

reviewed and held to be constitutional in *Proffitt v. Florida*, 428 U.S.242 (1976) is very different from the current statute in terms of aggravating circumstances. The statute held to be constitutional in *Proffitt* contained eight aggravators. The current statute has been expanded over the past thirty-three years to include fifteen aggravators.

3. In addition to the adding of new aggravating circumstances, the amending of existing aggravating circumstances has also broadened the scope of the statute. The combination of these changes has eliminated the required limiting function of aggravating circumstances. Thus, the statute is in violation of the Florida and United States Constitutions. *Zant*.
4. The continued expansion of the death penalty statute is in violation of the International Covenant on Civil and Political Rights.
5. The Florida Statute also allows the death penalty for non-intentional murder. Indeed, the underlying felony itself is an aggravating circumstance, which creates death eligibility. This is in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution.

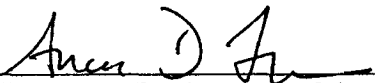
Conclusion

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 Florida Statute 921.141 Unconstitutional.

Respectfully submitted,



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CASEY MARIE ANTHONY.



JOSE A. BAEZ, one of the attorneys
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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 26 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.)	
)	

**MEMORANDUM OF LAW IN SUPPORT OF MOTION
TO DECLARE FLORIDA STATUTE 921.141 UNCONSTITUTIONAL
DUE TO ITS FAILURE TO NARROW THE SCOPE OF THE DEATH PENALTY**

COMES NOW the Defendant, CASEY MARIE ANTHONY, by and through her attorneys ANDREA D. LYON and JOSE BAEZ, and submits this Memorandum of Law in Support of her Motion to Declare Florida Statute 921.141 Unconstitutional Due to Its Failure to Narrow the Scope of the Death Penalty.

In support of her motion, Miss Anthony states as follows:

ARGUMENT

This is a capital case in which the prosecution is asking this Court to impose the death penalty. It is well established that heightened standards of due process apply to the imposition of the death penalty due to the severity, uniqueness, and finality of the situation. E.g. *Elledge v. State*, 346 So.2d 998 (Fla. 1977). The United States Supreme Court held in *Godfrey v. Georgia* that “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.” 446 U.S. 420, 428 (1980). 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. *Lowenfield v. Phelps*, 484 U.S. 231, 243 (1988); *Zant v. Stephens* 462 U.S. 862, 877 (1983).

I. The addition of aggravating factors has caused Florida Statute 921.141 to lose its constitutionally required narrowing function.

Through the constant addition of aggravating circumstances, *Fla. Stat.* 921.141 has lost the narrowing function that is essential to its constitutionality under the Florida and United States Constitutions.

It is well settled that aggravating circumstances “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, 877 (1983). The Florida death penalty statute that was reviewed and held to be constitutional in *Proffitt v. Florida*, 428 U.S. 242 (1976) is very different from the current statute in terms of aggravating circumstances. The statute as reviewed in *Proffitt* listed the following aggravating circumstances:

- a. The capital felony was committed by a person under sentence of imprisonment.
- b. The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person.
- c. The defendant knowingly created a great risk of death to many persons.
- d. The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
- e. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody.
- f. The capital felony was committed for pecuniary gain.

- g. The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
- h. The capital felony was especially heinous, atrocious, or cruel.

428 U.S. at 249 n. 6

The statute as currently written lists the following aggravating circumstances:

- a. The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.
- b. The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
- c. The defendant knowingly created a great risk of death to many persons.
- d. The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.
- e. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
- f. The capital felony was committed for pecuniary gain.
- g. The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
- h. The capital felony was especially heinous, atrocious, or cruel.
- i. The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
- j. The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.
- k. The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

- l. The victim of the capital felony was person less than 12 years of age.
- 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.
- n. The capital felony was committed by a criminal street gang member, as defined in s. 874.03.
- o. The capital felony was committed by a person designated as a sexual predator pursuant to s. 775.21 or a person previously designated as a sexual predator who had the sexual predator designation removed.

Fla. Stat. 921.141(5).

The difference between the two versions of the statute is striking. The statute reviewed in *Proffitt* contained eight aggravating circumstances. The current version contains fifteen. Since the ruling in *Proffitt* in 1976, the number of statutorily accepted aggravating circumstances has nearly doubled.

Of particular importance is the addition of aggravator *i* (homicide was cold, calculated, and premeditated).¹ This aggravator, in combination with aggravator *d* (felony murder), makes virtually every first-degree murder eligible for the death penalty.² If virtually every first-degree murder is eligible for the death penalty, the statute is clearly not narrowing the class of people who are eligible for the death penalty, as is constitutionally required. When the aggravating factors are so broad and have been applied so loosely that they do not limit the class of persons eligible for the death penalty, the statute violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution as well as article I, sections 2, 9, 16, 17, and 22 of the Florida Constitution.

²See Defense Motion to Declare Fla. Stat. 921.141(5)(i) And/Or the Standard (5)(i) Instruction Unconstitutional Facially and as Applied.

³See Defense Motion to Declare Fla. Stat. 921.141(5)(d) And/Or the Standard (5)(d) Instruction Unconstitutional Facially and as Applied.

II. The broadening of existing aggravating circumstances through amendment and/or judicial interpretation has caused Florida Statute 921.141 to lose its constitutionally required narrowing function.

The combination of aggravators concerning victim status; *j, k, l, m*, constitute a significant expansion of the statute. Particularly pernicious aggravating factors *l* and *m*, dealing with the victim's age.³ The street gang aggravator is also potentially vague, overbroad and violative of the Florida and Federal constitutions as it requires no connection to the offense.

Instead of narrowing the types capital felonies that make a defendant eligible for the death penalty, after *Proffitt* the Florida statute expanded aggravator *d* even further. Pre-*Proffitt*, aggravator *d* said that an aggravating circumstance was: the capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after the attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb. Since *Proffitt*, aggravator *d* has been expanded to also include sexual battery, aggravated child abuse, and abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement. *Fla. Stat.* 921.141(5)(d).⁴ This is clearly an expansion of the statute and not a narrowing.

The Florida Statute is unconstitutionally vague, overly broad, arbitrary, and capricious. It is so broad and has been applied so loosely that it fails to genuinely limit the class of persons eligible for the death penalty, making it in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as article I, sections 2, 9, 16, 17 and 22 of

³ See Defense Motion to Declare Fla. Stat. 921.141(5)(l) And/Or Standard (5)(l) Instruction Unconstitutional Facially and As Applied

⁴ See Defense Motion to Declare Fla. Stat. 921.141(5)(d) And/Or the Standard (5)(d) Instruction Unconstitutional Facially and as Applied.

the Florida Constitution. It also clearly violates the dictates of *Furman v. Georgia* 408 U.S. 238 (1972).

III. The Florida death penalty statute is in violation of the International Covenant on Civil and Political Rights

International law requires that any procedure for determining whether a sentence of life or death is to be imposed must provide at the very least the same rights and protections given to the initial determination of guilt.⁵ The International Covenant on Civil and Political Rights (ICCPR) explicitly states that in countries that have not yet abolished the death penalty, a sentence of death may only be imposed for the most serious crimes. *International Covenant on Civil and Political Rights*, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (Dec. 16, 1966).

Florida's current death penalty statute allows for a defendant to face a death sentence for a non-intentional murder. Certainly a non-intentional murder is not what the ICCPR intended to mean as the "most serious crimes." Florida's statute is in clear violation of the International Covenant on Civil and Political Rights.

Florida's statute allows arbitrary death sentences and does not guarantee that defendants indicted for capital murder are told all the elements of the charges against them, for example, the aggravating circumstances upon which a death sentence is sought, and the particular felonies which underlie the State's theory of felony murder.

IV. Allowing the death penalty for non-intentional murder violates both the United States and Florida Constitutions

In *Lockett*, the Court set aside a death conviction because the statute did not allow for the full consideration of whether or not there was an intention to cause death in mitigation. *Lockett v.*

⁵ The International Covenant on Civil and Political Rights is a multilateral Treaty adopted by the United Nations General Assembly in 1966. It was ratified by the United States in 1992.

Ohio, 428 U.S. 586 (1978). The Florida statute allows juries to consider the following in mitigation:

- a. The defendant has no significant history of prior criminal activity.
- b. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- c. The victim was a participant in the defendant's conduct or consented to the act.
- d. The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.
- e. The defendant acted under extreme duress or under the substantial domination of another person.
- f. The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.
- g. The age of the defendant at the time of the crime.
- h. The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

Fla. St. 921.141(6)

Notably absent from the Florida statute is the jury's ability to consider intent to cause death as mitigation. The Supreme Court has previously held in *Hitchcock v. Duggar* that limiting full consideration of mitigation circumstances is improper. 481 U.S. 393, 398 (1987). The Florida statute does not even allow for the consideration of whether or not a murder is intentional in mitigation. This failure to allow consideration of the defendant's intent thus impermissibly limits the mitigating circumstances that a jury can consider, in violation of *Hitchcock*. The inability of a jury to consider all mitigating circumstances violates a defendant's Due Process right to a fair trial as guaranteed by the Fourteenth Amendment of the United States Constitution.


CONCLUSION

The Florida Statute is unconstitutionally vague, overly broad, arbitrary, and capricious on its face and as applied. It is so broad and has been applied so loosely that it fails to genuinely limit the class of persons eligible for the death penalty, making it in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution. It also clearly violates the dictates of *Furman v. Georgia*, 408 U.S. 238 (1972).

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;
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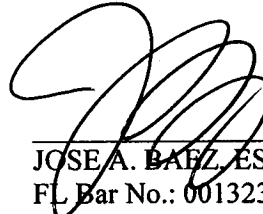
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