3] It should be noted that one form of sexual battery in Florida is also specified to be a "capital crime," punishable by the death penalty as controlled by Section 921.141, Fla.Stat. See Section 794.011(2)(a), Fla.Stat. (2005) ("A person 18 years of age or older who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age commits a capital felony, punishable as provided in §§ 775.082 and 921.141.").

At the conclusion of the guilt phase of a murder trial, the 12-person jury must return a unanimous verdict of guilt finding that the defendant committed first-degree murder based on a felony-murder theory, a premeditated-murder theory, or both. A conviction for first-degree murder, however, does NOT render a defendant eligible for the death penalty because in Florida the death penalty cannot be imposed in the absence of "*sufficient* aggravating circumstances."

Specifically, the eligibility of a defendant to receive the death penalty in Florida is based on a determination that "sufficient aggravating circumstances" exist to impose capital punishment as required under the procedure set forth in §921.141, Fla.Stat.:

> **921.141. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence**
>
> **(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 §775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or the defendant's counsel

shall be permitted to present argument for or against sentence of death.

(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.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with § 775.082.

(4) Review of judgment and sentence.--The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida and disposition rendered within 2 years after the filing of a notice of appeal. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances.--Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.

(k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

(*l*) The victim of the capital felony was a person less than 12 years of age.

(m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

(n) The capital felony was committed by a criminal street gang member, as defined in §874.03.

(*o*) The capital felony was committed by a person designated as a sexual predator pursuant to § 775.21 or a person previously designated as a sexual predator who had the sexual predator designation removed.

(6) Mitigating circumstances.--Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

(h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

(7) Victim impact evidence.--Once the prosecution has provided

> evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.
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> **(8) Applicability.**--This section does not apply to a person convicted or adjudicated guilty of a capital drug trafficking felony under § 893.135.

(Footnote omitted) (Emphasis added). Under the current procedure, the jury does not render a verdict as to whether there are "*sufficient* aggravating circumstances" to justify imposition of capital punishment. Instead the jury provides a recommendation to the judge as to what sentence should be imposed. The judge is precluded from using a verdict form other than the standard jury form. ***State v. Steele***, 921 So.2d 538 (Fla. 2005).

This procedure denies the right to a jury trial. Florida law requires a written waiver of the right to a jury. Fla.R.Crim.P. 3.260. See ***Solis v. State***, 801 So.2d 208, 209 (Fla. 4th DCA 2001). There is a presumption against the waiver of a constitutional right, and the waiver of the right to a jury trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Florida Constitution otherwise requires a knowing, voluntary and express waiver to be effective. ***Brookhart v. Janis***, 394 U.S. 1 (1966); ***Johnson v. Zerbst***, 304 U.S. 458 (1938).

Application of Law to Florida's Scheme

At the onset, it must be noted that the State has the burden to create law that comports with the requirements of the United States Constitution:

> If the state wishes to authorize capital punishment it has a constitutional responsibility to *tailor* and *apply* its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.

> Part of a state's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." (citations omitted). It must channel the sentencer's discretion by "clear and objective" standards and then "make rationally reviewable the process for imposing a sentence of death."

Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (Emphasis added). It is a fundamental premise that the judicial branch of government is the enforcer of the due process commanded by the Constitution. In the context of capital punishment, greater due process is required than that commanded for lesser punishments. See Amendments to Fla.R.Crim.P. & Fla.R.App.P., 875 So.2d 563, 568 (Fla. 2004) (Cantero, J., concurring) ("As we have repeatedly recognized, 'death is different.'"); ***Chamberlain v. State***, 881 So.2d 1087, 1108 (Fla. 2004) ("On this issue as on many others, death is different."). Death is different because of the "acute need" for reliability in carrying out a sentence unique in its severity and finality:

> "[D]eath is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (Citation omitted).

Gardner v. Florida, 430 U.S. 349, 357 (1977).

The "acute need for reliable decision making" was recognized early-on by the United States Supreme Court:

> . . . 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. "*Because the death penalty is unique "in both its severity and its finality,"* [Gardner v. Florida, 430 U.S. 349] 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, 731-732 (1998) (Emphasis added). See ***Deck v. Missouri***, 544 U.S. 622 (2005); ***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 procedures required to ensure due process in the context of imposition of capital punishment may not be explicitly provided for by statute. Nonetheless, the Constitution compels courts to adopts procedures that a accommodate the due process requirements compelled by the Constitution:

> To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case.

Beck v. Alabama, 447 U.S. 625, 637-638 (1980). Thus, unlike some mandatory sanctions, state legislatures cannot require "automatic" imposition of capital punishment. ***Sumner v. Shuman***, 483 U.S. 66 (1987); ***Woodson v. North Carolina***, 428 U.S. 280 (1976). Defendants must be given notice and the opportunity to address all evidence upon which imposition of capital punishment is based. ***Gardner v. Florida***, 430 U.S. 349 (1977). The sentencing body cannot be precluded from

considering and giving effect to relevant mitigation. See ***Smith v. Texas***, 543 U.S. 37 (2004) (procedure unconstitutional where jury asked to answer "yes" or "no" to two questions in a manner where valid mitigating evidence was not considered); ***Skipper v. South Carolina***, 476 U.S. 1 (1976) (sentencing body cannot be precluded from considering defendant's potential for rehabilitation); ***Penry v. Lynaugh***, 492 U.S.302 (1989) (sentencing body cannot be precluded from considering defendant's mental retardation as mitigating circumstance).

The analysis to be applied by the courts is far more complex when a death penalty statute is being analyzed, for not only must the statute satisfy ordinary due process requirements, it also must satisfy an Eighth Amendment analysis that compels heightened due process to ensure reliable sentencing. The United States Supreme Court has expressly alluded to the analysis that must be conducted when a court reviews the constitutionality of a statutory aggravating circumstance that is used to impose capital punishment:

> The difficulty with the State's argument is that it presents a Due Process Clause approach to vagueness and fails to recognize the rationale of our cases construing and applying the Eighth Amendment. Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk. Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis. [Cit.] Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

Maynard v. Cartwright, 486 U.S. 356, 361-362 (1988).

Due Process and fundamental fairness considerations under the Fifth and Fourteenth Amendments to the United States Constitution and article I, sections 2 and 9 of the Florida Constitution are inextricably tied to the heightened reliability demanded by the Eighth Amendment to the United States Constitution. See ***Caldwell v. Mississippi***, 472 U.S. 320, 329 (1985) ("This Court has repeatedly said that under the Eighth Amendment 'the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.'") (Citation omitted - emphasis added). Aside from heightened requirements of reliability required as a component of Due Process, the Eighth Amendment proscription against cruel and unusual punishments precludes capital punishment where imposition of the death penalty is contrary to contemporary standards of decency. See ***Roper v. Simmons***, 543 U.S 551 (2005) (death penalty for person less than 18 years old unconstitutional); ***Atkins v. Virginia***, 536 U.S. 304 (2002) (death penalty impermissible for mentally retarded); ***Stanford v. Kentucky***, 492 U.S. 361 (1989) (death penalty unconstitutional for person under seventeen years of age); ***Tison v. Arizona***, 481 U.S. 137 (1987) (death penalty unconstitutional for person who lacks sufficient moral culpability).

In summary, a court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." ***Burger v. Kemp***, 483 U.S. 776, 785 (1987). Arbitrary and capricious imposition of capital punishment is forbidden. ***Furman v. Georgia***, 408 U.S. 238 (1977). "Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." ***Gregg v. Georgia***, 428 U.S. 153, 189 (1976) (plurality opinion).

Florida's statute is unique. By express legislation, a defendant convicted of first-degree murder *cannot* receive the death penalty in the absence of "*sufficient* aggravating circumstances." Section 921.141(2) & (3), Fla.Stat.. Holdings by the United States Supreme Court make clear that the statutory aggravating circumstances that authorize and that render a defendant eligible for imposition of capital punishment are entitled to the full protections of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. See ***Shepard v. United States***, 544 U.S. 13 (2005); ***United States v. Booker***, 543 U.S. 220 (2005), ***Ring v. Arizona***, 536 U.S. 584 (2002), ***Apprendi v. New Jersey***, 530 U.S. 466 (2001); ***Jones v. United States***, 526 U.S. 227 (1999); ***Gardner v. Florida***, 430 U.S. 349, 357 (1977). But see, ***Winkles v. State***, 894 So.2d 842 (Fla. 2005); ***Bottoson v. Moore***, 833 So.2d 693, 732-733 (Fla. 2002). Thus, since in Florida a defendant's eligibility for capital punishment is expressly and statutorily based on a factual and legal determination that there are "*sufficient* aggravating circumstances," due process demands that the jury make that determination beyond a reasonable doubt. Further, because Florida requires a unanimous 12-person jury determination before a verdict of guilt for first-degree murder can be rendered, the determination that there are "*sufficient* aggravating circumstances" to render a defendant eligible for the death penalty must also be made by a unanimous jury. Anything less than a unanimous jury denies due process under the Fourteenth Amendment to the United States Constitution and is otherwise an arbitrary and irrational diminution of the standard of proof that violates the due process and reliability requirements commanded by the Eighth Amendment to the United States Constitution.

At first blush, the *individual* components that make up the "*sufficient* aggravating circumstances" may not be entitled to Sixth Amendment protection if the analysis set forth in ***Schad v. Arizona***, 501 U.S. 624, 645 (1991) is applied. Clearly, there is here a Sixth Amendment

right for the jury to make a unanimous determination beyond a reasonable doubt that there are "*sufficient* aggravating circumstances" because that is the standard that was expressly set by the State Legislature. The absence of an itemized verdict form becomes problematic insofar as the determination of prejudicial versus harmless error when improper aggravating circumstances are used. The procedure currently in Florida is that the judge determines eligibility of a defendant and sentences the defendant. Whether used by the judge or jury, aggravating circumstances that are too vague or imprecise or that support imposition of capital punishment based on the exercise of a constitutional right are unconstitutional. See ***Griffin v. U.S.***, 502 U.S. 46, 54 (1991); ***Stromberg v. California***, 283 U.S. 319 (1931) (unconstitutional if aggravating factor used by jury to determine eligibility); ***Brown v. Sanders***, 546 U.S. 212, 126 S.Ct. 884 (2006) (unconstitutional if used by sentencer to impose capital punishment).

In Florida, the process does not require the jury issue even a general verdict as to whether sufficient aggravating circumstances exist based on the existence of one or more aggravating circumstances. Instead, *there is no verdict form used at all*. The jury never overtly makes a reviewable finding beyond a reasonable doubt that "*sufficient* aggravating circumstances" exist to impose the death penalty, and the jury "recommendation" form cannot suffice for this purpose unless the jury unanimously recommends imposition of the death penalty. A unanimous death recommendation by the jury necessarily entails an implicit finding that there are sufficient aggravating circumstances to impose capital punishment, whether as a matter of "eligibility" or a matter of moral judgment after weighing all the factors. However, every non-unanimous jury recommendation presents the very real and constitutionally unacceptable chance that there was never a finding by the jury that *sufficient* aggravating circumstances exist to justify imposition of capital punishment, and the jury as a body is thus denied a meaningful opportunity to say that

this poor devil that committed first-degree murder ought not receive the death penalty. This is the very essence of the interplay between the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Even with a unanimous death recommendation, a "bad" individual aggravating circumstance is unconstitutional where the jury fails to make an express finding of the existence of all statutory elements that comprise requisite "sufficient aggravating circumstances" that render the defendant eligible for the death penalty and that authorize imposition of capital punishment. This is so because the appellate court must apply a harmless error analysis that is not meaningful – the court can only guess at what effect the bad factor played in imposition of the death penalty. This is shown by the results of the analysis used by the Court in dealing with the "witness elimination" aggravating circumstance from its enactment to the present.

Specifically, this aggravating circumstance was contained in Florida's death penalty statutory scheme that was passed in the wake of ***Furman v. Georgia***, 408 U.S. 238 (1972) (*per curiam*). The statute seemingly creates the following specific aggravating consideration that may be used in conjunction with other aggravating circumstances to determine a defendant's eligibility to receive the death penalty: "The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." §921.141(5)(e), Fla.Stat.. This statute has been widely interpreted on an *ad hoc* basis by the Florida Supreme Court in a manner that allows defendants to receive capital punishment based on the exercise of rights secured by the First Amendment to the United States Constitution and article I, section 4 of the Florida Constitution. The legal standard for finding the existence of this aggravating circumstance has vacillated wildly on an *ad hoc* basis, rendering the capital sentencing process

inconsistent and unreliable in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

Initially, the Defendant objects to the use of this aggravating circumstance as a basis to impose capital punishment because its existence is not determined by a unanimous jury beyond all reasonable doubt. However stated, the question of whether a person was killed to "eliminate" a witness or to "avoid arrest" is a factual question concerning motive that falls squarely within the Sixth and Fourteenth Amendment guarantee of jury determination beyond all reasonable doubt, based on the following analysis set forth in ***Ring v. Arizona***, 536 U.S. 584 (2002):

> Arizona also supports the distinction relied upon in *Walton* between elements of an offense and sentencing factors. See *supra,* at 2437-2438; Tr. of Oral Arg. 28-29. As to elevation of the maximum punishment, however, *Apprendi* renders the argument untenable; *Apprendi* repeatedly instructs in that context that the characterization of a fact or circumstance as an "element" or a "sentencing factor" is not determinative of the question "who decides," judge or jury. See, *e.g.,* 530 U.S., at 492, 120 S.Ct. 2348 (noting New Jersey's contention that "[t]he required finding of biased purpose is not an 'element' of a distinct hate crime offense, but rather the traditional 'sentencing factor' of motive," and calling this argument "nothing more than a disagreement with the rule we apply today"); *id.*, at 494, n. 18, 20 S.Ct. 2348 ("[W]hen the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict."); *id.*, at 495, 120 S.Ct. 2348 ("[M]erely because the state legislature placed its hate crime sentence enhancer within the sentencing provisions of the criminal code does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense." (internal quotation marks omitted)); see also *id.*, at 501, 120 S.Ct. 2348 (THOMAS, J., concurring) ("[I]f the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact[,] ... the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime.").

Even if facts increasing punishment beyond the maximum authorized by a guilty verdict standing alone ordinarily must be found by a jury, Arizona further urges, aggravating circumstances necessary to trigger a death sentence may nonetheless be reserved for judicial determination. As Arizona's counsel maintained at oral argument, there is no doubt that "[d]eath is different." Tr. of Oral Arg. 43. States have constructed elaborate sentencing procedures in death cases, Arizona emphasizes, because of constraints we have said the Eighth Amendment places on capital sentencing. Brief for Respondent 21-25 (citing *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) *(per curiam)*); see also *Maynard v. Cartwright*, 486 U.S. 356, 362, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) ("Since *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action."); *Apprendi*, 530 U.S., at 522-523, 120 S.Ct. 2348 (THOMAS, J., concurring) ("[I]n the area of capital punishment, unlike any other area, we have imposed special constraints on a legislature's ability to determine what facts shall lead to what punishment--we have restricted the legislature's ability to define crimes.").

Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional protections ... extend[ed] to defendants generally, and none is readily apparent." *Id.*, at 539, 120 S.Ct. 2348 (O'CONNOR, J., dissenting). The notion "that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence ... is without precedent in our constitutional jurisprudence." *Ibid.*

In various settings, we have interpreted the Constitution to require the addition of an element or elements to the definition of a criminal offense in order to narrow its scope. See, *e.g.*, *United States v. Lopez*, 514 U.S. 549, 561-662, 115 S.Ct. 1264, 131 L.Ed.2d 626 (1995) (suggesting that addition to federal gun possession statute of "express jurisdictional element" requiring connection between weapon and interstate commerce would render statute constitutional under Commerce Clause); *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) *(per curiam)* (First Amendment prohibits States from "proscrib[ing] advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing

imminent lawless action and is likely to incite or produce such action"); *Lambert v. California*, 355 U.S. 225, 229, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957) (Due Process Clause of Fourteenth Amendment requires "actual knowledge of the duty to register or proof of the probability of such knowledge" before ex-felon may be convicted of failing to register presence in municipality). If a legislature responded to one of these decisions by adding the element we held constitutionally required, surely the Sixth Amendment guarantee would apply to that element. We see no reason to differentiate capital crimes from all others in this regard. Arizona suggests that judicial authority over the finding of aggravating factors "may ... be a better way to guarantee against the arbitrary imposition of the death penalty." Tr. of Oral Arg. 32. The Sixth Amendment jury trial right, however, does not turn on the relative rationality, fairness, or efficiency of potential factfinders. Entrusting to a judge the finding of facts necessary to support a death sentence might be "an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State. ... The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free." *Apprendi*, 530 U.S., at 498, 120 S.Ct. 2348 (SCALIA, J., concurring).

In any event, the superiority of judicial factfinding in capital cases is far from evident. Unlike Arizona, the great majority of States responded to this Court's Eighth Amendment decisions requiring the presence of aggravating circumstances in capital cases by entrusting those determinations to the jury.

Although " 'the doctrine of *stare decisis* is of fundamental importance to the rule of law[,]' ... [o]ur precedents are not sacrosanct." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989) (quoting *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 494, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987).). "[W]e have overruled prior decisions where the necessity and propriety of doing so has been established." 491 U.S., at 172, 109 S.Ct. 2363. We are satisfied that this is such a case.

For the reasons stated, we hold that *Walton* and *Apprendi* are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both. Accordingly, we overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death

> penalty. See 497 U.S., at 647-649, 110 S.Ct. 3047. Because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense," *Apprendi*, 530 U.S., at 494, n.19, 120 S.Ct. 2348, the Sixth Amendment requires that they be found by a jury.
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> * * *
>
> "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. ... If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it." *Duncan v. Louisiana*, 391 U.S. 145, 155-156, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).
>
> The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both. The judgment of the Arizona Supreme Court is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Ring v. Arizona, 536 U.S. 584, 604-609 (2002) (Footnotes omitted).

The Sixth and Fourteenth Amendment rights to a unanimous jury determination aside, the considerations set forth in §921.141(5)(e), Fla.Stat., deny due process, basic rights under the First Amendment, and otherwise result in arbitrary and capricious imposition of capital punishment. These considerations are shown by the arbitrary use of this circumstance in ***Buzia v. State***, SC04-582 (2006WL721612) (Fla. March 23, 2006)(slip opinion, pages 9-13). Bearing in mind that the jury did not make a unanimous finding as to the existence of this factor, either in the rendition of the guilty verdict for first-degree (premeditated *and* felony) murder or during the penalty phase, where the recommendation of the jury was eight to four in favor of capital punishment. Under this recommendation, it is not even established that Buzia's jury made a unanimous determination that there were "*sufficient* aggravating circumstances" to make Buzia eligible for capital punishment. Yet the trial judge used the "avoid arrest" circumstance to

impose capital punishment and the Florida Supreme Court applied its own analysis to approve the trial court's use of this factor.

In footnote 4, rejecting as irrelevant the fact that the victims were alive when Buzia left, the Court noted that, "The question, again, is whether [Bruzia] killed [the victim] to eliminate him as a witness." Slip opinion, p.10, fn4. That question is a classic jury question entitled to protection under the Sixth and Fourteenth Amendments to the United States Constitution because its answer, individually and/or in conjunction with the presence of other statutory aggravating circumstances, render Buzia eligible for the death penalty. See ***Ring***, *supra*. It is not known whether the jury in Buzia found the existence of this aggravating circumstance. However, the Court upheld the *judge's* use of this factor based on the analysis contained in ***Parker v. State***, 873 So.2d 270, 289 (Fla. 2004):

> Where the victim is not a police officer, "the evidence [supporting the avoid arrest aggravator] must prove that the sole or dominant motive for the killing was to eliminate a witness," and "[m]ere speculation on the part of the state that witness elimination was the dominant motive behind a murder cannot support the avoid arrest aggravator." However, this factor may be proved by circumstantial evidence from which the motive for the murder may be inferred, without direct evidence of the offender's thought processes.
>
> In other cases, this Court has found it significant that the victim's knew and could identify their killer. While this fact alone is insufficient to prove the avoid arrest aggravator, we have looked at any further evidence presented, such as whether the defendant used gloves, wore a mask, or made any incriminating statements about witness elimination; whether the victims offered resistance; and whether the victims were confined or were in a position to pose a threat to the defendant.

Parker, 873 So.2d at 289 (Fla. 2004) (emphasis in original).

The consideration that a defendant's prior association with a victim supports imposition of capital punishment under this factor violates the right First Amendment right of association.

The legal standard otherwise is inconsistent with the due process requirement that the State bears the burden of proving the existence of elements of an offense beyond a reasonable doubt. Circumstantial evidence is not legally sufficient proof if it fails to exclude all reasonable hypothesis of innocence. In ***Buzzia***, the Court rules that the fact the victims were initially left alive by Buzzia irrelevant. The jury's determination that a premeditated murder occurred did not establish that the motive for the murder was elimination of a witness any more than it established the victims were intentionally killed because they were Jewish, or Catholic, or Asian, or American Indian.

The analysis used by the Court otherwise produces inconsistent results. The "avoid arrest or to escape" aggravating circumstance is unconstitutionally vague and overbroad under the teachings of ***Maynard***, where it is silent as to whether the arrest must be imminent, and makes no provision as to whether the person being arrested or escaping must be the defendant or whether it could be someone else. It fails to state whether the escape must be from actual or imminent custody or whether the custody must be legal. Hence, the aggravating circumstance is subject to variable and uneven application depending on whether the sentencer uses a strict or a liberal construction of it.

This aggravating circumstance has been applied in an inconsistent and arbitrary manner. Specifically, in ***Nelson v. State***, 850 So.2d 514 (Fla. 2003), the Court analyzed the use of this factor and the trial court's denial of a special jury instruction as follows:

> Nelson makes a two-part claim regarding the avoid arrest aggravator. He alleges that (1) the trial court erred by not informing the jurors that when the victim is not a police officer, the primary or dominant motive must be to eliminate the witness or that the State's proof must be very strong; and (2) the trial court erred by finding the avoid arrest aggravator.
>
> As to the avoid arrest aggravator instruction, we agree with the State that Nelson did not properly preserve this issue for

review. Although the record reflects that Nelson filed a motion to declare sections 921.141 and 921.141(5)(e), Florida Statutes (1997), unconstitutional, Nelson did not specifically address the avoid arrest jury instruction in that motion. Further, Nelson did not object to the adequacy of the avoid arrest jury instruction at trial. This Court has held that the contemporaneous objection rule applies to *Espinosa* challenges. *See* Hodges v. State, 629 So.2d 272, 273 (Fla. 1993). Failure to make an objection at trial about a jury instruction will render it procedurally barred. *See id.* Because the record reflects that Nelson did not object to the avoid arrest aggravator jury instruction at trial, we find this issue procedurally barred.

The trial court found that Nelson's sole or dominant motive for the murder (of a victim who was not a law enforcement officer) was for the purpose of avoiding or preventing a lawful arrest. The trial court found that the aggravator was proven beyond a reasonable doubt and listed four factors that supported it as being Nelson's sole murder motive:

> (1) The Defendant in his confession to the police said he killed the victim because he was afraid that [redacted] could identify him, "because she saw his face."
> (2) Once he removed her from her home and placed her in the trunk of her car, she was no longer a threat to his escape.
> (3) The Defendant placed the victim in the trunk of her car and drove her around over six hours. Thus he had ample opportunity to release the victim or simply leave her in the trunk. See *Alston v. State*, 723 So.2d 148, 160 (Fla. 1998).
> (4) The victim was abducted from her home and transported to an isolated area where she was killed.

We conclude that Nelson's claim that the trial court erred in finding the avoid arrest aggravator is refuted by the record, including his own admissions. After [redacted] body was found, Nelson agreed to waive his rights and to speak with police. When Detective Sergeant Robinson asked why this happened, Nelson responded that he was mad at the world and mad about his life. When Nelson was describing his encounter with [redacted] in her bedroom, he related that she was screaming and when Sergeant Robinson asked, "And you were saying you didn't want to leave because of what reason?" Nelson replied, "(Inaudible) she would call the police." Sergeant Robinson then asked, "So you were worried about her calling the police if you left?" Nelson replied, "Yes." Sergeant Robinson asked Nelson, "Why did you put her in the trunk?" Nelson replied, "So no one would see." Nelson expressly agreed with the police when they asked him if he killed

[redacted] because he felt like she could identify him. In fact, when Nelson was asked how [redacted] could identify him in the dark, he replied, "From the bathroom light." Later on in the interview, Sergeant Robinson asked Nelson, "So what made you kill Ms. [redacted] Nelson answered, "I got scared." Thus, the record reflects that Nelson's own explanations about why he killed [redacted] consistently related his concerns about her identifying him. *See* *Walls v. State*, 641 So.2d 381, 390 (Fla. 1994) (stating that the defendant's argument that the avoid arrest aggravator was improperly found was without merit "because it is directly refuted by the record and Walls' own words").

Although Nelson's admissions to police alone support his intentional elimination of [redacted] as a witness, other considerations also support the avoid arrest aggravator in this case. For example, when evaluating the avoid arrest aggravator, this Court has stated that it will look at whether the victims knew and could identify their killer, but that this fact alone is insufficient to prove the aggravator beyond a reasonable doubt. *See* *Farina*, 801 So.2d 44, 54 (Fla. 2001). We have held that the following evidence is also pertinent when reviewing this aggravator: "[W]hether the defendant used gloves, wore a mask, or made any incriminating statements about witness elimination; whether the victims offered resistance; and whether the victims were confined or were in a position to pose a threat to the defendant." *Id.* The evidence in this case indicates that Nelson probably could have accomplished the burglary of [redacted] home and sexual battery without killing her since [redacted] likely posed little physical resistance to Nelson: she was [redacted] years old; she was awakened from her bed in the middle of the night when she was wearing only a nightgown; and at that time her eyeglasses and hearing aids were on her night stand. Further, Nelson easily obtained access to her car. Therefore, it appears that once Nelson immobilized [redacted] by putting her in the trunk, he secured an uncontested getaway and there was no reason for him to kill her except to eliminate her as a witness. *See* *Looney v. State*, 803 So.2d 656, 677-78 (Fla. 2001) (finding that once the defendants immobilized the victims, gained access to the victims' property and vehicles, and secured an uncontested getaway, the only remaining reason to kill the victims was to eliminate them as witnesses), *cert. denied,* 536 U.s. 966, 122 S.Ct. 2678, 153 L.Ed.2d 2002).

Nelson's act of taking [redacted] to a remote area to kill her also lends support to the finding of the avoid arrest aggravator in this case. The evidence at trial was that Nelson drove to an isolated orange grove to kill [redacted] but his plan was stymied when the car became stuck in the sand and he needed the assistance of other people to extricate the car. Nelson then drove to another orange

> grove where he killed [redacted] The record reflects that Nelson's journey to two different orange groves was intended to find an isolated place to kill [redacted] the sole witness to his crimes. *See* Knight v. State, 746 So.2d 423, 435 (Fla. 1998); Preston v. State, 607 So.2d 404, 409 (Fla. 1992); Cave v. State, 476 So.2d 180, 188 (Fla. 1985); Martin v. State, 420 So.2d 583, 585 n. 3 (Fla. 1982).
>
> We find no error in the trial court's finding of the avoid arrest aggravator because the defendant's own statements and actions corroborate evidence that the sole or dominant murder motive in this case was to silence Brace as the sole witness against him.

Nelson v. State, 850 So.2d 514, 524-526 (Fla. 2003) (Footnotes omitted). See ***Floyd v. State***, 850 So.2d 383, 406 (Fla. 2002) ("Although issue may be debated and contested," the circumstantial evidence that witness elimination was not the dominant motive is overcome by direct evidence of defendant stating he shot the victim because she "threatened to call the police on me."); ***Philmore v. State***, 820 So.2d 919, 935 (Fla. 2002) (same).

While this reasoning appears consistent with that in ***Brucia***, supra, it is wholly inconsistent with the reasoning and results in other cases with similar facts: See ***Anderson v. State***, 841 So.2d 390, 405 (Fla. 2003)(Possibility that defendant murdered person whom he knew and who could turn him in for crime out of anger precluded finding victim was killed to eliminate a witness); ***Bell v. State***, 841 So.2d 329, 336 (Fla. 2002) (Possibility that victim killed out of anger precluded finding that victim was killed to eliminate witness); ***Hurst v. State***, 819 So.2d 689, 695-696 (Fla. 2002) (Witness elimination circumstance disallowed in robbery that could have been completed without killing the victim and despite the defendant's statement that he did not want the victim, whom he knew, "to see his face."); ***Urbin v. State***, 714 So.2d 411, 415-16 (Fla. 1998) (witness elimination circumstance disallowed where defendant said he shot the victim because he bucked *and* because he saw [Urbin's] face, thereby establishing multiple motives for the murder rather than a "sole" or "dominant" motive); ***Livingston v. State***, 565 So.2d 1288, 1292 (Fla. 1988) (witness elimination factor disallowed because defendant's

statement after shooting first victim that, "now I'm going to get the one in the back [of the store] did not establish witness elimination was the sole or dominant motive for the shooting).

The factor was approved in the case of ***Thompson v. State***, 648 So.2d 692 (Fla. 1994). To understand the analysis used by the Court, the facts cited in the opinion must also be repeated here:

> Charlie Thompson appeals his convictions of two counts of first-degree murder and his two death sentences. We have jurisdiction pursuant to article V, section 3(b)(1), of the Florida Constitution. For the reasons expressed in this opinion, we affirm the convictions and death sentences.
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> The record reveals the following facts. The appellant, Charlie Thompson, was a groundskeeper at Myrtle Hill Cemetery in Tampa. Although he was a large man, about six feet tall and weighing 220 pounds, Thompson injured his back while digging a grave and began collecting workers' compensation benefits through the cemetery's office. After the workers' compensation benefits ran out, Thompson persisted in his belief that the cemetery owed him $150 more than he had collected. Thompson was fired from his job at the cemetery in July of 1986 for failing to show up for work. In the early afternoon of August 27, 1986, the bodies of Russell Swack and Nancy Walker were found in a wooded area near the Myrtle Hill Cemetery. Swack was the bookkeeper for the cemetery and Walker was his assistant. A medical examination revealed that Swack had been stabbed nine times and shot once in the face. All of the injuries had been inflicted while Swack was alive. The medical examination of Walker established that she had been shot once in the back of the head. A watch and ring were missing from Swack's body.
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> One of the managers of the cemetery testified that he had last seen Swack and Walker at about ten o'clock on that same morning and that the victims were speaking with a large unidentified man in the cemetery's business office. The witness also stated that he left the office and that, when he returned about fifteen minutes later, the victims were gone and the office door was locked.
>
> A search of the office revealed that Walker's purse was under her desk and her typewriter was still turned on. In addition, Swack's adding machine was left on and a bookkeeping ledger was on Swack's desk. The last entry in the ledger, dated that same day,

> was for a check payable to Charlie Thompson in the amount of $1,500.
> Several witnesses, including the mother of Thompson's children, testified that Thompson had a watch and a ring in his possession on the afternoon and evening of the crime. The watch and ring were recovered and identified as belonging to Swack. Two days after the crime, Thompson was arrested when an alert car salesman contacted the police after Thompson and three others attempted to purchase a used car with the $1,500 check from Myrtle Hill Cemetery.
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> At Thompson's trial for the murders, the State presented this and other evidence to the jury, including the testimony of a jailhouse informant who stated that Thompson admitted killing Swack and Walker. Thompson presented no witnesses in his defense. The jury found Thompson guilty of two counts of first-degree murder and two counts of kidnapping. In the penalty phase of the trial, the defense presented two psychologists who testified as to Thompson's mental deficiencies. Thompson's sister also testified to a history of mental illness in the family. After hearing this testimony, the jury recommended the death penalty for each murder by a 7-to-5 vote. The court found the following six aggravating factors: prior felony conviction; murder committed while engaged in a kidnapping; murder committed to avoid arrest; murder committed for pecuniary gain; murder especially heinous, atrocious, or cruel; and murder committed in a cold, calculated, and premeditated manner. The court found that the evidence failed to establish extreme mental or emotional disturbance and substantially impaired capacity, but did give some weight to nonstatutory mitigating factors including chronic mental illness, moderate disturbance, symptoms of mental illness, family background, and mental retardation.
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> The court sentenced Thompson to death for each murder and to consecutive life sentences for each kidnapping. Thompson appeals seven issues to this Court.

Thompson v. State, 648 So.2d 692, 693-694 (Fla. 1994). The Court approved the trial court's finding of a murder committed to eliminate a witness based on the following analysis, which is repeated here in full:

> To establish the avoid arrest aggravator in this case, "the State must show that the sole or dominant motive for the murder[s] was the elimination of ··· witness[es]." *Preston v. State*, 607 So.2d 404, 409 (Fla. 1992), *cert. denied*, 507 U.S. 999, 113 S.Ct. 1619, 123 L.Ed.2d 179 (1993). "[T]his factor may be proved by

> circumstantial evidence from which the motive for the murder[s] may be inferred." *Id.* Once Thompson had obtained the $1,500 check from Swack and Walker, there was little reason to kill them other than to eliminate the sole witnesses to his actions. This factor is clearly supported by the evidence. We also reject Thompson's argument that the pecuniary gain aggravator does not apply in this case and that this factor is inconsistent with the avoid arrest aggravator. There is ample evidence in the record to prove that Thompson benefitted [sic] financially from these murders. Furthermore, we have previously held that it is proper for a trial court to utilize both the pecuniary gain and avoid arrest aggravators. *See Prestion*, 607 So.2d at 409.

Thompson, 648 So.2d at 695 (Fla. 1994). The presence of the "pecuniary gain" motive for a homicide apparently does not provide a sufficient motive to render witness elimination a secondary or non-dominant motive.

The cases where the "witness elimination" factor have been disapproved had essentially the same factual elements as those where the factor is approved, and the analysis used to either approve or reject the circumstance allows arbitrary results. Compare ***Zack v. State***, 753 So.2d 9, 20 (Fla. 2000) (factor disapproved where, "While it is true that Smith was able to identify Zack, this alone is insufficient to support application of this aggravator. . . . The record suggests only that Smith's murder was part of Zack's premeditated plan to kill her and take her car and possessions. While it is true that Zack did not have to murder Smith to accomplish his monetary goals, this alone does not make Zack's dominant motive the desire to avoid arrest.") with ***Knight v. State***, 746 So.2d 423, 435 (Fla. 1998) (factor approved where, "In finding that the State had met that burden in this case, the trial court observed: 'Had the sole motive for the murders been financial gain, the defendant's purpose would have been accomplished upon the receipt of the money. Even if he had wanted to perfect his get-away he could have taken the car after he asked the Ganses to exit the vehicle and driven away. His actions clearly indicate however that he ordered them back into the car, told them to drive to an even more secluded area and executed

them.' Obviously, Knight had some purpose in mind, regardless of the state of his mental faculties, in killing the victims execution style at the end of his rambling journey to a remote location. We conclude that although the issue may be contested, there is sufficient evidence, including circumstantial evidence, to support the trial court's finding. Hence, we affirm the trial court's finding of the avoid arrest aggravator.").

As part of its analysis, the Court states that, "Where the victim is not a police officer, 'the evidence [supporting the avoid arrest aggravator] must prove that the sole or dominant motive for the killing was to eliminate a witness.'" ***Parker v. State***, 873 So.2d 270, 289 (Fla. 2004) (Emphasis in original). The Court feels comfortable in deciding whether witness elimination is a dominant motive, e.g., ***Howell v. State***, 707 So.2d 674, 682 (Fla. 1998) ("The fact that Howell may have had other motives for murdering Bailey does not preclude the application of this aggravator") or only a secondary motivation that is not dominant. E.g., ***Urbin v. State***, 714 So.2d 411, 416 (Fla. 1998) (The evidence suggests that Urbin shot the victim because he saw his face at most a corollary, or secondary motive, not the dominant one).

The Court at times writes that this circumstance is sufficiently proved where the victim knew the defendant. E.g., ***Wike v. State***, 698 So.2d 817, 822 (Fla.1997) ("Evidence that a victim knew the Defendant and could later identify him is sufficient to prove this aggravating circumstance.") (citing ***Correll v. State***, 523 So.2d 562 (Fla. 1988); ***Welty v. State***, 402 So.2d 1159 (Fla. 1981). At other times, the Court writes that knowledge of the defendant's identity alone does not prove this factor. E.g., ***Consalvo v. State***, 697 So.2d 805, 819 (Fla. 1996) ("Likewise, the mere fact that the victim knew and could identify defendant, without more, is insufficient to prove this aggravator.") (citing ***Geralds v. State***, 601 So.2d 1157, 1164 (Fla. 1992); ***Davis v. State***, 604 So.2d 794, 798 (Fla. 1992). Either line of cases can be applied by the

Court to either approve or reject the trial court's use of this circumstance of motive that has not been found by a unanimous jury.

The arbitrary use of this factor to impose capital punishment by the Courts absent an express, unanimous finding by the jury that the sole or dominant motive for a murder was to eliminate a witness denied due process and the right to a jury trial, a reliable sentencing determination, meaningful appellate review and separation of powers where the Florida Supreme Court is providing the substance of this aggravating circumstance on an *ad hoc* basis from a cold record. The Courts use this circumstance to impose the death penalty under the same facts where this circumstance is rejected. E.g., ***Bates v. State***, 465 So.2d 490 (Fla. 1985) (avoid arrest circumstance rejected where defendant abducted woman from her office, took her into woods, sexually battered and then killed her); ***Hall v. State***, 614 So.2d 473, 475, 477-478 (Fla. 1993) (avoid arrest circumstance approved where defendant abducted woman from parking lot, took her into woods, sexually battered then killed her).

The foregoing cases have arbitrary and capricious results because the legal standard to apply the "avoid arrest" factor vacillates on an *ad hoc* basis. Arbitrary" is defined as "depending on choice or discretion: determined by decision of a judge or tribunal rather than defined by statute." Webster's Third New International Dictionary (1981). "Capricious" is likewise defined as "marked or guided by caprice: given to changes of interest or attitude according to whims or passing fancies: not guided by steady judgment, intent or purpose." Webster's Third New International Dictionary (1981). The foregoing examples show that the "avoid arrest" aggravating factor in Florida does not meet the requirements of strict construction, due process, or a meaningful standard by which the death penalty can be consistently and reliably imposed as required. The arbitrariness of the court's use of this factor is exacerbated here because a unanimous jury does not determine the existence of this statutory

element that renders the defendant eligible for capital punishment. Use of this factor does not survive scrutiny and application of time-honored requirements under the United States Constitution.

The Constitution requires that capital sentencing discretion must be directed and limited by considerations sufficiently limited in their application to provide principled, objective bases for determining the presence of the circumstance in some cases and its absence in others, in order to provide consistent and rational imposition of the death penalty. The Florida Legislature failed to adequately define what the "avoid arrest" aggravating circumstance entails, and the interpretation provided by the Florida Supreme Court has produced widespread and inconsistent results under the same facts. In violation of the separation of powers proscription contained in article II, section 3 of the Florida Constitution, the Florida Supreme Court has attempted to provide the substance of this factor but has failed to do so consistently and in a manner that is capable of reliable application by the trial courts and juries in Florida, as shown by the foregoing analysis. If Florida is going to have a valid death penalty, it is incumbent on the Legislature to adequately establish it substantively and for the courts to meaningfully enforce the Constitutional requirements:

> [I]f the state wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a state's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." (citations omitted). It must channel the sentencer's discretion by "clear and objective" standards and then "make rationally reviewable the process for imposing a sentence of death."

Godfrey v. Georgia, 446 U.S. 420, 428 (1980). This factor cannot stand judicial scrutiny.

Section 921.141(5)(e), Florida Statutes, is unconstitutionally vague, overly broad, and it is applied in an arbitrary and capricious manner in violation of 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 as discussed above.

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.

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