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

STATE OF FLORIDA
Plaintiff,

CASE NO: 23-CF-2935

Vs.

TOMASZ KOSOWSKI,
Defendant.
_____/

MOTION TO DECLARE SECTION 921.141(6)(i), FLORIDA STATUTE, UNCONSTITUTIONAL FACIALLY AND AS APPLIED-CCP INCORPORATED MOTION FOR JUDICIAL NOTICE AND INCORPORATED MEMORANDUM OF LAW

DEFENDANT, TOMASZ KOSOWSKI, by and through undersigned counsel, moves for an order declaring Section 921.141(6)(i), Florida Statutes, unconstitutional under the Constitution of the State of Florida and/or the Constitution of the United States and applicable international treaties as follows:

1. Mr. Kosowski is charged with First Degree Capital Murder.

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. Section 921.141, Fla.Stat. (2017).

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 circumstnaces must satisfy a constutional standard derived from the pricniples 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 requries the sentencer to balance those aggravating factors with mitigating *circumstances*. *Fla. Stat.* §§ 921.141(5), (6) (a)- (p) (2017). One factor in Florida provides aggreavation if, "[h]e capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification," (hereinafter refereed to as "CCP"). *Id.* at (6) (i).

5. As written, the CCP statutory aggravating factor is vague and overly broad because it fails to set forth an objective standard capable of consistent application and meaningful appellate review and otherwise authorizes the sentencer to impose capital punishment based on the exercise of fundamental constitutional rights and is thus unconstitutional under Article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments, as set forth in the accompanying memorandum of law and as may be argued during the hearing of this motion.

6. As applied by trial courts, appellate courts and presumably by the juries of the State of Florida, the "CCP" statutory aggravating factor has been applied in an arbitrary, inconsistent and capricious manner and in violation of the separation of powers and is thus unconstitutional under Article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution, Article II, Section 3 of the Florida Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States

Constitution, as forth in the accompanying memorandum of law and as may be argued during the hearing of this motion.

INCORPORATED MOTION TO TAKE COMPULSORY JUDICIAL NOTICE PURSUANT TO FLORIDA STATUTES SECTIONS 90.202(2), (11) AND 90.203.

The evidentiary basis showing the "CCP" aggravating factor is applied unconstitutionally is proved by, and this Court is asked pursuant to Florida Statutes section 90.202(2), (11) and 90.203, to take compulsory judicial notice of the reported decisions of Florida courts applying Section 921.141(5)(i), Fla.Stat., expressly including but not limited to the following:

Ibar v. State, 31 FLW S149 (Fla. March 9, 2006); *Walls v. State*, 31 FLW S101 (Fla. February 9, 2006); *Penalver v. State*, 31 FLW S59 (Fla. January 27, 2006); *Happ v. State*, 30 FLW S839 (Fla. December 8, 2005); *Suggs v. State*, 30 FLW S812 (Fla. November 17, 2005); *Snelgrove v. State*, S785 (Fla. November 10, 2005); *State v. Steele*, 31 FLW S74 (Fla. October 12, 2005); *Knight v. State*, 30 FLW S768 (Fla. November 3, 2005); *Perez v. State*, 919 So.2d 347 (Fla. 2005); *Brooks v. State*, 918 So.2d 181 (Fla. 2005); *Robinson v. State*, 913 So.2d 514 (Fla. 2005); *Crook v. State*, 908 So.2d 350 (Fla. 2005); *Hendrix v. State*, 908 So.2d 412 (Fla. 2005); *Green v. State*, 907 So.2d 489 (Fla. 2005); *Sireci v. State*, 908 So.2d 321 (Fla. 2005); *Dufour v. State*, 905 So.2d 42 (Fla. 2005); *Johnson v. State*, 903 So.2d 888 (Fla. 2005); *Cave v. State*, 899 So.2d 1042 (Fla. 2005); *Arbalaez v. State*, 898 So.2d 25 (Fla. 2005); *Winkles v. State*, 894 So.2d 842 (Fla. 2005); *Mordenti v. State*, 894 So.2d 161 (Fla. 2004); *Brown v. State*, 894 So.2d 137 (Fla. 2004); *Monlyn v. State*, 894 So.2d 832 (Fla. 2004); *Busby v. State*, 894 So.2d 88 (Fla. 2004); *Phillips v. State*, 894 So.2d 28 (Fla. 2004); *Hodges v. State*, 885 So.2d 338 (Fla. 2004); *Peterka v. State*, 890 So.2d 219 (Fla. 2004); *Hernandez-Alberto v. State*, 889 So.2d 721 (Fla. 2004); *Pietri v. State*, 885 So.2d 245 (Fla. 2004); *Sochor v. State*, 883 So.2d 766 (Fla. 2004); *Hutchison v. State*, 882 So.2d 943 (Fla. 2004); *Pearce v. State*, 880 So.2d 561 (Fla. 2004); *Chamberlain v. State*, 881 So.2d 1087 (Fla. 2004); *Howell v.*

State, 877 So.2d 697 (Fla. 2004); *Windom v. State*, 886 So.2d 915 (Fla. 2004); *Gamble v. State*, 877 So.2d 706 (Fla. 2004); *Power v. State*, 886 So.2d 952 (Fla. 2004); *Reed v. State*, 875 So.2d 415 (Fla. 2004); *Globe v. State*, 877 So.2d 663 (Fla. 2004); *Smith v. State*, 866 So.2d 51 (Fla. 2004); *Parker v. State*, 873 So.2d 270 (Fla. 2004); *Guzman v. State*, 868 So.2d 498 (Fla. 2003); *Zakrzewski v. State*, 866 So.2d 688 (Fla. 2003); *Owen v. State*, 862 So.2d 687 (Fla. 2003); *Cummings-El v. State*, 863 So.2d 246 (Fla. 2003); *Henry v. State*, 862 So.2d 679 (Fla. 2003); *Anderson v. State*, 863 So.2d 169 (Fla. 2003); *Griffin v. State*, 866 So.2d 1 (Fla. 2003); *Davis v. State*, 859 So.2d 465 (Fla. 2003); *Diaz v. State*, 860 So.2d 960 (Fla. 2003); *Rivera v. State*, 859 So.2d 495 (Fla. 2003); *Conde v. State*, 860 So.2d 930 (Fla. 2003); *McCoy v. State*, 853 So.2d 396 (Fla. 2003); *Owens v. Crosby*, 854 So.2d 182 (Fla. 2003); *Fennie v. State*, 855 So.2d 597 (Fla. 2003); *Caballero v. State*, 851 So.2d 655 (Fla. 2003); *Belcher v. State*, 851 So.2d 678 (Fla. 2003); *Nelson v. State*, 850 So.2d 514 (Fla. 2003); *Wright v. State*, 857 So.2d 861 (Fla. 2003); *Blackwelder v. State*, 851 So.2d 650 (Fla. 2003); *Duest v. State*, 855 So.2d 33 (Fla. 2003); *Cooper v. State*, 856 So.2d 969 (Fla. 2003); *Walton v. State*, 847 So.2d 436 (Fla. 2003); *Pace v. State*, 854 So.2d 167 (Fla. 2003); *Brown v. State*, 846 So.2d 1114 (Fla. 2003); *Gore v. State*, 846 So.2d 461 (Fla. 2003); *Spann v. State*, 857 So.2d 845 (Fla. 2003); *Butler v. State*, 842 So.2d 817 (Fla. 2003); *Harris v. State*, 843 So.2d 856 (Fla. 2003); *Lawrence v. State*, 846 So.2d 440 (Fla. 2003); *Kormondy v. State*, 845 So.2d 41 (Fla. 2003); *Lugo v. State*, 845 So.2d 74 (Fla. 2003); *Jones v. State*, 845 So.2d 55 (Fla. 2003); *Doorbal v. State*, 837 So.2d 940 (Fla. 2003); *Thomas v. State*, 838 So.2d 535 (Fla. 2003); *Damren v. State*, 838 So.2d 512 (Fla. 2003); *Anderson v. State*, 841 So.2d 390 (Fla. 2003); *Conahan v. State*, 844 So.2d 629 (Fla. 2003); *Lightbourne v. State*, 841 So.2d 431 (Fla. 2003); *Spencer v. State*, 842 So.2d 52 (Fla. 2003); *Lynch v. State*, 841 So.2d 362 (Fla. 2003); *Israel v. State*, 837 So.2d 381 (Fla. 2002); *Bruno v. Moore*, 838 So.2d 485 (Fla. 2002); *Marquard v. State*,

850 So.2d 417 (Fla. 2002); *Chavez v. State*, 832 So.2d 730 (Fla. 2002); *Evans v. State*, 838 So.2d 1090 (Fla. 2002); *Bell v. State*, 841 So.2d 329 (Fla. 2002); *Lawrence v. State*, 831 So.2d 121 (Fla. 2002); *Barnhill v. State*, 834 So.2d 836 (Fla. 2002); *Johnson v. Moore*, 837 So.2d 343 (Fla. 2002); *Shere v. Moore*, 830 So.2d 56 (Fla. 2002); *Valle v. Moore*, 837 So.2d 904 (Fla. 2002); *Floyd v. State*, 850 So.2d 383 (Fla. 2002); *Swafford v. State*, 828 So.2d 968 (Fla. 2002);*Hurst v. State*, 819 So.2d 689 (Fla. 2002); *Vining v. State*, 827 So.2d 201 (Fla. 2002); *Rimmer v. State*, 825 So.2d 304 (Fla. 2002); *Ocha v. State*, 826 So.2d 956 (Fla. 2002); *Gaskin v. State*, 822 So.2d 1243 (Fla. 2002); *Asay v. Moore*, 828 So.2d 985 (Fla. 2002); *Anderson v. State*, 822 So.2d 1261 (Fla. 2002); *Philmore v. State*, 820 So.2d (Fla. 2002); *Griffin v. State*, 819 So.2d 705 (Fla. 2002); *Cox v. State*, 819 So.2d 705 (Fla. 2002); *Smithers v. State*, 826 So.2d 916 (Fla. 2002); *Garcia v. State*, 816 So.2d 554 (Fla. 2002); *White v. State*, 817 So.2d 799 (Fla. 2002); *Hunter v. State*, 817 So.2d 786 (Fla. 2002); *Pagan v. State*, 830 So.2d 792 (Fla. 2002); *Morrison v. State*, 818 So.2d 432 (Fla. 2002); *Sireci v. Moore*, 825 So.2d 882 (Fla. 2002); *Foster v. State*, 810 So.2d 910 (Fla. 2002); *Sweet v. State*, 810 So.2d 854 (Fla. 2002); *Darling v. State*, 808 So.2d 145 (Fla. 2002); *Dennis v. State*, 817 So.2d 741 (Fla. 2002); *Wike v. State*, 813 So.2d 12 (Fla. 2002); *Floyd v. State*, 808 So.2d 175 (Fla. 2002); *Francis v. State*, 808 So.2d 110 (Fla. 2001); *Evans v. State*, 808 So.2d 92 (Fla. 2001); *Hertz v. State*, 803 So.2d 629 (Fla. 2001); *Looney v. State*, 803 So.2d 656 (Fla. 2001); *Perry v. State*, 801 So.2d 78 (Fla. 2001); *Bowles v. State*, 804 So.2d 1173 (Fla. 2001); *Card v. State*, 803 So.2d 613 (Fla. 2001); *Evans v. State*, 800 So.2d 182 (Fla. 2001); *Thompson v. State*, 796 So.2d 511 (Fla. 2001); *Overton v. State*, 801 So.2d 877 (Fla. 2001); *Ford v. State*, 802 So.2d 1121 (Fla. 2001); *O'Connor v. State*, 803 So.2d 598 (Fla. 2001); *Connor v. State*, 803 So.2d 598 (Fla. 2001); *Feffries v. State*, 797 So.2d 573 (Fla. 2001); *Farina v. State*, 801 So.2d 44 (Fla. 2001); *Slawson v. State*,796 So.2d 491 (Fla. 2001); *Hoffman v. State*, 800 So.2d 174 (Fla. 2001); *Hall v. Moore*, 792

So.2d 447 (Fla. 2001); *Morton v. State*, 789 So.2d 324 (Fla. 2001); *Porter v. State*, 788 So.2d 917 (Fla. 2001); *Atwater v. State*, 788 So.2d 223 (Fla. 2001); *Waterhouse v. State*, 792 So.2d 1176 (Fla. 2001); *Happ v. Moore*, 784 So.2d 1091 (Fla. 2001); *Gore v. State*, 784 So.2d 418 (Fla. 2001); *Rose v. State*, 786 So. 787 (Fla. 2001); *Jennings v. State*, 782 So.2d 853 (Fla. 2001); *Valle v. State*, 778 So.2d 960 (Fla. 2001); *Bradley v. State*, 787 So.2d 732 (Fla. 2001); *Blackwood v. State*, 777 So.2d 399 (Fla. 2000); *Glock v. Moore*, 776 So.2d 243 (Fla. 2001); *Sexton v. State*, 775 So.2d 923 (Fla. 2000); *Rutherford v. Moore*, 774 So.2d 637 (Fla. 2000); *Booker v. State*, 773 So.2d 1079 (Fla. 2000); *Keen v. State*, 775 So.2d 263 (Fla. 2000); *Lukehart v. State*, 776 So.2d 906 (Fla. 2000); *Owen v. State*, 773 So.2d 510 (Fla. 2000); *Foster v. State*, 778 So.2d 906 (Fla. 2000); *Sireci v. State*, 773 So.2d 34 (Fla. 2000); *Reese v. State*, 768 So.2d 1057 (Fla. 2000); *Arbelaez v. State*, 775 So.2d 909 (Fla. 2000); *Kearse v. State*, 770 So.2d 1119 (Fla. 2000); *Asay v. State*, 769 So.2d 974 (Fla. 2000); *Occhicone v. State*, 768 So.2d 1037 (Fla. 2000); *Huff v. State*, 762 So.2d 476 (Fla. 2000); *Robinson v. State*, 761 So.2d 269 (Fla. 2000); *Way v. State*, 760 So.2d 903 (Fla. 2000); *Thompson v. State*, 759 So.2d 650 (Fla. 2000); *Stoll v. State*, 762 So.2d 870 (Fla. 2000); *Mansfield v. State*, 758 So.2d 646 (Fla. 2000); *Brown v. State*, 755 So.2d 616 (Fla. 2000); *State v. Riechmann*, 777 So.2d 342 (Fla. 2000); *Bryan v. State*, 753 So.2d 1244 (Fla. 2000); *Ray v. State*, 755 So.2d 604 (Fla. 2000); *Rodriguez v. State*, 753 So.2d 29 (Fla. 2000); *Jackson v. State*, 767 So.2d 1156 (Fla. 2000); *Zack v. State*, 753 So.2d 9 (Fla. 2000); *Kessler v. State*, 752 So.2d 545 (Fla. 1999);*Bates v. State*, 750 So.2d 6 (Fla.1999); *Johnson v. State*, 750 So.2d 22 (Fla.1999); *Nelson v. State*, 748 So.2d 237 (Fla. 1999): *Peede v. State*, 748 So.2d 253 (Fla.1999); *Almeida v. State*, 748 So.2d 922 (Fla.1999); *Bryan v. State*, 748 So.2d 1003 (Fla.1999): *Knight v. State*, 746 So.2d 423 (Fla.1999); *Ruiz v. State*, 743 So.2d 1 (Fla.1999); *McDonald v. State*, 743 So.2d 501 (Fla.1999); *Shere v. State*, 742 So.2d 215 (Fla.1999); *Davis v. State*, 742 So.2d 233 (Fla.1999); *Lightbourne v. State*, 742 So.2d

238 (Fla.1999); *Cooper v. State*, 739 So.2d 82 (Fla. 1999); *Larkins v. State*, 739 So.2d 90 (Fla.1999); *Ramirez v. State*, 739 So.2d 568 (Fla.1999); *Provenzano v. State*, 739 So.2d 1150 (Fla. 1999); *Gaskin v. State*, 737 So.2d 509 (Fla.1999); *Bolin v. State*, 736 So.2d 1160 (Fla.1999); *Woods v. State*, 733 So.2d 980 (Fla.1999); *Snipes v. State*, 733 So.2d 1000 (Fla.1999); *Valdez v. State*, 728 So.2d 736 (Fla 1999); *Rutherford v. State*, 727 So.2d 216 (Fla.1998); *Cave v. State*, 727 So.2d 227 (Fla.1998); *LeCroy v. Dugger*, 727 So.2d 236 (Fla.1998); *Alston v. State*, 723 So.2d 148 (Fla.1998); *Donaldson v. State*, 722 So.2d 177 (Fla.1998); *Brown v. State*, 721 So.2d 274 (Fla. 1998); *Knight v. State*, 721 So.2d 287 (Fla.1998); *State v. Parker*, 721 So.2d 1147 (Fla.1998); *Guzman v. State*, 721 So.2d 1155 (Fla.1998); *Kokal v. Dugger*, 718 So.2d 138 (Fla.1998); *Jennings v. State*, 718 So.2d 144 (Fla.1998); *Zakrzewski v. State*, 717 So.2d 488 (Fla.1998); *Hardy v. State*, 716 So.2d 761 (Fla.1998): *Cummings v. State*, 715 So.2d 944 (Fla.1998); *Fisher v. State*, 715 So.2d 950 (Fla.1998); *Buckner v. State*, 714 So.2d 384 (Fla.1998); *Mahn v. State*, 714 So.2d 391 (Fla.1998); *Mordenti v. State*, 711 So.2d 30 (Fla.1998); *Remeta v. State*, 710 So.2d 543 (Fla.1998); *Boenoano v. State*, 708 So.2d 941 (Fla.1998); *Walker v. State*, 707 So.2d 300 (Fla.1997); *Sanders v. State*, 707 So.2d 664 (Fla.1997); *Howell v. State*, 707 So.2d 674 (Fla.1997); *Blanco v. State*, 706 So.2d 7 (Fla.1997); *Gore v. State*, 706 So.2d 1328 (Fla.1997); *Monlyn v. State*, 705 So.2d 1 (Fla.1997); *Phillips v. State*, 705 So.2d 1320 (Fla.1997); *Raleigh v. State*, 705 So.2d 1324 (Fla.1997); *Valle v. State*, 705 So.2d 1331 (Fla.1997); *San Martin v .State*, 705 So.2d 107 (Fla.1997); *Jackson v. State*, 704 So.2d 500 (Fla. 1997); *Wainwright v. State*, 704 So.2d 511 (Fla.1997); *Manso v. State*, 704 So.2d 516 (Fla.1997); *Pooler v. State*, 704 So.2d 1375 (Fla.1997); *Kormondy v. State*, 703 So.2d 454 (Fla.1997); *Pomeranz v. State*, 703 So.2d 465 (Fla.1997); *Hamilton v. State*, 703 So.2d 1038 (Fla.1997); *Chandler v. State*, 702 So.2d 186 (Fla.1997); *Hoskins v. State*, 702 So.2d 202 (Fla.1997); *Pope v. State*, 702 So.2d 221 (Fla.1997); *Hauser v. State*, 701 So.2d 329 (Fla.1997); *Puccio v. State*, 701 So.2d 858 (Fla.1997); *Banks v. State*, 700 So.2d 363

(Fla.1997); *Lara v. State*, 699 So.2d 616 (Fla.1997); *Sliney v. State*, 699 So.2d 662 (Fla.1997); *Bell v. State*, 699 So.2d 674 (Fla.1997); *Marta-Rodriguez v. State*, 699 So.2d 1010 (Fla.1997); *Franqui v. State*, 699 So.2d 1312 (Fla.1997); *Wike v. State*, 698 So.2d 817 (Fla. 1997); *Lawrence v. State*, 698 So.2d 1219 (Fla.1997); *Sexton v. State*, 697 So.2d 833 (Fla.1997); *Crump v. State*, 697 So.2d 1211 (Fla.1997); *Willacy v. State*, 696 So.2d 693 (Fla.1997); *Damren v. State*, 696 So.2d 709 (Fla.1997); *Johnson v. Singletary*, 695 So.2d 263 (Fla.1997); *Johnson v. State*, 696 So.2d 317 (Fla.1997); *Johnson v. State*, 696 So.2d 326 (Fla.1997); *Reese v. State*, 694 So.2d 678 (Fla.1997); *Lott v. State*, 695 So.2d 1239 (Fla.1997); *Thomas v. State*, 693 So.2d 951 (Fla.1997); *Rolling v. State*, 695 So.2d 278 (Fla.1997); *Spencer v.* State, 691 So.2d 1062 (Fla. 1997); *Lawrence v. State*, 691 So.2d 1068 (Fla.1997); *Jones v. State*, 690 So.2d 568 (Fla.1997); *Clark v. State*, 690 So.2d 1280 (Fla.1997); *Morton v. State*, 689 So.2d 259 (Fla.1997); *Long v. State*, 689 So.2d 1055 (Fla.1997); *Valentine v. State*, 688 So.2d 313 (Fla.1996); *Boyett v. State*, 688 So.2d 308 (Fla.1996); *Mills v. State*, 684 So.2d 801 (Fla.1996); *Hill v. State*, 688 So.2d 901 (Fla.1996); *Robinson v. State*, 684 So.2d 175 (Fla.1996); *Bush v. State*, 682 So.2d 85 (Fla.1996); *Strausser v. State*, 682 So.2d 539 (Fla.1996); *Hartley v. State*, 686 So.2d 1316 (Fla. 1996); *Ferrell v. State*, 686 So.2d 1324 (Fla. 1996); *Craig v. State*, 685 So.2d 1224 (Fla. 1996); *Cummings-El v. State*, 684 So.2d 729 (Fla.1996); *Williamson v. State*, 681 So.2d 688 (Fla.1996); *Farina v. State*, 680 So.2d 392 (Fla.1996); *Bonifay v. State*, 680 So.2d 413 (Fla.1996); *Campbell v. State*, 679 So.2d 720 (Fla.1996); *Foster v. State*, 679 So.2d 747 (Fla.1996); *Farina v. State*, 679 So.2d 1151 (Fla.1996); *Hamilton v. State*, 678 So.2d 1228 (Fla.1996); *Larzelere v. State*, 676 So.2d 394 (Fla.1996); *Wournos v. State*, 676 So.2d 966 (Fla.1996); *Wournos v. State*, 676 So.2d 972 (Fla.1996); *Geralds v. State*, 674 So.2d 96 (Fla.1996); *Archer v. State*, 673 So.2d 17 (Fla.1996); *State v. Gunsby*, 670 So.2d 920 (Fla.1996); *Hunter v. State*, 660 So.2d 244 (Fla.1996); *Barwick v. State*, 660 So.2d 685 (Fla.1995); *Cave v. State*, 660 So.2d 705 (Fla.1996); *Gamble v. State*, 659 So.2d

242 (Fla.1996); *Windom v. State*, 656 So.2d 432 (Fla.1995); *Besaraba v. State*, 656 So.2d 441 (Fla.1995); *Lockhart v. State*, 655 So.2d 69 (Fla.1995); *Foster v. State*, 654 So.2d 112 (Fla.1995); *Crump v. State*, 654 So.2d 545 (Fla.1995); *Barrett v. State*, 649 So.2d 219 (Fla.1995); *Jackson v. State*, 648 So.2d 85 (Fla.1994); *Fennie v. State*, 648 So.2d 95 (Fla.1994); *Perez v. State*, 648 So.2d 715 (Fla.1995); *Spencer v. State*, 645 So.2d 377 (Fla.1994); *Caruso v. State*, 645 So.2d 389 (Fla.1994); *Turner v. State*, 645 So.2d 444 (Fla.1994); *Suggs v. State*, 644 So.2d 44 (Fla.1994*); Castro v. State*, 644 So.2d 987 (Fla.1994); *Wournos v. State*, 644 So.2d 1000 (Fla.1994); *Pietri v. State*, 644 So.2d 1347 (Fla. 1994); *Parker v. State*, 643 So.2d 1032 (Fla.1994); *Esty v. State*, 642 So.2d 1074 (Fla.1994); *Walls v. State*, 641 So.2d 381 (Fla.1994); *Peterka v. State*, 640 So.2d 59 (Fla.1994); *Griffin v. State*, 639 So.2d 966 (Fla.1994); *Vining v. State*, 637 So.2d 921 (Fla.1994); *Aberlaez v. State*, 626 So.2d 169 (Fla.1993); *Atwater v. State*, 626 So.2d 1325 (Fla.1993); *Sweet v. State*, 624 So.2d 1138 (Fla.1993); *Remeta v. Dugger*, 622 So.2d 452 (Fla.1993); *Williams v. State*, 622 So.2d 456 (Fla.1993); *Crump v. State*, 622 So.2d 963 (Fla.1993); *Trepal v. State*, 621 So.2d 1361 (Fla.1993); *Cannady v. State*, 620 So.2d 165 (Fla.1993); *Thompson v. State*, 619 So.2d 261 (Fla.1993); *Sochor v. State*, 619 So.2d 285 (Fla.1993); *Padilla v. State*, 618 So.2d 165 (Fla.1993); *Maulden v. State*, 617 So.2d 298 (Fla.1993); *White v. State*, 616 So.2d 21 (Fla.1993); *DeAngelo v. State*, 616 So.2d 440 (Fla.1993); *Gaskin v. State*, 615 So.2d 679 (Fla.1993); *Foster v. State*, 614 So.2d 455 (Fla.1992); *Hall v. State*, 614 So.2d 473 (Fla.1993); *Hunt v. State*, 613 So.2d 893 (Fla.1992); *Jones v. State*, 612 So.2d 1370 (Fla.1992); *Long v. State*, 610 So.2d 1268 (Fla.1992); *Clark v. State,* 609 So.2d 513 (Fla.1992); *Phillips v. State*, 608 So.2d 778 (Fla.1992); *Fotopoulos v. State*, 608 So.2d 784 (Fla.1992); *Power v. State*, 605 So.2d 856 (Fla.1992); *Durocher v. State*, 604 So.2d 810 (Fla.1992); *Geralds v. State*, 601 So.2d 1157 (Fla.1992); *Jackson v. State*, 599 So.2d 103 (Fla.1992); *Gore v. State*, 599 So.2d 978 (Fla.1992); *Castro v. State*, 597 So.2d 259 (Fla.1992); *Maharaj v. State*, 597 So.2d 786 (Fla.1992); *Durocher v. State*, 596 So.2d

997 (Fla. 1992); *Wike v. State*, 596 So.2d 1020 (Fla.1992); *Dougan v. State*, 595 So.2d 1 (Fla.1992); *Ponticelli v. State*, 593 So.2d 483 (Fla.1991); *Santos v. State*, 591 So.2d 160 (Fla. 1991); *Gaskin v. State*, 591 So.2d 917 (Fla.1991); *Klokoc v. State*, 589 So.2d 219 (Fla.1991); *Bedford v. State*, 589 So.2d 245 (Fla.1991); *Cruse v. State*, 588 So.2d 983 (Fla.1991); *Wright v. State*, 586 So.2d 1024 (Fla.1991); *Davis v. State*, 586 So.2d 1038 (Fla.1991); *Omelus v. State*, 584 So.2d 563 (Fla.1991); *Green v. State*, 583 So.2d 647 (Fla.1991); *Capehart v. State*, 583 So.2d 1009 (Fla.1991); *Hayes v. State*, 581 So.2d 121 (Fla.1991); *Derrick v. State*, 581 So.2d 31 (Fla.1991); *Riechmann v. State*, 581 So.2d 133 (Fla.1991); *Scott v. State*, 581 So.2d 887 (Fla. 1991); *Sochor v. State*, 580 So.2d 595 (Fla.1991); *Asay v. State*, 580 So.2d 610 (Fla.1991); *McKinney v. State*, 579 So.2d 80 (Fla.1991); *Shere v. State*, 579 So.2d 86 (Fla.1991); *Douglas v. State*, 575 So.2d 165 (Fla.1991); *Hegwood v. State*, 575 So.2d 170 (Fla.1991); *Bruno v. State*, 574 So.2d 76 (Fla.1991); *Anderson v. State*, 574 So.2d 87 (Fla.1991); *Robinson v. State*, 574 So.2d 108 (Fla.1991); *Penn v. State*, 574 So.2d 1079 (Fla.1991); *Gunsby v. State*, 574 So.2d 1085 (Fla.1991); *Holton v. State*, 573 So.2d 284 (Fla.1990); *Nixon v. State*, 572 So.2d 1336 (Fla.1990); *Occhicone v. State*, 570 So.2d 902 (Fla.1990); *Farinas v. State*, 569 So.2d 425 (Fla. 1990); *Jones v. State*, 569 So.2d 1234 (Fla.1990); *Lucas v. State*, 568 So.2d 18 (Fla. 1990); *Hall v. State*, 568 So.2d 882 (Fla.1990); *Thompson v. State*, 565 So.2d 1311 (Fla.1990); *Preston v. State*, 564 So.2d 120 (Fla.1990); *Porter v. State*, 564 So.2d 1060 (Fla.1990); *Haliburton v. State*, 561 So.2d 248 (Fla.1990); *Blakely v. State*, 561 So.2d 560 (Fla.1990); *Reed v. State*, 560 So.2d 203 (Fla.1990); *Boenoano v. Dugger*, 559 So.2d 1116 (Fla.1990); *Burr v. State*, 550 So.2d 444 (Fla.1989); *Christian v. State*, 550 So.2d 450 (Fla.1989); *Fuente v. State*, 549 So.2d 652 (Fla.1989); *Stokes v. State*, 548 So.2d 188 (Fla.1989); *Rhodes v. State*, 547 So.2d 1201 (Fla.1989); *Rutherford v. State*, 545 So.2d 853 (Fla.1989); *Dudley v. State*, 545 So.2d 857 (Fla. 1989); *Eutzy v. State*, 541 So.2d 1143 (Fla.1989); *Parker v. Dugger*, 537 So.2d 969 (Fla.1988); *Banda v. State*, 536 So.2d 221 (Fla.1988); *Lambrix v.*

State, 534 So.2d 1151 (Fla.1988); *Swafford v. State*, 533 So.2d 270 (Fla.1988); *Bryan v. State*, 533 So.2d 744 (Fla.1988); *Amoros v. State*, 531 So.2d 1256 (Fla.1988); *Turner v. State*, 530 So.2d 45 (Fla.1987); *Harmon v. State*, 527 So.2d 182 (Fla.1988); *Hamblen v. State*, 527 So.2d 800 (Fla.1988); *Lloyd v. State*, 524 So.2d 396 (Fla.1988); *Stano v. Dugger*, 524 So.2d 1018 (Fla.1988); *Caillier v. State*, 523 So.2d 158 (Fla.1988); *Jackson v. State*, 522 So.2d 802 (Fla.1988); *Burch v. State*, 522 So.2d 810 (Fla. 1988); *Remeta v. State*, 522 So.2d 825 (Fla.1988); *Smith v. State*, 515 So.2d 182 (Fla.1987); *Koon v. State*, 513 So.2d 1253 (Fla.1987); *Jennings v. State*, 512 So.2d 169 (Fla.1987); *Williamson v. State*, 511 So.2d 289 (Fla.1987); *Craig v. State*, 510 So.2d 857 (Fla.1987); *Nibert v. State*, 508 So.2d 1 (Fla.1987); *Fryson v. State*, 506 So.2d 1117 (Fla. 1st DCA 1987); *Muelheman v. State*, 503 So.2d 310 (Fla.1987); *Jackson v. State*, 498 So.2d 406 (Fla.1986); *Jackson v. State*, 498 So.2d 906 (Fla. 1986); *Melendez v. State*, 498 So.2d 1258 (Fla.1986); *Provenzano v. State*, 497 So.2d 1177 (Fla.1986); *Floyd v. State*, 497 So.2d 1211 (Fla.1986); *Way v State*, 496 So.2d 126 (Fla.1986); *Irizarry v. State*, 496 So.2d 822 (Fla.1986); *Puiatti v. State*, 495 So.2d 128 (Fla.1986); *Brookings v. State*, 495 So.2d 135 (Fla.1986); *Huff v. State*, 495 So.2d 145 (Fla.1986); *Dufour v. State,* 495 So.2d 154 (Fla.1986); *Scott v. State*, 494 So.2d 1134 (Fla.1986); *Lambrix v. State*, 494 So.2d 1143 (Fla.1986); *Wilson v. State*, 493 So.2d 1019 (Fla.1986); *Kokal v. State*, 492 So.2d 1317 (Fla.1986); *Kelley v. State*, 486 So.2d 578 (Fla.1986); *Echols v. State*, 484 So.2d 568 (Fla.1985); *Deaton v. State*, 480 So.2d 1279 (Fla.1985); *Parker v. State*, 476 So.2d 134 (Fla. 1985); *Hooper v. State*, 476 So.2d 1253 (Fla.1985); *Gore v. State*, 475 So.2d 1205 (Fla.1985); *Peede v. State*, 474 So.2d 808 (Fla.1985); *Griffin v. State*, 474 So.2d 777 (Fla.1985); *Hoffman v. State*, 474 So.2d 1178 (Fla.1985); *Francis v. State*, 473 So.2d 672 (Fla.1985); *Brown v. State*, 473 So.2d 1260 (Fla.1985); *Wright v. State*, 473 So.2d 1277 (Fla.1985); *Steiner v. State*, 469 So.2d 179 (Fla. 3d DCA 1985); *Patten v. State*, 467 So.2d 975 (Fla.1985); *Burr v. State*, 466 So.2d 1051 (Fla.1985); *Bates v. State*, 465 So.2d 490 (Fla.1985); *Johnson v. State*, 465 So.2d 499

(Fla.1985); *Middleton v. State*, 465 So.2d 1218 (Fla.1985); *Lara v. State*, 464 So.2d 1173 (Fla.1985); *Henderson v. State*, 463 So.2d 196 (Fla.1985); *Troedel v. State*, 462 So.2d 392 (Fla.1984); *Duest v. State*, 462 So.2d 446 (Fla.1985); *Mills v. State*, 462 So.2d 1075 (Fla.1985); *Parker v. State*, 456 So.2d 436 (Fla.1984); *Thompson v. State*, 456 So.2d 444 (Fla.1984); *Thomas v. State*, 456 So.2d 454 (Fla.1984); *Kennedy v. State*, 455 So.2d 351 (Fla.1984); *Card v. State*, 453 So.2d 17 (Fla.1984); *Jennings v. State*, 453 So.2d 1109 (Fla.1984); *Herring v. State*, 446 So.2d 1049 (Fla.1984); *Preston v. State*, 444 So.2d 939 (Fla.1984); *Maxwell v. State*, 443 So.2d 967 (Fla.1983); *Clark v. State*, 443 So.2d 973 (Fla.1983); *Pope v. State*, 441 So.2d 1073 (Fla.1983); *Drake v. State*, 441 So.2d 1079 (Fla.1983); *Livingston v. State*, 441 So.2d 1083 (Fla.1983); *Jones v. State*, 440 So.2d 570 (Fla. 1983); *Routly v. State*, 440 So.2d 1257 (Fla.1983); *Herzog v. State*, 439 So.2d 11372 (Fla.1983); *Justus v. State*, 438 So.2d 358 (Fla.1983); *Mason v. State*, 438 So.2d 374 (Fla.1983); *Lightbourne v. State*, 438 So.2d 380 (Fla.1983); *Johnson v. State*, 438 So.2d 774 (Fla.1983); *Harich v. State*, 437 So.2d 1082 (Fla.1983); *Hawkins v. State*, 436 So.2d 44 (Fla.1983); *King v. State*, 436 So.2d 50 (Fla.1983); *Washington v. State*, 432 So.2d 44 (Fla.1983); *O'Callaghan v. State*, 429 So.2d 691 (Fla.1983); *Cannady v. State*, 427 So.2d 723 (Fla.1983); *Middleton v. State*, 426 So.2d 548 (Fla.1982); *Smith v. State*, 424 So.2d 726 (Fla.1982); *Hill v. State*, 422 So.2d 816 (Fla.1982); *Bolender v. State*, 422 So.2d 833 (Fla.1982); *Mann v. State*, 420 So.2d 578 (Fla. 1982); *Gilvin v. State*, 418 So.2d 996 (Fla.1982); *McCray v. State*, 416 So.2d 804 (Fla.1982); *Miller v. State*, 415 So.2d 1262 (Fla.1982); *Jent v. State*, 408 So.2d 1024 (Fla.1981); *Blair v. State*, 406 So.2d 1103 (Fla.1981); *White v. State*, 403 So.2d 331 (Fla.1981); *Combs v. State*, 403 So.2d 418 (Fla.1981).

MEMORANDUM OF LAW

A constitution takes precedence over any statute and guarantees the *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 provisions apply to Florida in general and to this Defendant specifically. *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 or she] 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 "[e]xcessive 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 of 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 in the 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 trial 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 than 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. In 2017, the Florida Legislautre was again tasked in a second wake, in *Hurst,* wherein Florida's "hybrid" capital sentencing scheme, under which an advisory jury makes a recommendation to a judge, and the judge makes the critical findings needed for imposition of a death sentence, was held to violate ones Sixth Amendment Right to a trial by jury, to yet again create a constitutionally valid death penalty scheme. *Id.* The ruling was based upon the long elucidated and well reasoned ruling in *Ring v. Arizona*, 122 S.Ct. 2428 (2002). Florida's Legislature passed new legislation in March, 2017.

Even with the *Hurst* ruling, Florida's capital sentencing scheme,[1] however, is substantially different than mosts. 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(6), Fla.Stat., against the considerations set forth in §921.141(7), Fla.Stat..

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 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

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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(6), Fla.Stat. (2017) ("Aggravating circumstances *shall* be limited to the following"). In Florida, the aggravating circumstances set forth in §921.141(6), 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.").

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 factors" 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 factor 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 factors 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 factors" exist that legally and factually authorize capital punishment because that is the class of persons eligible for capital punishment.

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.:

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*, 125 S. Ct. 2007 (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 adopt procedures that 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. (2017) 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).

The CCP factor, either alone or in conjunction with other factors, may constitute "sufficient" aggravation to render a defendant eligible for capital punishment. Section 921.141(6)(i), Fla.Stat., can be used to impose the death penalty in Florida where the "capital felony was a homicide and was

committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification." However, the actual use of this factor has been arbitrary and inconsistent. For example, the CCP factor has been approved where "the evidence does reflect that appellant first shot the store clerk in response to what appellant believed was a threatening movement by the clerk and then shot him a second time after the clerk had fallen to the floor. The facts of this case are sufficient to show the heightened premeditation required for the application of this aggravating circumstance." *Herring v. State*, 446 So.2d 1049, 1075 (Fla. 1984). A year later its use was disapproved where a store clerk was shot three times. See *Caruthers v. State*, 465 So.2d 496, 498 (Fla. 1985) (CCP rejected because "[T]he cold, calculated and premeditated factor applies to a manner of killing characterized *by heightened premeditation* b*eyond that required to establish premeditated murder*.") (Emphasis added). In the next reported decision, however, use of the CCP factor was approved because "this factor focuses more on the perpetrator's state of mind than on the method of killing." *Johnson v. State*, 465 So.2d 499, 507 (Fla. 1986). This analysis, however, obviously does not give effect to the consideration of whether a pretense of moral or legal justification existed. However, the legal standard changed from "focusing on the perpetrator's state of mind" to focusing on the manner in which the crime was committed. See *Provenzano v. State*, 497 So.2d 1177, 1183 (Fla. 1986), ("as the statute indicates, if the murder was committed in a *manner* that was cold and calculated, the aggravating circumstance of heightened premeditation is applicable." (Emphasis in original).

Insofar as the state of mind of the defendant, one line of cases holds that the doctrine of transferred intent applies and that a person's planning to kill one person can readily be transferred to another victim. E.g., *Diaz v. State*, 860 So.2d 960, 969 (Fla. 2003) ("Because it is clear that the heightened premeditation necessary to find the CCP factor need not be directed toward the specific

victim, we find that the trial court did not err by using the theory of transferred intent in this case."); *Provenzano*, supra. Another line of cases holds that despite the planning and intent to kill another person, the doctrine of transferred intent, CCP cannot be used. E.g. *Amoros v. State*, 531 So.2d 1256 (Fla.1988) (defendant's plan to kill his ex-girlfriend could not be transferred to include the death of her current boyfriend who was chased by Amoros and shot three times); *Banda v. State*, 536 So.2d 221, 225 (Fla. 1988).

The standards set by the Florida Supreme Court governing use of this factor are inconsistent. They fail to provide any guidance as to when the CCP factor is to be properly found and weighed by the judge and/or jury. The constitutional principles of substantive due process and equal protection require that a provision of law be rationally related to its purpose. *Reed v. Reed*, 404 U.S. 71 (1971). See also *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). This principle applies to criminal laws. See *State v. Walker*, 461 So.2d 108 (Fla. 1984). Thus, criminal statutes "must bear a reasonable relationship to the legislative objective and must not be arbitrary." *Potts v. State,* 526 So.2d 104 (Fla. 4th DCA 1987), Aff'd., *State v. Potts*, 526 So.2d 63 (Fla. 1988). Due process requires that criminal provisions be strictly construed. *Bifulco v. United States*, 447 U.S. 381 (1980); *Dunn v. United States*, 442 U.S. 100, 112 (1979). Florida otherwise expressly directs the strict construction of penal statutes, with ambiguous statutes to be construed most favorably to the accused. See Section 775.021, Fla. Stat. All of these principles are violated by the CCP factor.

Specifically, the Legislature expressly created the "CCP" statutory aggravating circumstance in 1979 "to include execution-type killings as one of the enumerated aggravating circumstances." Senate Staff Analysis and Economic Impact Statement, SB 523 (May 9, 1979, revised). See also, Barnard, "Death Penalty (1988 Survey of Florida Law), 13 Nova L. Rev. 907*,* 936-37 (1989). The standard construction is that it "ordinarily applies in those murders which are characterized as

executions or contract murders, although that description is not intended to be all-inclusive." See *McCray v. State*, 416 So.2d 804, 807 (Fla. 1982). The qualifier "ordinarily" thus opens the use of this factor to areas other than executions or contract murders. E.g., *Duest v. State*, 462 So.2d 446 (Fla. 1985) (killing during course of robbery without more); *Herring v. State*, 446 So.2d 1049 (Fla.), *cert. denied*, 469 U.S. 989 (1984) (defendant shot store clerk who made threatening move); *Phillips v. State*, 476 So.2d 194 (Fla. 1985) (defendant had to reload before firing final shot).

The CCP statute became effective July 1, 1979 and was capable of being applied retroactively under the absurd rational that it somehow *benefited* defendants in the weighing process by *narrowing* the class of persons eligible for the death penalty. See *Combs v. State*, 404 So.2d 418 (Fla. 1981). This totally ignored the requirement under Section 921.141, Fla.Stat., that the aggravating circumstances be weighed against the mitigating circumstances to determine whether a death penalty should be imposed, and the addition of an additional aggravating circumstance added to the aggravation side of the scale in that weighing process. By 1987, 80% of cases in which CCP was applied did *not* involve execution-style killings. J. Kennedy, Florida's "Cold, Calculated and Premeditated" Aggravating Circumstance in Death Penalty Cases, XVII Stetson Law Review 47, 96-97 (1987).

The CCP circumstance has been applied in a manner inconsistent with its stated legislative purpose and without regard to the requirement of strict construction of penal statutes. The Eighth Amendment requires that aggravating circumstances "must be construed to permit a principled distinction between those who deserve the death penalty and those who do not." *Lewis v. Jeffers*, 110 S.Ct. 3092, 3099 (1990). How much "additional" premeditation over that needed to convict of premeditated murder has never been set. It is not quantifiable and it is not an objective standard, but

if it is, that distinction must be created by the legislative branch of government rather than by the judicial branch, as is occurring with absurd results.

For instance, in *Herring v. State*, 446 So.2d 1049 (Fla.), cert. *denied*, 469 U.S. 989 (1984), the CCP factor was upheld where the defendant shot a store clerk a second time after he fell to the floor. The interval between the first and second shot *alone* appeared to be the legal standard used by the Florida Supreme Court and to be applied by the lower courts and juries when the CCP factor was an issue. In *Rogers v. State*, 511 So.2d 526 (Fla. 1987), the legal standard changed:

> Where there is ample evidence to support simple premeditation, we must conclude that there is insufficient evidence to support the heightened premeditation described in the statute, which must bear the indicia of "calculation." Since we conclude that "calculation" consists of a careful plan or pre-arranged design, we recede from our holding in *Herring v. State*, 446 So.2d 1049, 1057 (Fla.), cert. denied, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984), to the extent it dealt with this question.

Id. at 533. Then, in *Swafford v. State*, 533 So.2d 270, 277 (Fla.1988), the *Herring* analysis was resurrected and the legal analysis changed again, from focusing on the defendant's "careful plan or prearranged design" to "the time for reflection" – equivalent to the time required to reload a firearm:

> The evidence showed, however, that Swafford shot the victim nine times including two shots to the head at close range and that he had to stop and reload his gun to finish carrying out the shootings. This aggravating factor can be found when the evidence shows such reloading, Phillips v. State, 476 So.2d 194, 197 (Fla. 1985), because reloading demonstrates more time for reflection and therefore "heightened premeditation." See Herring v. State, 447 So.2d 1049, 1057 (Fla.), cert. denied, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984).

Then in 1990 the legal standard inexplicably changed back:

> The state's reliance upon Phillips v. State, 476 So.2d 194 (Fla. 1985), is misplaced. In Phillips, this Court held that because appellant had to reload his revolver in order for all of the shots to be fired, he was afforded ample time to contemplate his actions and choose to kill his victim, and the record therefore amply supported the finding that the murder was cold, calculated, and premeditated. Our decision in Phillips however was predicated on Herring v. State, 446 So.2d 1049

> (Fla.), cert. denied, 469 U.S. 989 (1984). We receded from this portion of Herring in our decision in Rogers v. State, 511 So.2d 526 (Fla. 1986), cert. denied, 108 S.Ct. 733 (1988).

Farinas v. State, 569 So.2d 425, 431 fn 8 (Fla. 1990). This is arbitrary.

The cases are wildly inconsistent as to whether bringing the murder weapon to the scene in and of itself establishes the CCP circumstance. Compare *Swafford v. State*, 533 So.2d 270 (Fla. 1988), *Lamb v. State*, 532 So.2d 1051, 1053 (Fla.1988) and *Huff v. State*, 495 So.2d 145 (Fla.1986) (weapon brought to scene; CCP found) with *Amoros v. State*, 531 So.2d 1256 (Fla.1988), *Hamblen v. State*, 527 So.2d 800 (Fla.1988) and *Lloyd v. State*, 524 So.2d 396 (Fla.1988) (weapon brought to scene; CCP rejected)[3]. Cases differ as to whether moving the victim to a remote location prove the CCP factor. Compare *Preston v. State*, 444 So.2d 939 (Fla.1984) (store clerk moved one-and-a-half miles, then stabbed to death; CCP disallowed) and *Cannady v. State*, 427 So.2d 723 (Fla.1983) (hotel night auditor taken to remote location and killed by five gunshots; CCP disallowed) with *Card v. State*, 453 So.2d 17 (Fla.1984) (trial court finding upheld where defendant drove office clerk eight miles to wooded area and cut her throat; "The appellant had ample time during this series of events to reflect on his actions and their attendant consequences") and *Herring v. State*, 446 So2d 1049 (Fla.1984) (CCP found where clerk shot twice after making threatening move during robbery). The cases using the CCP factor fail to recognize as a pretense of justification the defense of unborn children and the protection of life contrary to the express terms of the factor that it is not to be applied if "a pretense" or moral or legal

[3] In *Lloyd*, the defendant arrived at the victim's house with a .38 caliber pistol, demanded money and ordered the victim and her daughter into the bathroom. The victim was shot twice, the fatal shot being fired with the pistol in contact with her head. The CCP circumstance was disallowed because, while there was a "suspicion that this was a contract killing," such was not proven beyond a reasonable doubt. There was no discussion or analysis as to why bringing the gun to the scene did not support the CCP finding, as it had in other cases.

justification exists. See *Hill v. State*, 688 So.2d 901 (Fla.1996). Such a narrow construction of the CCP aggravating factor is not proper where the factor was intended to address execution and contract killings. By a common understanding of the express terms of the statute as passed, a pretense of moral justification would include defending the life of unborn children solely for the purpose of defending the life of the fetus that cannot defend itself. Even if the statute was considered ambiguous, the court's narrow use violates Section 775.021, Florida Statute.

The foregoing cases have arbitrary and capricious results because the legal standard to apply the CCP 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." Websters Third New International Dictionary (1981). The foregoing examples show that the CCP 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 Constitution requires that capital sentencing discretion must be directed and limited by considerations that are 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 CCP aggravating circumstance entails. This is evident because the Florida Supreme Court ultimately conceded[4] that fact in *Jackson v. State*, 648 So.2d 85, 88-90 (Fla. 1994).

[4] If the standard jury instruction that tracked the statute *verbatim* was unconstitutionally vague, the statute also was necessarily unconstitutionally vague.

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.

Simply said, Section 921.141(6)(i), Florida Statutes, as amended, 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 and 16 of the Florida Constitution as discussed above.

WHEREFORE, based on the argument and authorities set forth in the foregoing memorandum of law and as may be further argued when this motion is heard, this Court is respectfully asked to declare Section 921.141(6)(i), Florida Statute, unconstitutional as written and as applied.

CERTIFICATE OF SERVICE

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

Respectfully submitted,

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