

C) and its bare terms are all that is required to be read to sentencing juries,. See *Espinosa v. Florida*, 505 U.S. 1079, 1081-82 (1992).

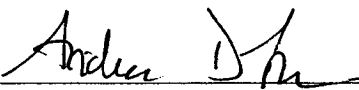
3. Furthermore, the standard Section 921.141(5)(h) jury instruction violates Miss Anthony's protection by the Eighth Amendment to the United States Constitution and Article I, Sections 17, of the Florida Constitution.

4. In support of her motion, Miss Anthony respectfully presents the attached Memorandum of Law.

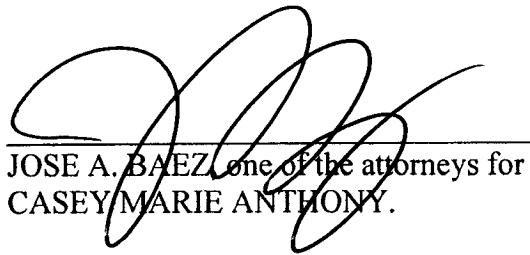
WHEREFORE, the Defendant, CASEY MARIE ANTHONY, respectfully requests that this Honorable Court:

- a. Order the prosecution to file a response motion and memorandum of law within thirty days of filing of this memorandum of law and accompanying motion;
- 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 Defense and Prosecution's motions;
- d. Preclude the Prosecution from seeking the death penalty in the instant case;
- e. Declare Florida Statute 921.141(5)(h) unconstitutional and preclude its use in the case at bar.

Respectfully submitted,



ANDREA D. LYON, one of the attorneys
for CASEY MARIE ANTHONY.



JOSE A. BAEZ, one of the attorneys for
CASEY MARIE ANTHONY.

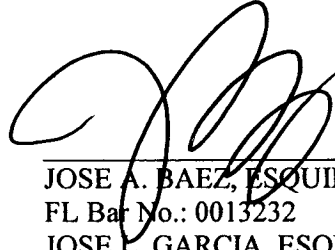
Dated: 11/25, 2009

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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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)	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.)	
)	

MEMO SUPPORTING MOTION TO DECLARE FLA. STAT. 921.141(5)(h) AND/OR THE STANDARD (5)(h) JURY INSTRUCTION UNCONSTITUTIONAL FACIALLY AND AS APPLIED

ARGUMENT

The Eighth Amendment requires that a legislature exercise great care in defining aggravating circumstances. *Maynard v. Cartwright*, 486 U.S. 356, 360-362 (1988). Defining aggravating circumstances is especially important in states, such as Florida, where a jury is required to weigh aggravating factors against mitigating factors to determine an appropriate sentence. *Stringer v. Black*, 503 U.S. 222, 240 (1992). An aggravating circumstance is unconstitutional if it fails to narrow the class of persons eligible for the death penalty, fails to guide the discretion of the sentencer, or undermines the meaningfulness of appellate review. *Godfrey v. Georgia*, 446 U.S. 420, 422 (1980); *Maynard v. Cartwright*, 486 U.S. at 360. Florida capital cases construing the meaning of the aggravator "heinous, atrocious or cruel" have not complied with these requirements. Florida Statute 921.141(5)(h) defining the "heinous, atrocious or cruel" (HAC) aggravating circumstance and the accompanying standard jury instruction are unconstitutionally vague, do not perform the constitutionally required narrowing

function, and have been applied in an arbitrary and inconsistent manner in violation of the Eight Amendment.

I. The “Heinous, Atrocious, or Cruel” Aggravating Factor is Unconstitutionally Vague, Does Not Adequately Narrow, And Has Been Applied in An Arbitrary and Inconsistent Manner

The HAC aggravating circumstance is unconstitutional on its face. The Florida Supreme Court first defined the aggravating circumstance of heinous, atrocious, or cruel in *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973). The court stated that “heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.” *Id.*¹

a. The “Heinous, Atrocious, or Cruel” Aggravating Factor is Unconstitutionally Vague.

The United States Supreme Court found the definition of “heinous, atrocious, or cruel”, the words identical to those in Florida’s current jury instruction to be unconstitutionally vague. *Shell v. Mississippi*, 498 U.S. 1, 1 (1990) citing *Maynard v. Cartwright*, 486 U.S. at 356; *Espinosa v. Florida*, 505 U.S. 1079, 1080 (1992). The use of the word “heinous” seems applicable to any murder. In *Tedder v. State*, the Florida Supreme Court recognized that all murders are heinous. 322 So.2d 908, 910 (Fla. 1975). In fact, some commentators have specifically stated the “attribute of all murders (that they are “heinous, atrocious or cruel”) may be treated as enough to “aggravate” the killing from first-degree murder to a capital offense. See James S. Liebman, *The Over Production of Death*, 100 Colum. L. Rev. 2030, 2099 (2000). In *State v. Dixon*, the Florida Supreme Court found that describing a murder as “especially heinous” merely suggests that the individual jurors should determine that the murder is more than just

¹ A discussion of the latest Florida Supreme Court decision, *In Re: Standard Jury Instruction in Criminal Cases- Report No. 2005-2*, 2009 Fla. LEXIS 1806, Oct. 29, 2009 is in Section II of this memorandum.

"heinous," and an ordinary person could honestly believe that every unjustifiable, intentional taking of human life is "especially heinous". 283 So. 2d at 9. *Shell* held that instructions defining "heinous," "atrocious," and "cruel" in terms identical to those used in the Mississippi 1991 instruction are unconstitutionally vague. 498 U.S. at 1.

Additionally, under the plain language of the Florida Statute 921.41(5)(h), the aggravating factor could be "heinous cruel, or atrocious". In other words, a jury could find the heinous factor, the atrocious factor or the cruel factor present in the aggravator. Therefore, the HAC factor could be any of the three factors adding to the vagueness of the statute.

b. The "Heinous, Atrocious, or Cruel" Aggravating Factor Does Not Adequately Narrow

The United States Supreme Court has held that the HAC aggravating factor, when not narrowed by a proper limiting instruction is unconstitutional. *Jennings v. McDonough*, 490 F.3d 1230 (11th Cir. 2007) citing *Espinosa*, 505 U.S. at 1081-82. It has further held that neither the jury nor the trial judge may weigh an invalid aggravator in making a sentencing decision. *Id.*; *Shell*, 498 U.S. at 1 citing *Godfrey v. Georgia*, 446 U.S. at 420; *Cartwright v. Maynard*, 822 F.2d 1477, 1489-1491 (CA10 1987) (en banc), *aff'd*, 486 U.S. 356 (1988). In *Godfrey v. Georgia*, a death sentence was issued based upon a finding that the aggravator of "outrageously or wantonly vile, horrible and inhuman" was present. 446 U.S. at 428-29. The Court deemed that this formulation violated the Eighth Amendment because it was vague and imprecise, which allowed for arbitrary and capricious application of the death penalty. Later, in *Maynard*, the Court considered an aggravating circumstance created by an Oklahoma statute that applied to a killing that was "especially heinous, atrocious, or cruel." 486 U.S. at 359. The Supreme Court found this language gave no more guidance than did the statute in *Godfrey*, and the Oklahoma Statute was invalidated. 486 U.S. at 363-364.

In *Shell v. Mississippi*, the Court emphasized that the Mississippi capital scheme required a weighing of aggravating versus mitigating factors in order to determine a sentence. In *Stringer v. Black*, the U.S. Supreme Court recognized Florida as a state that was a weighing state and stated this feature only gives emphasis to the requirement that aggravating factors be defined with some degree of precision.” 503 U.S. at 229. In *Zant v. Stephens*, the Court left open the possibility that in a weighing State, an invalid aggravating factor might require invalidation of the death sentence.” 462 U.S. 862 , 890 (1983). While the Florida Standard Jury Instruction has stated since 1991 that the HAC aggravator has includes the crime be a "conscienceless ... pitiless ... unnecessarily torturous" crime is "intended to be included," it does not expressly limit the aggravator only to such crimes, as required by *Proffitt v. Florida*. 428 U.S. 242 (1976). Although the Florida Supreme Court has followed *Proffitt*, stating that the aggravator limits the HAC instruction by requiring both torturous intent, and an unnecessarily torturous killing, application of this distinction is inconsistent. *Id.* at 255. In *Hertz v. State*, the court held that to qualify for HAC, "the crime must be both conscienceless or pitiless **and** unnecessarily torturous to the victim." 803 So. 2d 629, 651 (Fla. 2001) (quoting *Richardson v. State*, 604 So. 2d 1107, 1109 (Fla. 1992) (emphasis added); *Sochor v. Florida*, 12 S. Ct. 2114, 2121 (1992)).

In the article *Espinosa v. Florida: Constitutional Hurricane, Lambent Breeze, or Idiot Wind*, the authors discussed their findings after surveying Florida courts which found the heinousness factor relevant:

The survey suggested that virtually all reported Florida death cases have been found especially heinous, atrocious, or cruel except those resulting in instantaneous, unexpected death not committed "execution-style". This is no surprise. Murders by stabbing, strangulation, beating and gunshot are especially heinous, atrocious or cruel. That, in fact, is the point-all capital murders are especially heinous atrocious or cruel. The difficulty is that a statutory aggravating circumstance that focuses on the heinousness

of the crime cannot genuinely narrow the class of persons eligible for the death penalty for the very reason that nearly all capital felonies will meet the test.

Michael Mello & Nell Joslin Medlin, 22 Stetson L. Rev. 907, 938-39 n. 147 (1992-93). Alternatively, the only way the application of the HAC aggravator would be a limiting circumstance would if the Florida court had to find more than one aggravator for capital cases. However, the death penalty has been upheld where HAC it is the only aggravator found. *See e.g. Butler v. State*, 842 So. 2d 817, 833 (Fla. 2003). Therefore, the HAC aggravator does not adequately narrow the class of death eligible cases as required by law.

c. The “Heinous, Atrocious, or Cruel” Aggravating Factor Has Been Applied in An Arbitrary and Inconsistent Manner

As applied, the heinous, atrocious or cruel aggravator has been applied in an arbitrary and inconsistent manner. The HAC aggravator is among the “most weighty in Florida’s sentencing calculus”. *Serici v. State*, 825 So. 2d 882, 887 (Fla. 2002).

Florida courts have found the aggravating factor present in a variety of circumstances. Florida courts have found the HAC aggravator should only be present when victims are “acutely aware” of their impending deaths. *Wyatt v. State*, 641 So. 2d 1336, 1341 (Fla. 1994). Florida courts have upheld the death sentence ruling that the victim remained conscious throughout the shooting. *See e.g. Shere v. State*, 579 So. 2d 86, 89 (Fla. 1991). *Jennings v. McDonough*, 490 F.3d 1230, 1241 (11th Cir. Fla. 2007), *writ of certiorari denied by* 128 S. Ct. 1762, (U.S. 2008). However, the question of consciousness has been applied in an arbitrary manner. For example, the HAC aggravating factor has been upheld when victims lost consciousness in less than sixty seconds. *See Rolling v. State*, 695 So. 2d 278, 296 (upholding HAC after concluding victim was conscious between thirty and sixty seconds); *Peavy v. State*, 442 So. 2d 200, 202-203 (upholding HAC after finding victim lost consciousness in sixty seconds).

Death by gunshot usually does not satisfy the HAC aggravating circumstance because death in these cases is instantaneous. In *Porter v. State* the court agreed that a murder of the victim did not “stand apart from the norm of capital felonies” wherein the Court struck the trial court’s finding of especially heinous, atrocious, or cruel on a finding that the murderer fired three shots into the victim at close range. 564 So. 2d 1060, 1063 (Fla. 1990). However, when death is not instantaneous from gunshot wounds, the HAC aggravator and death sentence has been inconsistently upheld by Florida courts. For example, the HAC aggravator has been overruled when a victim was shot several times and begged for mercy and the death sentence was vacated and remanded for resentencing. See *Bonifay v. State*, 626 So. 2d 1310, 1311 (Fla. 1993). However, the HAC aggravator has been upheld where a victim was shot several times, dragged into another room and shot again and the death sentence was affirmed. See *Hutchinson v. State*, 882 So. 2d 943, 958-59 (Fla. 2004). Florida courts have also found strangulation as inherently part of an HAC aggravator case and affirmed death sentences. E.g., *Orme v. State*, 677 So. 2d 258, 263 (Fla. 1996); *Belcher v. State*, 851 So. 2d 678, 683 (Fla. 2003). However, in another strangulation case, *Rhodes v. State*, the Court struck down the HAC aggravating factor because of a defendant’s statement that the victim may have been semiconscious at the time and vacated and remanded his death sentence. 547 So. 2d 1201, 1208 (Fla. 1989).

Courts have also been inconsistent in applying the narrowing instruction of Fla. Stat. 921.41(h) which requires that the HAC aggravator only be applied where the crime is both “conscienceless or pitiless and unnecessarily tortuous to the victim”. *Sochor v. Florida*, 504 U.S. 527, 536-37 (1992). In *Hertz v. State*, the Court explains why the crime was tortuous to the victim, but does not address if the crime was conscienceless or pitiless. 803 So. 2d 629, 652 (Fla. 2001). In other cases, the Court has completely ignored the “conscienceless or pitiless” aspect of

this aggravating factor. See *Mason v. State*, 438 So. 2d 374, 379 (Fla. 1983) (Court finds HAC aggravator when discussing factor of “unnecessarily tortuous to the victim”); *Guzman v. State*, 721 So. 2d 1155, 1159-60 (Fla. 1998) (holding intention of killer to inflict pain on victim is not a necessary element of HAC aggravator).

In some cases, however, the Florida Supreme Court has regarded the mental element of torturous intent of the defendant as having great significance. In *Pope v. State*, the court found that “the record is consistent with the hypothesis that Porter’s was a crime of passion, not a crime that was meant to be deliberately and extraordinarily painful). 441 So. 2d 1073 (Fla.1983). In *Cheshire v. State*, the court found that the “aggravating factor of heinous, atrocious or cruel is proper only in torturous murders -- those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another.” 568 So. 2d 908, 912 (Fla. 1990); *State v. Dixon*, 283 So.2d at 1. This was followed in *Santos v. State*, 591 So. 2d 160, 163 (Fla. 1991) (the murders happened too quickly with no substantial suggestion that defendant intended to inflict a high degree of pain or otherwise torture the victims).

Under *Godfrey v. Georgia*, “if a 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, and thus it must define the crimes for which death may be imposed in a way that obviates standardless sentencing discretion.” 446 U.S. 421, 428 (1980). The Florida Courts have interpreted the HAC aggravating factor in arbitrary and inconsistent ways rendering the Fla. Stat. 921.141 (5)(h) unconstitutional.

II. The Florida Standard Jury Instruction for “Heinous, Atrocious, or Cruel” are Unconstitutionally Vague.

The standard jury instruction defines the terms “heinous, atrocious, or cruel” (HAC) as follows:

- (1) "Heinous" means extremely wicked or shockingly evil;
- (2) "Atrocious" means outrageously wicked and vile; and
- (3) "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. *Fla. Standard Jury Instructions in Criminal Cases* § 7.11 (5th ed. 2005).²

The standard jury instruction also includes a limiting instruction, which states that the type of crime intended to be within the meaning of "heinous, atrocious, or cruel" is "one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim." The United States Supreme Court declared that the (5)(h) aggravating factor is constitutional only if its application is limited to a "conscienceless or pitiless crime which is unnecessarily torturous to the victim." *Proffitt*, 428 U.S. at 254-56. In *Espinosa*, the Supreme Court emphasized the importance of the jury's role in capital sentencing proceedings and stated that "an unconstitutional jury instruction renders a resulting death sentence unconstitutional." 505 U.S. at 1079.

The current standard instruction on the HAC factor is unconstitutional under both *Proffitt* and *Espinosa*. As the Michael Mello and Nell Joslin Medlin noted fifteen years ago, the HAC factor has been found to exist in the majority of Florida capital cases:

Although there is no central source which identifies all cases in which sentencing juries or trial courts have found the heinousness circumstance, existing evidence indicates that the circumstance is epidemic. Seven hundred sixty Florida death sentences have been imposed in the post-Furman era; 118 of these cases were pending direct appeal in the Florida Supreme Court as of this writing. Of the remaining 641 cases, the heinous circumstances has been found in 490 cases, but this number does not includes cases where the circumstances was not addressed or reached by the Supreme Court of Florida. The Florida Supreme Court explicitly invalidated the factor in seventy-two cases and appeared to disapprove it in eight-three others; the court specifically affirmed the factor in 222 cases and appeared to reject it in forty-five others...According to published Florida Supreme Court

² In the decision *Re: Standard Jury Instruction in Criminal Cases-Report No. 2005-2*, 2009 Fla. LEXIS 1806, Oct. 29, 2009 the changing of the standard jury instructions only changing the description of the (5)(h) instruction from "a crime for which the defendant is sentenced was especially heinous atrocious or cruel" to "the capital felony was especially heinous atrocious or cruel. (page 30)

opinions, trial courts have found the heinous factor in at least 448 Florida capital cases....the sheer volume of these cases dramatizes the pervasiveness of the heinousness circumstance in Florida.

Michael Mello & Nell Joslin Medlin, *Espinosa v. Florida: Constitutional Hurricane, Lambent Breeze, or Idiot Wind*, 22 Stetson L. Rev. 907, 921-27 (1992-93). The widespread use of the HAC aggravator exists because the Florida Supreme Court has been unable to provide any comprehensible and consistently applied limitations on the vague wording of the statute.

The volume and breadth of conflicting cases, and the studies on juror confusion in capital cases should cause this Court to reevaluate the constitutionality of HAC despite the fact the Florida Supreme Court has found the HAC instructions to be sufficiently narrowing. In the latest Florida Supreme Court decision, *In Re: Standard Jury Instructions in Criminal Cases-Penalty Phase of Capital Trials*, the Court emphasized how much juror confusion there was over the HAC instructions:

Florida capital jurors also have had difficulty understanding the effect of finding the existence of the statutory aggravating factor involving “heinous, atrocious or cruel” conduct and the non-statutory aggravating factor involving future dangerousness, which is prohibited in Florida. Approximately 36 percent of interviewed Florida capital jurors believed that they were required to sentence the defendant to death if they found the defendant’s conduct to be “heinous, vile, or depraved” beyond a reasonable doubt.

2009 Fla. LEXIS 1806 (2009). Additionally, there is no current method to study how jurors weigh aggravating factors. In this opinion, Florida Supreme Court Justice Barbara J. Pariente’s concurrence addressed the current problems of the current Florida Standard Jury Instructions. 2009 Fla. LEXIS 1806 (2009). Although Justice Pariente concurred in the majority’s adoption of the proposed changes, she argued that special verdict forms were needed for the guilt and penalty phases in capital cases. *Id.* The need for special verdict forms was rejected by the majority court in *State v. Steele* holding that “a judge

does depart from the essential requirements of law by requiring a majority of jurors to agree that a particular aggravator applies. Such a requirement imposes a substantive burden on the state not contained in the statute and not required by *Ring*. ” 921 So. 2d 538, 540 (Fla. 2005). Justice Pariente, in her concurrence in *State v. Steele*, stated:

By requiring a special verdict on aggravating circumstances, this Court will not only assist trial judges in administering section 921.141, but also enhance the quality of our own constitutionally mandated review of death sentences in a manner that anticipates the likely effect of *Ring* and its progeny. First, the special verdict would serve to facilitate our determination of harmless error during appellate review. Second, the additional procedure would assist in the jury override situation because this Court would know whether the jury's life recommendation was based on a finding of no aggravators or on a determination that the mitigators outweighed the aggravators. Finally, a special verdict [**44] form would help to ensure that this Court does not run afoul of the Eighth Amendment by affirming a death sentence based on an invalid aggravator--i.e. in this context, an aggravator not properly found by the jury. See *Sochor v. Florida*, 504 U.S. 527 (1992) (holding that an Eighth Amendment violation occurred when, under Florida's sentencing scheme, a trial judge weighed an invalid aggravating factor).

By acting prospectively, we can act to ensure that future verdicts comply with our state constitutional requirements . . . as well as the Sixth Amendment dictates of *Ring*. These additional findings through special verdicts will also facilitate our appellate review and enhance the integrity of the death penalty verdicts.

Id. at 538 (Pariente, J., concurring). Justice Pariente stated *In Re: Standard Jury Instruction* that “I have stated many times in the past the importance of having the jury’s vote recorded on any matters that may form the basis for an aggravating factor that allows the trial court to impose a sentence of death..”

2009 Fla. LEXIS 1806. Justice Pariente also states in her concurrence,

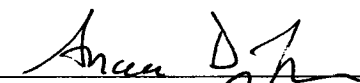
The role of the jury during the penalty phase under the Florida death penalty scheme has always been confusing. The jury makes no findings of fact as to the existence of aggravating or mitigating circumstances, nor what weight should be given to them, when making its sentencing recommendation. This places the Court in the position of not knowing which aggravating and mitigating circumstances the jury considered to be proven and provides little, if any, guidance in determining a sentence.

Id. Because Florida's cases involving the use of the HAC aggravator can not and will not sufficiently narrow the scope of eligible offenders as required under the United States and Florida Constitutions, the Court should declare the Florida Statute 921.141(5)(h) and/or the Standard (5)(h) Jury Instruction unconstitutional facially and as applied.

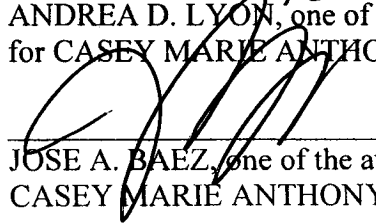
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- e. Declare Florida Statute 921.141(5)(h) unconstitutional and preclude its use in the case at bar.

Respectfully submitted,



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Dated: 11/25, 2009

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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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