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 PRECLUDE IMPOSITION OF CAPITAL PUNISHMENT ON THE GROUND THAT THE DEATH PENALTY, AS PRESENTLY ADMINISTERED, IS *PER SE* CRUEL AND UNUSUAL PUNISHMENT

> ***"[W]e are left in limbo, with [death penalty] machinery that is immensely expensive, that chokes our legal institutions so they are impeded from doing all the other things a society expects from its courts, that visits repeated trauma on victims' families, and that ultimately does not produce anything like the benefits we would expect from an effective death penalty. As time passes, the balance is likely to shift even farther toward to costs and away from the benefits. This is surely the worst of all worlds."***[1]

The Defendant, TOMASZ KOSOWSKI, moves this Court to enter an order precluding the prosecution from seeking the death penalty in this case. As Defendant will explain *infra*, capital punishment -- at least as it is presently administered -- violates the Eighth and Fourteenth Amendments to the U.S. Constitution and Article I, Section 17 of the Florida Constitution. As grounds thereof, the Defendant states the following:

1. The Defendant is charged with One Count of First Degree Murder. The State to date, has indicated that it intends to seek imposition of the death penalty upon conviction of First-Degree Murder.
2. The Defendant entered a plea of not guilty.
3. The Defendant submits the following Memorandum of Law in support.

MEMORANDUM OF LAW

[1] Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE WEST. RES. L. REV. 2 (Fall 1995).

A. Introduction

As we approach the completion of the third decade following Furman,[2] an increasing

number of distinguished jurists who formerly supported capital punishment have either directly stated or suggested that capital punishment is currently unconstitutional.[3] "[T]he controversy about the constitutionality of capital punishment,"[4] it seems, will not go away.[5]

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[2] Furman v. Georgia, 408 U.S. 238 (1972).

[3] Joan Biskupic, *Judges Attack the Death "Machine": Top Jurists Find Fault with the Effectiveness of Capital Punishment,* WASHINGTON POST, April 16, 1995, at A16. *See*, e.g., Callins v. Collins, 114 S. Ct. 1127 (1994) (Blackmun, J., dissenting from denial of certiorari); John C. Jeffries, Jr., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 451 (1994) (quoting interview with retired Justice Powell in which he stated that he now believes that capital punishment is unconstitutional).

Justice Blackmun concluded his dissent in Callins by stating that he was "optimistic" that a majority of the Court would eventually strike down the present system of capital punishment. Callins, 114 S. Ct. at 1138. A little over a year later, two other members of the present Court signaled that they may be amenable to arguments that could significantly curtail the implementation of capital punishment. *See* Lackey v. Texas, 115 S. Ct. 1421, 1421-22 (1995) (statements of Stevens & Breyer, JJ., respecting the denial of certiorari). (The Lackey case is discussed infra.) Justice Stevens appears to be on the brink of following Justice Blackmun's path paved in Callins. Compare Harris v. Alabama, 115 S. Ct. 1031, 1042 (1995) (Stevens, J., dissenting) ("The Court today casts a cloud over the legitimacy of our capital sentencing jurisprudence."), with Herrera v. Collins, 113 S. Ct. 853, 884 (1993) (Blackmun, J., dissenting) ("I have voiced disappointment over this Court's obvious eagerness to do away with any restrictions on the States' power to execute whomever and however they please. I have also expressed doubts about whether, in the absence of such restrictions, capital punishment remains constitutional at all."). Rumblings by lower court judges are also increasingly apparent. *See*, e.g., Jeffers v. Lewis, 38 F.3d 411, 425-28 (9th Cir. 1994) (en banc) (Noonan, J., dissenting, joined by Pregerson & Norris, JJ.) (*sua sponte* arguing that Arizona's post-Furman system of capital punishment is unconstitutional because of the arbitrary and slow pace of executions).

[4] Coker v. Georgia, 433 U.S. 584, 591 (1977).

[5] Even many conservative jurists have criticized the post-Furman capital punishment system as being inefficacious or illogical. *See* Coleman v. Balkcom, 451 U.S. 949 (1981) (Rehnquist, J., dissenting from denial of certiorari) (arguing that the substantial delays between sentencing and execution that were increasing apparent in the early 1980s undermined the legitimate purposes of capital punishment); Walton v. Arizona, 497 U.S. 639, 656-73 (1990) (Scalia, J., concurring in part and concurring in judgment) (arguing that Court's current capital sentencing jurisprudence violates the core principle underlying the Court's action in Furman v. Georgia, supra); Graham v. Collins, 113 S. Ct. 892, 903-15 (1993) (Thomas, J., concurring) (making essentially the same point).

Notably, a former law clerk of Justice Thomas, has concluded that "[t]he Supreme Court's current capital jurisprudence is a disaster" and has suggested that the Court should re-examine that jurisprudence. He further "suggests that even the dramatic step of prohibiting the imposition of capital punishment altogether as a matter of federal constitutional law, although not yet warranted, ultimately may be the most satisfying resolution " Stephen R. Mcallister, *The Problem of Implementing a Constitutional System of Capital Punishment*, 43 U. KAN. L. REV. 1039 (August 1995).

Most of these legal thinkers have not criticized our current system of capital punishment based on traditional arguments for abolition, which have typically invoked moralistic or quasi-religious themes, such as the inviolable dignity of human life.[6] Rather than being motivated primarily by abstract moral qualms, they have focused largely on the *practical* problems with the

"machinery of death," a phrase coined by retired Justice Harry Blackmun in his landmark dissenting opinion in Callins v. Collins in early 1994. These problems include, *inter alia*, the lengthy delays between sentencing and actual execution, a seemingly irreconcilable paradox at the heart of the Supreme Court's post-Furman capital sentencing jurisprudence, the systemic racial disparities that continue to plague the implementation of capital punishment, and the prohibitive social and monetary costs of our current system of capital punishment. Defendant contends that these "major systemic defects"[7] have resulted in a presumptively unconstitutional death sentence in any given case. *Cf.* Furman v. Georgia, *supra*.

B. The Inefficacy of Our Current System of Capital Punishment

In a recent law review article, Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit was harshly critical of the current system of capital punishment in America. *See* Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE WEST. RES. L. REV. 1 (Fall 1995). Judge Kozinski observed that, although numerous persons are sentenced to death every year, we have very few actual executions; when executions do occur, they are typically a decade or more after trial. This is largely a function of: (1) the large number of reversals in capital appeals; (2) the extremely complex body of capital sentencing law and the protracted appellate process; and (3) limited resources (*e.g.*, lack of qualified capital defense counsel) and crowded appellate dockets which cause inherent delays between sentencing at trial and actual executions.

[6] During their respective tenures on the Supreme Court, former Justices William Brennan and the late Thurgood Marshall were the best-known advocates of this line of argument. See, e.g., Gregg v. Georgia, 428 U.S. 153 (1976) (Brennan & Marshall, JJ., dissenting).

[7] McCleskey v. Zant, 481 U.S. 279, 313 (1987).

Judge Kozinski has argued that such a system of capital punishment is miserably ineffective and, thus, must be seriously modified, if not abandoned: "Whatever purposes the death

penalty is said to serve -- deterrence, retribution, assuaging the pain suffered by victims' families -- these purposes are not served by the system as it now operates. We are left in limbo, with a machinery that is immensely expensive, that chokes the legal institutions so they are impeded from doing all the other things that a society expects from its courts, that visits repeated trauma on the victims families, and ultimately does not produce anything like the benefits we would expect from an effective death penalty [system]."

Similar sentiments were recently expressed by Justice Stevens in his opinion respecting the denial of certiorari in Lackey v. Texas, 115 S. Ct. 1421 (1995) (memorandum of Stevens, J., respecting the denial of certiorari, joined by Breyer, J.). In Lackey, a death row inmate contended that the state could not constitutionally carry out his death sentence in view of the inordinate amount of time that had passed since his original death sentence was imposed at trial in early 1978. Justice Stevens agreed that this claim was a substantial one which found support in three sources: (1) the Supreme Courts post-Furman jurisprudence, which holds that the death penalty operates in an unconstitutional manner if its method of implementation does not promote the recognized social purposes of capital punishment -- namely, retribution and deterrence;[8] (2) the Anglo-American

[8]*See* Gregg v. Georgia, 428 U.S. 153, 183-87 (1976) (joint opinion of Stewart, Powell & Stevens, JJ.); *see also* Furman v. Georgia, 408 U.S. 238, 312-13 (1972) (White, J., concurring); Coker v. Georgia, 433 U.S. 584, 592 n.4 (1977) (plurality); McCleskey v. Kemp, 481 U.S. 279, 301 (1987). In a similar vein, retired Justice Lewis Powell has stated that he now believes that capital punishment should be abolished because its lack of effective enforcement Adiscredits the law. John Jeffries, supra, at 451. Similar views are held by many people in this country. *See*, *e.g.*.., "*Anger and*

common law, which presupposed that capital punishment would be implemented in a swift manner and which considered lengthy delays between sentencing and execution to be cruel and unusual punishment;[9] and (3) a growing body of international law that prohibits executions when substantial delays occur after trial.[10] *See* Lackey, 115 S. Ct. at 1421-22. Without dissent, the full Court later made it apparent that it agreed with Justice Stevens' views on Lackey's novel yet

substantial claim. *See* Lackey v. Scott, 115 S. Ct. 1818 (1995) (staying Lackey's execution and remanding for hearing on his claim).

As Chief Justice Rehnquist and others have recognized, "[t]here can be little doubt that delay in the enforcement of capital punishment frustrates the purpose of retribution."[11] Retribution is undermined "[w]hen people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they deserve...."[12] Likewise, as recognized by Blackstone and numerous other Eighteenth Century Anglo-American legal thinkers,[13] as well as by modern jurists,[14] the goal of deterrence is undermined by inordinate delays between sentencing

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Ambivalence: Most Americans Support Capital Punishment, Yet Few Inmates Are Actually Executed. Why the County Has Mixed Feelings About Putting People to Death," NEWSWEEK, August 7, 1995, at 24-29.

[9] *See e.g.*, IV BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 404 (5th ed. 1773) (to be effective capital punishment must be carried out swiftly) (citing Beccaria's ESSAY ON CRIMES AND PUNISHMENTS 74-75 (1764)).

[10] *See*, *e.g.*, State v. Makwanyane & Mchunu, Case No. CCT/3/94 (So. Afr. Const. Ct. June 6, 1995); Pratt & Morgan v. Attorney General of Jamaica, Privy Council Appeal No. 10 of 1993, slip op., at 16, *reported at* 3 W.L.R. 995, 143 N.L.J. 1639, 2 A.C. 1, 4 All E.R. 769 (British Privy Council Nov. 2, 1993) (*en banc*); Soering v. United Kingdom, 11 E.H.R.R. 429, 161 Eur. Ct. H.R. (Ser.A) (Eur. Ct. Hum. Rts. 1989).

11 Coleman v. Balkcom, 451 U.S. 949, 960 (1981) (Rehnquist, J., dissenting from denial of certiorari).

12 Furman v. Georgia, 408 U.S. at 308 (1972) (Stewart, J., concurring).

13 *See*, *e.g.*, BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 404-05 (5th ed. 1773).

14 *See* Coleman v. Balkcom, 451 U.S. 949, 952 (1981) (Stevens, J., concurring in the denial of certiorari) (recognizing that the mental pain suffered by a condemned prisoner awaiting execution "is [a] significant form of punishment" that "may well be comparable to the consequences of the ultimate step itself [*i.e.*, the actual execution]" in terms of its deterrent effect); id. at 959 (Rehnquist, J., dissenting from denial of certiorari); Justice Lewis Powell

and execution. When these two main purposes of capital punishment are undermined, the death penalty system does not operate in a constitutional manner.

C. The Continuing Problem of Systemic Racial Discrimination

In Furman v. Georgia, 408 U.S. 238 (1972), the U.S. Supreme Court invalidated the death penalty under the vast majority of statutes in effect in the country. The five concurring Justices in the majority agreed that the death penalty was being imposed in an "arbitrary" manner. As Justice Thomas has noted, the principal motivating factor of the Furman majority in finding that the death penalty was being arbitrarily imposed was a special concern about racial discrimination. *See* Graham v. Collins, 113 S. Ct. 892, 904-05 (1993) (Thomas, J., concurring) (discussing Furman).

Over two decades after Furman, there is no question that invidious racial bias is still manifest in the administration of the death penalty. There are numerous post-Furman studies, based on data in Florida cases and in other American death penalty jurisdictions, which conclude that capital punishment is administered in a racially biased-manner. These studies focus both on discrimination based on the race of the capital defendant (concluding that minority defendants are more likely to receive capital punishment) and also on discrimination based on the race of the victim (concluding that killers of whites are considerably more likely to be sentenced to death than killers of minorities).[15]

(retired), *Commentary: Capital Punishment*, 102 HARV. L. REV. 1035, 1035 (1989) ("years of delay between sentencing and execution ... undermines the deterrent effect of capital punishment and reduces public confidence in our criminal justice system"); James R. Acker & C.S. Lanier, *Aggravating Circumstances and Capital Punishment Law: Rhetoric or Real Reforms*, 29 CRIM. L. BULL. 467, 480 (Nov.-Dec. 1993) ("Classical deterence theory posits that punishment is most likely to deter crime when it follows quickly and with certainty upon the commission of the crime .... The [post-Furman] death penalty fails miserably on the celerity and certainty scales.").

15 *See*, *e.g.*, *Report and Recommendation of the Florida Supreme Court Racial and Ethnic Bias Study Commission*, at xvi (Dec. 11, 1991) (Athe application of the death penalty in Florida is not colorblind); Michael Radalet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FLA. L. REV. 1 (1991); Samuel Gross & Robert Mauro, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 44 (1989); Hans Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456 (1981); United States General Accounting Office, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL

In 1990, the United States General Accounting Office (GAO) surveyed various studies on racism and the death penalty and concluded that the studies show "a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the Furman decision" and that "race of victim influence was found at all stages of the criminal justice system."[16] The studies recounted in the GAO survey make it clear that discrimination based on race remains widespread and systematic in the imposition of the death penalty in the United States; in particular, such racism manifests itself most vividly in discrimination based on the race of capital murder victims. For example, of the 210 persons executed between January, 1977 and July, 1993, only a small fraction killed non-whites, despite the fact that non-white victims of murders are roughly equal in number of the percentages of white victims.[17]

Although in McCleskey v. Kemp, 481 U.S. 279 (1987), a bare majority of the Supreme Court refused to find that a statistical study of racism in Georgia was sufficient to warrant a finding that the death penalty was unconstitutional in that state, the McCleskey Court was not considering the evidence of systemic racial bias as simply one of many reasons to invalidate capital punishment (as the Court considered such systemic racism in Furman).

DISPARITIES (1990); David C. Baldus, et al., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990); Sheldon Eckland-Olson, *Structured Discretion, Racial Bias, and the Texas Death Penalty*, 69 SOC. SCI. Q. 853 (1988); David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty*, 15 STETSON L. REV. 133 (1986); Samuel R. Gross, *Race and the Judicial Evaluation of Discrimination in Capital Sentencing*, 18 U.C. DAVIS L. REV. 1275 (1985); David C. Baldus et al., *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia*, 18 U.C. DAVIS L. REV. 1375 (1985); David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983); William Bowers, *The Pervasiveness of Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067 (1983); Raymond Peternoster, *Race of the Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754 (1983); William Bowers & Glenn Pierce, *Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563 (1980).

16 U.S. General Accounting Office, DEATH PENALTY SENTENCING, at 5-6 (1990).

17 *See* NAACP Legal Defense and Educational Fund, "Death Row, USA," Summer 1993 (listing race of executed persons and their victims).

D. The Paradox in the U.S. Supreme Courts post-Furman Capital Sentencing Jurisprudence

Another defect in the post-Furman system of capital punishment was discussed at length by former Justice Blackmun in his landmark dissenting opinion in Callins v. Collins, 114 S. Ct. 1127 (1994). After supporting capital punishment as a jurist for well over two decades, Justice Blackmun declared in his Callins dissent that he no longer could vote to uphold death sentences. In large part, his dissent focused on what he identified as an irreconcilable paradox in the Supreme Courts post-Furman capital sentencing jurisprudence: Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death, *See* Furman v. Georgia ..., can never be achieved without compromising an equally essential component of fundamental fairness -- individualized sentencing. *See* Locket v. Ohio, 438 U.S. 586 ... (1978). Callins, 114 S. Ct. at 1129. Rather than abandon one of these two principles at the expense of the other, Justice Blackmun argued that the only appropriate response was to abandon the Courts post-Furman death penalty experiment and declare that capital punishment was unconstitutional. Id. at 1130.

E. The Florida Constitution

The excessive punishments clause of the Florida Constitution prohibits punishments that are either cruel *or* unusual and is therefore broader than the eighth amendment to the federal constitution, which prohibits only punishments that are both cruel *and* unusual. *Compare* U.S. Const. amend. VIII *and* Fla. Const. art. I, 17; *See* Allen v. State, 636 So. 2d 494, 497 & n.5 (Fla. 1994); Hale v. State, 630 So. 2d 521, 526 (Fla. 1993), *cert. denied*, 513 U.S. 909, 115 S.Ct. 278, 130 L.Ed.2d 195 (1994); Tillman v. State, 591 So. 2d 167, 169 n.2 (Fla. 1991). The Florida Supreme Court has stressed that, "[w]hen called upon to decide matters of fundamental rights, Florida's state courts are bound under federalist principles to give primacy to our state Constitution

and to give independent legal import to every phrase and clause contained therein." Traylor v. State, 596 So. 2d 957, 962 (Fla. 1992) (emphasis added); *See also* Harry Lee Anstead, Florida's Constitution: A View from the Middle, 18 NOVA L. REV. 1277 (1994). Consistent with the primacy principle enunciated in Traylor, the Florida Supreme Court has given independent meaning to the state constitution's prohibition of "unusual" punishments. *See* Tillman, 591 So. 2d at 169 (citing article I, section 17 as one basis for proportionality review of capital cases); Allen, 636 So. 2d at 497 (imposition of death penalty on 15-year-old offender violates Florida constitution because it is unusual).

The death penalty, as it is imposed under Florida's capital sentencing statute, has become unusual because the fundamental problem of arbitrariness remains unresolved. In the seminal case of Dixon v. State, 283 So. 2d 1, 7 (Fla. 1973), *cert. denied sub nom*, Hunter v. Florida, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), the Florida Supreme Court approved the newly-enacted capital sentencing statute, believing that the statute would winnow out Aonly the most aggravated and unmitigated of most serious crimes for imposition of the death penalty. While noting the impossibility of Acomputer justice, id., the Court optimistically predicted that the discretion charged in Furman v. Georgia, *supra*, can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all. Id. at 10.

Twenty-three years later, Florida's experience with the death penalty belies Dixon's optimism. Not only has the death penalty statute fail to winnow out the most aggravated and least mitigated of first degree murders, but -- as noted above -- racial discrimination in the imposition of the death penalty remains intractable in Florida as elsewhere, and inmates spend decades on death row before execution while the death row population continues to expand at a pace far exceeding executions. In an exhaustive analysis of Florida's post-Furman experience with the

death penalty, author and former Miami Herald reporter David Von Drehle illustrates all of these flaws in the imposition of Florida's death penalty and concludes, like Judge Kozinski, that [t]he only way to make the death penalty work, reasonably quickly and reliably, may be to have a lot less of it by defining capital offense more narrowly rather than relying on broader laws that require judges and juries Ato weigh ineffable shades of evil". DAVID VON DREHLE, AMONG THE LOWEST OF THE DEAD 411 (1995).

CONCLUSION

Because the present system of capital punishment operates in a presumptively unconstitutional manner, the Defendant asks this Court to enter an order precluding the prosecution from seeking the death penalty in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished via electronic submission to the Office of the State Attorney on this 29th day of January, 2026.

Respectfully submitted,

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