IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

STATE OF FLORIDA
Plaintiff,

CASE NO: 23-CF-2935

v.

TOMASZ KOSOWSKI,
Defendant,
_____/

MOTION TO DECLARE SECTIONS 921.141 AND/OR 921.141 (6)(h),FLORIDA STATUTES, "HEINOUS ATROCIOUS OR CRUEL" AGGRAVATOR AND/OR THE CURRENT (6)(h) INTERIM INSTRUCTION UNCONSTITUTIONAL FACIALLY AND AS APPLIED AND INCORPORATED MEMORANDUM OF LAW

COMES NOW, TOMASZ KOSOWSKI, THE DEFENDANT, through his undersigned counsel, and moves this Court to enter its order declaring Florida Statute sections 921.141 and/or Section 921.141(6)(h), Florida Statutes (2017), and its corresponding interim jury instruction unconstitutional and precluding their application at bar for the following reasons:

1. Mr. Kosowski is charged with First Degree Capital Murder in contravention of Florida Statute sections 782.04 and 775.087 by a Convicted Felon.

2. To be eligible for capital punishment in Florida a person must be convicted of first-degree murder under Section 782.04, Fla.Stat., and there must be "sufficient aggravating circumstances" of *only* those factors listed in Section 921.141(6), Fla.Stat., to justify imposition of capital punishment.

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). Statutory aggravating circumstances must satisfy a constitutional standard derived from the principles of *Furman* itself. *Id. citing Furman v.* Georgia, 408 U.S. 238 (1972). A statutory aggravating factor that does not genuinely limit the class of persons eligible for the death penalty or one that fails to can 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 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. Over the years death-penalty jurisprudence has distinguished between that of weighing and non-weighing States. Florida is a weighing state in that it allows aggravating factors to be considered and requires the sentencer to balance those aggravating factors with mitigators *circumstances*. *Fla. Stat.* §§ 921.141(5), (6) (a)- (p) (2017). One aggravating factor in Florida provides, "The capital felony was a homicide and was especially heinous, atrocious, or cruel." *Id.* at (6) (h).

5. The "heinous atrocious or cruel," (hereinafter referred to as "HAC"), as outlined in Florida Statute section 921.141(6)(h) and the current interim corresponding jury instruction are unconstitutionally vague and overbroad, are not capable of a constitutionally adequate narrowing construction, and have been applied in an arbitrary and inconsistent manner in contravention to Article I, sections 9, 16, 17, and 22 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth amendments to the United States Constitution.

MEMORANDUM OF LAW

A. The HAC factor does not narrow the class of individuals death eligible, guide the jury or courts, or allow for meantingful apellate review.

The standards guiding the construction of capital aggravating circumstances are stricter than those governing general interpretation of criminal stuatues. *See Maynard v. Crwright*, 108 S. Ct. 1853, 1857-58 (1988). We think the Court of Appeals was quite right in holding that *Godfrey* controls this case. First, the language of the Oklahoma aggravating circumstance at issue—"especially heinous, atrocious, or cruel"—gave no more guidance than the "outrageously or wantonly vile, horrible or inhuman"

language that the jury returned in its verdict in *Godfrey.* The State's contention that the addition of the word "especially" somehow guides the jury's discretion, even if the term "heinous" does not, is untenable. To say that something is "especially heinous" merely suggests that the individual jurors should determine that the murder is more than just "heinous," whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is "especially heinous." *Godfrey, supra,* at 428–429, 100 S.Ct. at 1764–1765. Likewise, in *Godfrey* the addition of "outrageously or wantonly" to the term "vile" did not limit the overbreadth of the aggravating factor. *Id. Maynard* at 364.

The Supreme Court has found a lack of consistency applied for standrads for an aggravating cirumstance violative of the Eighth Amendment if it (1) fails to narrow the class of person eligible for the death penalty, (2) fails to guide the discretion of the sentences, or (3) undermines the meaningfulness of appellate reveiw. *See Godfrey v. Georgia,* 446 U.S. 420, 422 (1980) (finding that a capital sentencing scheme must provide a meaningful basis for distinguishing the few cases in which the penalty is imposed from the many cases in which it is not); *Maynard v. Cartwright*, 108 S. Ct. 1853 (1988) (holding Oklahoma's addition of word 'espcially' to its statutory aggravating cirucmsntce that murder was "especially heinous, atrocious, or curel," did not sufficiently guide jury's discretion in decididng whether ot impose death); *Godfrey v. Georgia*, 446 U.S. 420 (1980)(Georgia's death sentence imposed for murder which was "outrageously or wantonly vile, horrible or inhuman" was so broad and vague as to violate the Eighth and Fourteenth Amendments, becasue there was nothing in the words themselves that implied restraint on the arbitray and capricious infliction of death sentence).

In the instant case, addition of the word "especially" does not guide the jury's discretion, even if the term heinous does. Florida cases have tried to avoid the clear teachings of *Maynard* in various ways. In *Smalley v. State,* 546 So.2d 720 (Fla. 1989) the Florida Supreme Court

distinguished *Maynard* on the grounds that Florida limited the circumstance in *State v. Dixon,* 283 So.2d 1, 9 (1973), *cert. denied*, 416 U.S. 943 (1974), noting that the Supreme Court upheld a challenge to the facial validity of the statute based on *Dixon's* construction in *Proffitt v. Florida,* 428 U.S. 242, 254-6, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (plurality opinion). The Florida Supreme Court wrote:

> . . . 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 analysis is arguably no longer applicable, in that Florida's Death Penalty Scheme was held to be unconstitutional and thus it is no longer "possible to discern upon what facts the sentencer relied" upon in finding whether a killing is deemed heinous, atrocious, or cruel. *Hurst v. Fla.*, 136 S.Ct. 616 (2016).

Even still, the 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... 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. 546 So.2d at 722. The force of the foregoing *dicta* in *Smalley* is significantly undermined by two more recent pronouncements from that court. In *Cheshire v. State,* 568 So.2d 908 (Fla. 1990), the court deferred ruling on the constitutionality of the circumstance. Also post-*Smalley,* the Court revisited the language of the heinousness circumstance in *Standard Jury Instructions in Criminal Cases - 90-1*, 579 So.2d 75 (Fla.1990). There, the Court ordered publication of the report of the Committee on Standard Jury Instructions (Criminal), with a proposed amendment to the HAC (heinous, atrocious, or cruel) instruction. The Committee stated its proposed amendment "improves the instruction and ... adequately addresses any problem the paragraph may present in light of *Maynard v. Cartwright,* 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.sd 372 (1988)." *Id*. The court's decision to revisit the wording of the heinousness circumstance is a recognition of "problems" in applying it. The Eighth Amendment requires accurate jury instruction of this circumstance in Florida sentencing. *Cf*. *Hitchcock v. Dugger,* 107 S.Ct. 1821, 1824 (1987) ("We think it could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport" with eighth amendment.). The Florida Supreme Court also did not undertake the careful analysis mandated by *Maynard*. Oklahoma adopted the *Dixon* construction of its statute, but in applying that construction so expanded it as to render the circumstance overly vague. *Cartwright v. Maynard,* 822 F.2d 1477, 1487-1491 (10th Cir. 1987) (en banc), *affirmed*, 108 S.Ct. 1853 (1988); *see Adamson v. Ricketts,* 865 F.2d 1011, 1031-1037 (9th Cir. 1988) (en banc), *cert. denied sub nom*. *Lewis v. Adamson,* 58 U.S.L.W. 3835 (U.S. 88-1553 June 28, 1990). Study of Florida capital decisions shows that Florida's application of the circumstance suffers from the same faults found in the Oklahoma circumstance. The sheer number of cases in which heinousness becomes a factor

evidences the use of the circumstance as a catch-all. *See Adamson*, 865 F.2d at 1031. This wide use comes about because the Florida Supreme Court has been unable, despite its best efforts, to provide any comprehensible, consistently applied limitations on the vague wording of the statute. Indeed, the cases are so fraught with inconsistencies and irrational distinctions that analysis itself becomes difficult.

By way of example, one of the frequent heinousness analyses deal with death by gunshot. Whether a single shot or quick volley of shots causes quick death or whether it is proceeding by a lengthy period in which the victim knows of his or her impending doom. This rule does not consistently narrow the circumstance and has been inconstantly applied. Sometimes, the Florida Supreme Court states that lingering on after a shooting cannot be used to find heinousness. In other words, it depends on the amount of suffering. Florida Supreme Court has stated it does not require complete unawareness by the decedent, yet it upheld the circumstance where the only evidence of foreknowledge was that the decedent raised his hand towards the gun at the moment of the shot. *See Huff v. State,* 495 So.2d 145, 153 (Fla. 1986). *Huff* cannot be rationally distinguished from *Parker v. State,* 458 So.2d 750, 754 (Fla. 1984), *cert. denied*, 470 U.S. 1088 (1985) in which the victim was taken to see her boyfriend's body and upon realizing what had happened, fell to her knees, covered her face, and then was shot. Yet, the circumstance was upheld in *Huff* and struck in *Parker*. When the victim attempts to flee, it shows awareness of death; sometimes the Court upholds the circumstance on this basis and sometimes not.

Stabbings are usually found to be heinous, but in *Demps v. State*, 395 So.2d 501(Fla.) *cert denied,* 454 U.S. 933 (1981), the court overturned a heinousness finding even though the decedent had been stabbed repeatedly, was left to die and expired only after being taken to three hospitals. The trial court in *Demps* found four aggravating factors, one of which was that the murder was especially

heinous, atrocious, or that the murder was so "conscienceless or pitiless" and thus apart from the norm of capital felonies, so as to render it especially heinous, atrocious, or cruel. However, the Court held that this aggravator was not applicable because it did not believe this murder to have been so "conscienceless or pitiless" and thus set "apart from the norm of capital felonies" as to render it "especially heinous, atrocious, or cruel." See *Lewis v. State,* 377 So.2d 640 (Fla.1979); *Cooper v. State,* 336 So.2d 1133 (Fla.1976*)*; *Tedder v. State,* 322 So.2d 908 (Fla.1975)

Thus, except in cases of death by gunshot, it is rare to see a heinousness finding overturned. Where stabbings, beating and strangulations are determined non-heinous, the principles used are completely hidden from view. The one limitation that death be nearly instantaneous, by gunshot, and with little or no foreknowledge by the decedent turns the guidance function of the circumstance on its head. Unless the defendant chooses a gun as a murder weapon, no hints can be derived from Florida case law on what constitutes a heinous crime.

A more general way to judge heinousness might be to focus on the defendant's mental state. The court sometimes focuses on that factor. *Mills v. State,* 476 So.2d 172, 178 (Fla. 1985), *cert. denied*, 475 U.S. 1031 (1986), ("The intent and method employed by the wrongdoers is what needs to be examined."; HELD, lingering death following gunshot did not make the killing heinous because it did not reflect on the defendant's culpability). In other cases, the mental state of the defendant is one factor to consider in finding heinousness. *See Card v. State,* 453 So.2d 17 (Fla. 1984), *cert. denied*, 469 U.S. 989 (1984) (fact that defendant enjoyed killing one consideration). But in *Pope v. State,* 441 So.2d 1073, 1078 (Fla. 1984), the Florida Supreme Court rejected using the defendant's mental state to show heinousness, writing: "nor is the defendant's mindset ever at issue." Most recently in *Cheshire v. State,* 568 So.2d 908 (Fla.1990), the court indicated it has always said the primary focus is the mental state of the defendant: "[t]he factor of heinous atrocious or cruel is

proper only in torturous murders -- those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another. *State v. Dixon,* 283 So.2d 1 (Fla. 1973)."

The mindset of the decedent is another way in which the circumstance might be narrowed. The court has said that awareness of death by the decedent suffices to establish the circumstance due to the mental anguish it causes. But inconsistencies abound in applying decedent awareness as a limitation. Comparing *Brown v. State,* 526 So.2d 903 (Fla. 1988), *cert. denied*, 109 S.Ct. 371 (1988) and *Grossman v. State,* 525 So.2d 833 (Fla. 1988) shows how meaningless this limitation has become. In *Brown*, the defendant jumped a police officer trying to arrest him and a codefendant. The codefendant heard a shot and then heard the officer begging Brown not to shoot him, but Brown did so. In *Grossman*, the officer stopped Grossman and another; Grossman attacked her and shot her with her revolver in the struggle. The Florida Supreme Court approved the heinousness circumstance in *Grossman* because the officer knew she was struggling for her life. 525 So.2d at 840-841. The court disapproved its application in *Brown* despite a finding by the trial court that the officer had been shot in the arm and pleaded for his life. 526 So.2d at 906-907, n.11. Even the death, post- unconsciousness limitation, has not been consistently followed.

B. The previous and current interim jury instruction used in Florida to define "heinous atrocious or cruel" is unconstitutional, and renders the death penalty unconstitutional by directing it be applied, in part, through the judgment of unguided juries.

The jury plays a crucial role in capital sentencing. Its penalty verdict carries great weight. Nevertheless, the interim jury instruction on the heinousness circumstance assures arbitrariness and maximizes discretion in reaching the penalty verdict. The Florida Supreme Court is tasked with

promulgating standard jury instructions for use in the trial courts of this state. Although the trial courts may substitute correct statements of the law when standard jury instructions are incorrect, the practical effect of the standard instructions is to render Florida's capital sentencing scheme unconstitutional. Its use in virtually all capital cases ensures arbitrary and capricious application of the death penalty contrary to the Constitution.

The interim instruction circumstance (h) still provides:

> The capital felony was especially heinous, atrocious or cruel. "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

This instruction assures the arbitrary application of this aggravating circumstance violation of the dictates of *Maynard v. Cartwright,* 108 S.Ct. 1853 (1988). A jury given this unconstitutional instruction receives no guidance in its sentencing decision. *See Walton v. Arizona,* 110 S.Ct. 3047, 3057 (1990); *Maynard v. Cartwright,* 108 S.Ct. 1853, 1857. It is thus unconstitutionally vague and overbroad.

This instruction does not satisfy the requirements of *Maynard*. Its definitions of "heinous," "atrocious," and "cruel" are virtually identical to the definitions used at Mr. Maynard's trial, and are exactly identical to definitions declared unconstitutional in *Shell v. Mississippi,* 111 S.Ct. 313 (1990). Although the final sentence includes the terms "conscienceless or pitiless" and

"unnecessarily torturous" approved in *Proffitt*, the instruction does not inform the jury that the circumstance applies only to the conscienceless or pitiless crime that is unnecessarily torturous. Further, *Proffitt* itself is suspect on this point because it did not use *Maynard's* eighth amendment analysis in ruling on the constitutionality of section 921.141. The plurality wrote in *Proffitt* that the aggravating and mitigating circumstances require no more line drawing than is commonly required of a fact finder in a lawsuit. For example, juries have traditionally evaluated the validity of defenses such as insanity or reduced capacity, both of which involve the same considerations as some of the above-mentioned mitigating circumstances. While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of *Furman* are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition. 428 U.S. at 257-258. *Proffitt* held only that the "conscienceless or pitiless" construction saved the circumstance from attack as being facially constitutional, but did not decide whether it defined the circumstance adequately for lay jurors. Finally, the instruction does not inform the jury of various other restrictions on application of the circumstance, such as that acts performed on the dead body cannot be considered in determining the circumstance, that lack of remorse cannot be considered, and that there must be a showing of torturous intent.

On April 13, 2017, the Florida Supreme Court on its own motion considered the criminal jury instructions pertaining to the imposition of the death penalty. SC17-583. The Florida Supreme Court authorized for publication and use amended Standard Jury Instructions in Criminal Cases 7.11 (Preliminary Instructions in Penalty Proceedings- Capital Cases) and 7.12 (Dialogue for Polling the Jury (Death Penalty Case)). In addition the Court proposed a new instruction, 3.12(e) (Jury Verdict

Form-Death Penalty) and 7.11(a) (Final Instructions in Penalty Proceedings- Capital Cases).

In adopting these interim instructions, the Court expressed "no opinion on their correctness and further noted that this authorization forecloses neither requesting additional or alternative instructions, nor contesting the legal correctness of the instructions." *Id.*

WHEREFORE, TOMASZ KOSOWSKI, through his undersigned counsel of record requests this Honorable Court enter an Order declaring Florida Statute section 921.141(6)(h) and the interim corresponding jury instruction unconstitutional both as applied and as written, and further hold such Unconstitutional based upon United States Constitution and the Constitution of Florida previously and hereafter made by counsel for the Defendant are adopted into this objection and memorandum of law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished electronically to the Office of the State Attorney, on this 29th day of January 2026.

Respectfully submitted,

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