

	)	In the Circuit Court of the
	)	Ninth Judicial Circuit, in and for
	)	Orange County, Florida
STATE OF FLORIDA	)	
	)	Case No.: 482008-CF-0015606-O
v.	)	Division 16
	)	
CASEY MARIE ANTHONY,	)	Hon. Stan Strickland
	)	
Defendant.	)	
	)	

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**MOTION TO DECLARE §921.141(5)(M) UNCONSTITUTIONAL FACIALLY AND AS APPLIED (VICTIM VULNERABLE DUE TO AGE, DISABILITY, OR FAMILIAL OR CUSTODIAL AUTHORITY)**

COMES NOW the Defendant, CASEY MARIE ANTHONY, by and through her attorneys, ANDREA D. LYON and JOSE A. BAEZ, and respectfully asks this Honorable Court to secure her rights as guaranteed by the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 9, 16, 17, 21 and 22 of the Florida Constitution and thus, respectfully asks this Court to declare section 921.141(5)(m) unconstitutional facially and as applied. In support thereof, the Defense states the following:

1. Section 921.141(5)(m) allows for the finding of an aggravating circumstance where: “The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familiar or custodial authority over the victim.” Fla. Stat. § 921.141(5)(m)(LexisNexis 2009).
2. Section 921.141(5)(m) is unconstitutional on its face.
  - a. Section 921.141(5)(m) is unconstitutional because it is so vague and ambiguous that it fails to adequately channel or guide the sentencer’s discretion.
    - i. An aggravating circumstance will be deemed unconstitutional on vagueness grounds if it “fails to adequately inform juries what they must

find to recommend the death penalty and as a result leaves the jury and the appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*. *Maynard v. Cartwright* 486 U.S. 356, 361-62; *Jackson v. State*, 648 So. 2d 85, 89 (Fla. 1994).

- ii. The terms of section 921.141(5)(m) are subject to varying interpretations and thus fail to adequately channel or guide the sentencer's discretion.
  - iii. The jury instruction merely mirrors the statute and it, therefore, cannot save section 921.141(5)(m) from being unconstitutionally vague.
- b. Section 921.141(5)(m) is unconstitutional because failure to limit this aggravating circumstance to situations in which the age, disability or subordinate position of the victim has a nexus to the capital felony fails to reasonably justify the imposition of a more severe sentence.
- i. To avoid arbitrary and capricious punishment an aggravating circumstance "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. *Zant v. Stephens*, 462 U.S. 862, 977; *Porter v. State*, 564 So.2d 1060, 1063-64 (Fla. 1990).
  - ii. In accordance with the constitutional principles enunciated in *Porter*, each of the other statutory aggravating circumstances based on the facts and circumstances of the crime requires that there be a nexus between the intentional acts of the defendant and the nature of the crime in order to justify the imposition of the more severe penalty of death.


- iii. Section 921.141(5)(m) lack such a nexus as it is completely unrelated to any specific action, intention, or motive of the defendant.
3. Section 921.141(5)(m) is unconstitutional as applied to Miss Anthony.
- a. Section 921.141(5)(m) has been applied only in situations in which the victim was of advanced age and/or disabled. *See, e.g., Woodel v. State*, 804 So.2d 316, 325 (Fla. 2001).
  - b. Section 921.141(5)(m) provides that an aggravating circumstance exists where “[t]he victim of the capital felony was *particularly* vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.” (emphasis added).
  - c. A position of familial or custodial authority alone is insufficient to establish this aggravator; rather, that relationship must make the victim *particularly* vulnerable. *Cf. Francis v. State*, 808 So.2d 110, 139 (Fla. 2001).
  - d. The Prosecution cannot establish how Caylee Anthony died, let alone that the manner of her death indicates a particular vulnerability that derived from her familial relationship.
  - e. Even if the Prosecution were to establish that a murder occurred, under *Francis*, this by itself would be insufficient to establish this aggravator.


Wherefore, in the interests of Casey Marie Anthony’s constitutional rights, the Defense respectfully asks this Honorable Court to:

- a. Order the Prosecution to file a response motion and memorandum of law within thirty days of the filing of this motion and accompanying memorandum of law;

- b. Allow the defense ten business days from the Prosecution's filing of its responsive motion and memorandum of law to file a reply motion and memorandum of law;
- c. Set a hearing date, at which time this Honorable Court may hear arguments relating to the motions; and
- d. Grant her Motion to Declare §921.141(5)(m) Unconstitutional Facially and As Applied.
- e. Preclude the application of section 921.141(5)(m) in the case at bar.

Respectfully submitted,

  
\_\_\_\_\_  
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\_\_\_\_\_  
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Dated: 11/25

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished to the Office of the State Attorney, 415 North Orange Avenue, Orlando, Florida 32801; via facsimile and /or U.S. Mail on this 25 day of November, 2009.



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STATE OF FLORIDA

v.

CASEY MARIE ANTHONY,

Defendant.

) In the Circuit Court of the  
 ) Ninth Judicial Circuit, in and for  
 ) Orange County, Florida  
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 ) Case No.: 482008-CF-0015606-O  
 ) Division 16  
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 ) Hon. Stan Strickland  
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**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DECLARE §921.141(5)(M) UNCONSTITUTIONAL FACIALLY AND AS APPLIED (VICTIM VULNERABLE DUE TO AGE, DISABILITY, OR FAMILIAL OR CUSTODIAL AUTHORITY)**

COMES NOW the Defendant, CASEY MARIE ANTHONY, by and through her attorneys ANDREA D. LYON and JOSE A. BAEZ, and submits this Memorandum of Law in Support of her Motion to Declare §921.141(5)(m) Unconstitutional Facially and As Applied, Miss Anthony states as follows:

**SUMMARY OF ARGUMENT**

Section 921.141(5)(m) allows for the finding of an aggravating circumstance where: “The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familiar or custodial authority over the victim.” Fla. Stat. § 921.141(5)(m)(LexisNexis 2009). This aggravating circumstance is unconstitutional on its face and is unconstitutional as applied in the particular circumstances of this case. Miss Anthony, therefore, requests the court to grant her motion to declare section 921.141(5)(m) unconstitutional facially and as applied, and to preclude its application in this case.

**ARGUMENT**

**I. Section 921.141(5)(m) is unconstitutional on its face**

According to the Florida Supreme Court, an aggravating circumstance will be deemed unconstitutional on vagueness grounds if it “fails to adequately inform juries what they must find to recommend the death penalty and as a result leaves the jury and the appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*. *Maynard v. Cartwright* 486 U.S. 356, 361-62; *Jackson v. State*, 648 So. 2d 85, 89 (Fla. 1994). To avoid arbitrary and capricious punishment, an aggravating circumstance “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. *Zant v. Stephens*, 462 U.S. 862, 977 (1983); *Porter v. State*, 564 So. 2d 1060, 1063-64 (Fla. 1990).

Section 921.141(5)(m) is unconstitutional because its terms are so vague as to fail to adequately channel sentencing decision resulting in the unconstitutional risk of arbitrary and capricious sentencing. Further, the lack of nexus between the age, disability or subordinate position of the victim and the murder fails to reasonably justify the imposition of a more severe sentence. As such, this aggravator is unconstitutional on its face.

**A. Section 921.141(5)(m) is unconstitutional because it is so vague and ambiguous that it fails to channel or guide the sentencer’s discretion**

A death penalty statute is unconstitutional if its standards are “so vague that they would fail to adequately 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 (1980) (plurality opinion). Likewise, an aggravating circumstance will be deemed unconstitutional on vagueness grounds if it “fails to adequately inform juries what they must find to recommend the death penalty and as a result leaves the jury and the appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*. See summary of argument *infra*. According to the Supreme Court, in determining the facial constitutionality of an aggravating

circumstance challenged on vagueness grounds, the proper inquiry is not whether there are circumstances that “any reasonable person would recognize as covered by the statute,” but whether the provision fails to adequately inform juries what they must find to impose the death penalty. *Marynard*, 486 U.S. at 361-362.

In *Maynard*, the defendant challenged the sufficiency of Oklahoma’s “especially heinous, atrocious, or cruel” aggravator and its accompanying jury instruction. *Id.* at 60. The court held that both the aggravator and its accompanying jury instruction were unconstitutionally vague because any ordinary person could find that any murder is especially heinous, atrocious or cruel, and because the Oklahoma courts failed to cure the infirmity with a limiting construction. *Id.* at 363-64. The court in *Maynard* also made a distinction: in determining the facial constitutionality of an aggravating circumstance challenged on vagueness grounds, the proper inquiry is not whether there are circumstances that “any reasonable person would recognize as covered by the statute,” but whether the provision fails to adequately inform juries what they must find to impose the death penalty. *Id.* at 361-362.

In *Espinosa v. Florida*, the defendant challenged the sufficiency of Florida’s jury instruction on “especially heinous, atrocious, or cruel”, as it existed at the time of his trial and sentencing. 505 U.S. 1079, 1080 (1992). In finding the instruction unconstitutional, the United States Supreme held that: “Our cases . . . establish that an aggravating circumstance is invalid in this sense if its description is so vague as to leave the sentencer *without sufficient guidance* for determining the presence or absence of the factor. (Citations omitted.) *We have held instructions more specific and elaborate than the one given in the instant case unconstitutionally vague.* *Id.* at 1081.

In *Jackson*, the Florida Supreme Court held that Florida's cold, calculated, and premeditated aggravator and its standard jury instruction suffered from the same unconstitutional vagueness as the HAC aggravator and instruction in *Espinosa, Maynard, and Godfrey*. 648 So.2d at 90. The aggravator was found unconstitutionally vague and overbroad because, according to the court, the average juror may automatically characterize all premeditated murders as CCP and the instruction, which simply mirrored the statute, failed to provide an explanation that some "heightened" form of premeditation is required to find CCP. *Id* at 89. Such vagueness failed to provide the sentencer with sufficient guidance for determining the presence or absence of the factor. *Id* at 90. Further, the aggravator was susceptible to imposition in an arbitrary manner because the words "cold," "calculated," and "premeditated" were subject to varying misinterpretations. *Id*.

Miss Anthony recognizes that the Florida Supreme Court has upheld this circumstance against a facial attack. *Francis v. State*, 808 So.2d 110 (Fla. 2002). However, Miss Anthony respectfully disagrees with *Francis* as the Court did nothing to define the vague terms involved. Further, the CCP aggravator and HAC aggravator found unconstitutional in *Jackson* and *Espinosa* had previously withstood unconstitutional challenges on vagueness grounds before they were subsequently held unconstitutionally vague. See *Brown v. State*, 565 So.2d 304 (Fla. 1990), *Espinosa v. State*, 589 So.2d 887, 894 (Fla. 1991) ("We reject *Espinosa's* complaint with respect to the text of the jury instruction on the heinous, atrocious, or cruel aggravating factor...." (Citation omitted).

The aggravating circumstance the Miss Anthony challenges reads:

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

Fla. Stat. § 921.141(5)(m). The Standard Jury Instructions repeat the vague language of the statute. Thus, there is no guidance for the sentencer except the vague and ambiguous language of the statute itself. As such, Miss Anthony asserts that the language of section 921.141(5)(m) suffers from the same constitutional infirmity as did the Florida statutes and jury instructions found unconstitutionally vague in *Jackson* and *Espinoza*, as well as the Oklahoma statute and jury instruction in *Maynard*.

While it appears relatively clear that the gravamen of this aggravating circumstance is that the victim was “particularly vulnerable”, it is in no way clear how a judge or jury is to be guided in determining the presence or absence of such factor. Even the word “particularly” modifying “vulnerable” is open to varying interpretations and value judgments. For example, *Webster's II New College Dictionary* (1995) variously defines “particularly” as: “separate and distinct from others; specific” or “worthy of note...exceptional...encompassing some but not all of a class or group...especially.”

The entirely logical question (but one the statute does not answer) is: as used in the statute, is a victim automatically “particularly vulnerable” *merely if* that victim meets the (also vague) criteria (none of which are defined) “of advanced age”, or “disability”, or “because the defendant stood in a position of familial or custodial authority over” that victim? Or, are these the characteristics which the jury is to weigh in determining *whether or not* the victim was *in fact* “particularly vulnerable?”

The oft-used but obviously relative term “advanced” (modifying “age”) cannot be considered anything but vague without an explanatory context. According to *Webster's II New College Dictionary* (1995), “advanced” is defined as “far along in course or age.” But the statute fails to define the frame of reference to which or whom the victim’s age is to be compared.

Without any context or point of reference this term is clearly, and only, a relative term, having no clear or precise meaning or understanding, and wholly dependent on either one's individual point of view or some further guidelines (which in this case are missing). A sentencer without additional sufficient guidance could decide what this language means depending on any number of arbitrary, open-ended factors. Jurors in their twenties might regard a victim in his or her fifties as being at an advanced age, whereas jurors in their fifties or sixties would be unlikely to agree. The term "disability" is equally vague and indeterminate in meaning, running the gamut from persons who are totally paralyzed to persons who have chronic back pain.

Despite the vagueness of this statute's terms, the legislature *is* capable of adequately defining important terms for the purpose criminal liability. For example, compare the far more precise definitions of "disabled adult" and "elderly person" found in section 415.102, concerning offenses against disabled and elderly persons.<sup>3</sup> These terms were actually incorporated into the amendment to section 921.141(5)(d) effective October 1, 1996,<sup>4</sup> which expanded the definition of felony murder by adding the "abuse of an elderly person or disabled adult" to the list of felonies which can be used to aggravate a first degree murder.

Further, Miss Anthony asserts that without additional legal guidance the "average juror may automatically characterize" a victim as "particularly vulnerable" (whatever that means)

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<sup>3</sup> "Disabled adult" means a person 18 years of age or older who suffers from a condition of physical or mental incapacitation due to a developmental disability, organic brain damage, or mental illness, or who, has one or more physical or mental limitations that substantially restrict the ability to perform the normal activities of daily living. Fla. Stat. §415.102 (10). "Elderly person" means a person 60 years of age or older who is suffering from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunctioning to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired. Fla. Stat. §415.102 (11).

<sup>4</sup> This act also re-enacted section 921.141(5)(m), in precisely the same form as it was originally enacted in Laws, 96-290, effective May 30, 1996.

merely because of “advanced age or disability.” On the other hand, another “average juror” may understand the section to mean only that advanced age and disability” are the two factors they are to consider in determining whether or not that victim was in fact “particularly vulnerable.”

Although a unconstitutionally vague aggravating circumstance may be saved by a limiting jury instruction, the Florida Supreme Court has not yet authored a jury instruction that provides a jury with sufficient guidance to render the statute constitutional, and has rendered no opinions interpreting, limiting, or explaining the otherwise vague language of the statute, such that a trial court could utilize to interpret or explain to a jury what it must find in order to impose the death penalty based in whole or in part on section 921.141(5)(m). See *State v. Hootman*, 709 So.2d 1357 (Fla. 1998).

The unconstitutional vagueness of section 921.141(5)(m) can not be remedied in this court and, thus, violates the defendant’s federal constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and state constitutional rights under Article I, sections two, nine, sixteen, seventeen, twenty-one, and twenty-two of the Florida Constitution.

**B. Section 921.141(5)(m) is unconstitutional because failure to limit this aggravating circumstance to situations in which the age, disability or subordinate position of the victim has a nexus to the capital felony fails to reasonably justify the imposition of a more severe sentence**

To avoid arbitrary and capricious punishment an aggravating circumstance “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. *Zant v. Stephens*, 462 U.S. 862, 977; *Porter v. State*, 564 So.2d 1060, 1063-64.

Miss Anthony submits that because of the failure of the legislature to require any sort of nexus between a defendant’s actions or motivation in committing the capital felony and this

factor, section 921.141(5)(m) fails to meet the requirement that an aggravating circumstance “reasonably justify the imposition of a more severe sentence” as required by *Zant v. Stephens*.

Each of the other statutory aggravating circumstances based on the facts and circumstances of the crime (as opposed to those based on the defendant’s criminal history, such as: section 921.141(5)(a), the defendant was under a sentence of imprisonment or on community control; or section 921.141(5)(b), the defendant has previously been convicted of an offense involving violence) and which has been in effect long enough to have been tested for its constitutionality, requires, in accordance with the constitutional principles enunciated in *Porter*, that there be a nexus between the intentional acts of the defendant and the nature of the crime in order to justify the imposition of the more severe penalty of death.

Thus, subsection (5)(c) of section 921.141 requires that the defendant *knowingly* create a great risk of death to many persons. Subsection (5)(d) requires the defendant to have been *engaged in* the commission of another specific felony.<sup>1</sup> Subsection (5)(e) requires that the capital felony be done *for the purpose of* avoiding arrest or effecting an escape. Subsection (5)(f) requires that the capital felony be *committed for* pecuniary gain. Subsection (5)(g) requires that the capital felony be *committed to disrupt* a governmental function; subsection (5)(h) requires the murder to have been committed in an especially heinous, atrocious, or cruel manner, *and* requires detailed jury instructions to limit such cases to only those that were *accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily*

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<sup>1</sup> This argument in no way concedes or retreats from Miss Anthony's position that 921.141(d) is unconstitutional on its face and applied. See Def.'s Motion to Declare Fla. Stat. 921.141(5)(d) And/Or the Standard (5)(d) Instruction Unconstitutional Facially and as Applied.

*torturous to the victim.*<sup>2</sup> Subsection (5)(i) requires the murder to have been cold, calculated, and premeditated and *without any pretense of moral or legal justification*, and also requires elaborate jury instructions that explain that not only the *heightened* level of premeditation required, but that there must have been *cool reflection* and *a careful plan or prearranged design* to kill.<sup>3</sup> Subsection (5)(j) requires not only that the victim be a law enforcement officer, but also that the law enforcement officer *be engaged in the performance* of duty before this aggravating factor applies. Finally, subsection (5)(k) requires not only that the victim be a public official, but that *the motive for the capital felony was related, in whole or in part, to the victim's official capacity.*

In obvious and stark contrast, the aggravating factor enacted in section 921.141(5)(m), that the victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim, is completely unrelated to any specific action, intention or motive of the defendant. It's applicability to any case, and to any particular defendant, may be totally fortuitous and totally beyond the control of the accused. It will therefore be inevitably and routinely applied unconstitutionally in an utterly arbitrary and capricious manner, independent either of the defendant's criminal background or moral culpability and blameworthiness. See *Woodson v. North Carolina*, 428 U.S. 280 (1976) (automatic application of statutory aggravating factor that fails to allow particularized consideration of relevant aspects of defendant's character and record is unconstitutional).

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<sup>2</sup> This argument in no way concedes or retreats from Miss Anthony's position that 921.141(h) is unconstitutional on its face and applied. See Def.'s Motion to Declare Fla. Stat. 921.141(5)(h) And/Or the Standard (5)(i) Instruction Unconstitutional Facially and as Applied.

<sup>3</sup> This argument in no way concedes or retreats from Miss Anthony's position that 921.141(i) is unconstitutional on its face and applied. See Def.'s Motion to Declare Fla. Stat. 921.141(5)(i) And/Or the Standard (5)(i) Instruction Unconstitutional Facially and as Applied.

Thus, section 921.141(5)(m) is unconstitutional on its face. Accordingly, its application violates Miss Anthony's federal constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and state constitutional rights under Article I, sections two, nine, sixteen, seventeen, twenty-one, and twenty-two of the Florida Constitution.

## **II. Section 921.141(5)(m) is unconstitutional as applied**

Section 921.141(5)(m) is unconstitutional as applied to Miss Anthony. The particularly vulnerable victim aggravator has been applied only in situations in which the victim was of advanced age and/or disabled. *See, e.g., Woodel v. State*, 804 So.2d 316, 325 (Fla. 2001). Were the Prosecution to attempt to use this aggravator in a novel way in this case, where it would not be able to establish sufficient aggravating circumstances otherwise, it would further indicate that the Prosecution is seeking the death penalty to gain a strategic advantage and not to legitimately punish the worst of the worst offenders.

Furthermore, although Miss Anthony was Caylee Anthony's mother, there is no evidence that Caylee Anthony was particularly vulnerable because of that relationship. Section 921.141(5)(m) provides that an aggravating circumstance exists where "[t]he victim of the capital felony was *particularly* vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim." (emphasis added). A position of familial or custodial authority alone is insufficient to establish this aggravator; rather, that relationship must make the victim *particularly* vulnerable. *Cf. Francis v. State*, 808 So.2d 110, 139 (noting in the context of a victim who is of advanced age that "[t]he statute clearly reads that the person must not only be of 'advanced age,' but must instead be 'particularly vulnerable due to advanced age.'"). The Prosecution cannot establish how Caylee

Anthony died, let alone that the manner of her death indicates a particular vulnerability that derived from her familial relationship. Furthermore, even if the Prosecution were to establish that a murder occurred, this by itself would be insufficient to establish this aggravator. *See Francis* at 139 (“[T]he manner of the death and the nature of the wounds appear to have very little relationship to the vulnerability of the victims prior to their death. If that were the case, every murder victim would be vulnerable”).

Thus, section 921.141(5)(m) is unconstitutional as applied. Accordingly, its application violates the Miss Anthony’s federal constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and state constitutional rights under Article I, sections two, nine, sixteen, seventeen, twenty-one, and twenty-two of the Florida Constitution.

### CONCLUSION


Section 921.141(5)(m) is unconstitutional because its terms are so vague as to fail to adequately channel sentencing decision resulting in the arbitrary and capricious sentencing. Further, the lack of nexus between the age, disability or subordinate position of the victim and the murder fails to reasonably justify the imposition of a more severe sentence. As such, this aggravator is unconstitutional on its face. Additionally, section 921.141(5)(m) is unconstitutional as applied because the prosecution cannot prove its presence in the case at bar.

Therefore, in the interests of Casey Marie Anthony’s constitutional rights, the Defense respectfully asks this Honorable Court to:

- a. Order the Prosecution to file a response motion and memorandum of law within thirty days of the filing of this motion and accompanying memorandum of law;

- b. Allow the defense ten business days from the Prosecution's filing of its responsive motion and memorandum of law to file a reply motion and memorandum of law;
- c. Set a hearing date, at which time this Honorable Court may hear arguments relating to the motions; and
- d. Grant her Motion to Declare §921.141(5)(m) Unconstitutional Facially and As Applied.
- e. Preclude the application of Section 921.141(5)(m) in the case at bar.

Respectfully submitted,

  
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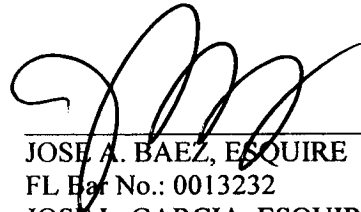
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished to the Office of the State Attorney, 415 North Orange Avenue, Orlando, Florida 32801; via facsimile and /or U.S. Mail on this 25 day of November, 2009.



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