

**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 SECTIONS 921.141 AND/OR 921.141(6)(b)  
FLORIDA STATUTES AND/OR THE STANDARD (6)(b) INSTRUCTION  
UNCONSTITUTIONAL FACIALLY AND AS APPLIED**

The defendant, moves that this Court enter its order declaring section 921.141 and/or section 921.141(6)(b) Florida Statutes, and the corresponding (6)(b) standard instruction unconstitutional, and precluding their application at bar for the following reasons:

1. The "prior violent felony" aggravating factor of section 921.141(6)(b),<sup>1</sup> and its corresponding standard instruction is unconstitutionally vague and overbroad has been applied in an overbroad fashion, and in an arbitrary and inconsistent manner.
2. Because this unconstitutional circumstance has been and continues to be used as a basis for imposing a number of death sentences in this state, because its unlawful use makes proportionality review arbitrary, and because its bare terms are all that is required to be read to sentencing juries, section 921.141, Florida Statutes as a whole is unconstitutional. *See Herring v. State*, 446 So.2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting in part).
3. Section 921.141(6)(b), its standard instruction, and the death penalty as applied in Florida thus violate the fifth, sixth, eighth and fourteenth amendments to the United States Constitution and Article I, Sections 9, 16, 17, 21 and 22 of the Florida Constitution.
4. Further grounds will be argued *ore tenus*.

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<sup>1</sup> "The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

## MEMORANDUM OF LAW

This is a capital case in which the prosecution is asking this Court to impose the death penalty. Accordingly, heightened standards of due process apply. *See Elledge v. State*, 346 So.2d 998 (Fla. 1977) ("heightened" standard of review), *Mills v. Maryland*, 108 S.Ct. 1860, 1866 (1988) ("In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds."), *Proffitt v. Wainwright*, 685 F.2d 1227, 1253 (11th Cir.1982) ("Reliability in the fact finding aspect of sentencing has been a cornerstone of [the Supreme Court's death penalty] decisions."), and *Beck v. Alabama*, 447 U.S. 625, 638, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1988) (same principles apply to guilt determination). "Where a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." *Gregg v. Georgia*, 428 U.S. 153, 187, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (plurality opinion) (citing cases).

A death penalty statute is unconstitutional if it has "standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing" could occur. *Godfrey v. Georgia*, 446 U.S., 420, 428, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (plurality opinion). A capital sentencing scheme must genuinely narrow 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. *Porter v. State*, 564 So.2d 1060, 1063-64 (Fla.1990), *Lowenfield v. Phelps*, 108 S.Ct. 546, 554(1988).

Section 775.021(1), Florida Statutes, sets out the rule for construing provisions of the Florida Criminal Code:

The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

This principle of strict construction is not merely a maxim of statutory interpretation: it is rooted in fundamental principles of due process. *Dunn v. United States*, 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979) (rule "is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited. [Cit.] Thus, to ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not "plainly and unmistakably" proscribed. [Cit.]"). This principle of strict construction of penal laws applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose. *Bifulco v. United States*, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980). It applies to Florida capital proceedings. *Trotter v. State*, 576 So.2d 691, 694 (Fla.1990)

(sentence of imprisonment aggravating circumstance).

Great care is needed in construing aggravating circumstances. In *Maynard v. Cartwright*, 108 S.Ct. 1853, 1857-58 (1988), the Court wrote:

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).

The Court held in *Maynard* that jury instructions which violate these principles are unconstitutional.

Substantive due process and equal protection principles require a provision of law, including criminal statutes, be rationally related to its purpose. *Reed v. Reed*, 404 U.S. 71 (1971); *Potts v. State*, 526 So.2d 104 (Fla. 4th DCA 1987), *aff'd.*, *State v. Potts*, 526 So.2d 63 (Fla. 1988).

The prior violent felony circumstance, as it has been interpreted, does not satisfy any of these constitutional concerns.

The first problem with the Florida Supreme Court's application of the circumstance is that it does not require the "prior" conviction be used as a basis for imposing a death sentence to be final. Even a conviction pending on appeal may be used as a circumstance. *See, e.g., Ruffin v. State*, 397 So.2d 277, 282-83 (Fla. 1981); *Peek v. State*, 395 So.2d 492, 499 (Fla. 1981). Such an interpretation violates the due process and equal protection rights to an appeal and the eighth amendment narrowing requirement and proscription that death sentences "cannot be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process,'" or on "materially inaccurate" information. *Johnson v. Mississippi*, 108 S.Ct.

1981, 1986, 1989 (1988) (reversing affirmance of death sentence where sentence based on prior violent felony which was later vacated).

The second problem is the expansion of the circumstance to permit contemporaneous violent felony convictions to be treated as a "prior violent felony". Florida permits any conviction prior to sentencing to be treated as a prior violent felony, even if that conviction arises from the same criminal episode as the capital felony, and even if the capital and other charges are tried together. *Lucas v. State*, 376 So.2d 1149, 1152 (Fla. 1979). While the Court has limited the contemporaneous conviction gloss on the circumstance to preclude its use where there is a single victim, *Wasko v. State*, 505 So.2d 1314, 1317-18 (Fla. 1987), that limitation does not save the circumstance. The Court's interpretation is not related to the purpose of the circumstance -- to punish more severely those who have committed violent crimes in the past. "[T]he individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant." *California v. Brown*, 107 S.Ct. 837, 841 (1987) (O'Connor, J., concurring). Use of a contemporaneous conviction ignores the legitimate inquiry into whether a person convicted of first degree murder has a history of violence, and exposes those who have no history of conviction for a violent felony to a greater likelihood of receiving death. The broad application of the circumstance thus fails to "genuinely narrow" the class of death eligible, is "wholly unrelated to the blameworthiness of the particular defendant," and relies on conduct that is "irrelevant to the sentencing process." *Zant v. Stephens*, 462 U.S. 862, 885 (1983).

The standard instruction is unconstitutionally vague, and similarly misleads jurors into considering unlawful and constitutionally irrelevant factors in deciding whether death is the appropriate sentence. The standard instructions instruct the trial judge as follows:

**Since the character of a crime involving violence or threat of violence is a matter of law, when the State offers evidence under aggravating circumstance "2" the court should instruct the jury of the following, as applicable:**

(Give a or b as applicable):

- a. The crime of (previous crime) is a capital felony.
- b. The crime of (previous crime) is a felony involving the [use]  
[threat] of violence to another person.

The trial court is thus required to direct the sentencing jurors to find a contemporaneous violent felony is actually "prior" under the Florida Supreme Court's case law, an instruction which is misleading, and unconstitutional, as discussed above. The (6) (b) standard instruction is thus also

unconstitutional for the same reasons as is the circumstance, under the teachings of *Maynard*.

Wherefore, the defendant moves that this Court enter its order:

1. Declaring section 921.141 and/or section 921.141(6)(b), Florida Statutes unconstitutional, and precluding their application at bar; or
2. Granting such other relief as may be appropriate.

### **CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing motion was served via E-filing notification on the Office of the State Attorney this 29<sup>th</sup> day of January, 2026.

Respectfully submitted,

/s/Daniel M. Hernandez  
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