

	)	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 FLORIDA STATUTE § 921.141(5)(L) UNCONSTITUTIONAL  
FACIALLY AND AS APPLIED, AND TO  
PRECLUDE ITS USE IN THE CASE AT BAR**

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COMES NOW the Defendant, CASEY MARIE ANTHONY, by and through undersigned counsel, ANDREA D. LYON and JOSE A. BAEZ, who moves this Honorable Court to declare Fla. Stat. § 921.141(5)(l) unconstitutional and preclude its use in the instant case. In support whereof Miss Anthony states as follows:

1. Florida’s Death Penalty Statute requires a jury to weigh aggravating factors against mitigating factors before recommending a sentence of death or life in prison. See *Fla. Stat. § 921.141(2)*, which provides:
 

“(2) Advisory sentence by the jury.--After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

  - (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
  - (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
  - (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.”

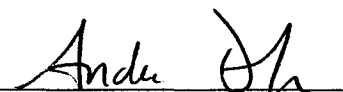
2. Fla. Stat. § 921.141(5)(l) specifically sets out as an aggravating factor that:  
  
“The victim of the capital felony was a person less than 12 years of age.”
  
3. Fla. Stat. § 921.141(5)(d) also lists as an aggravating factor that:  
  
“(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit . . . aggravated child abuse.”
  
4. The Florida Supreme Court has previously held that allowing Fla. Stat. § 921.141(5)(d) and (l) to operate as separate aggravating circumstances amounts to improper doubling, and is a sentencing error. *Lukehart v. State*, 776 So.2d 906 at 925 (Fla. 2000).
  
5. Any time a child under 12 is murdered it also constitutes aggravated child abuse. Allowing Fla. Stat. § 921.141(5)(l) to exist as an independent aggravator outside of § 921.141(5)(d) therefore would always constitute improper doubling in violation of due process and the defendant’s protection against cruel and unusual punishment.
  
6. Fla. Stat. § 921.141(5)(l) fails to take into account the defendant’s motivation or unique state of mind when committing the offense. Instead it focuses solely of the status of the victim.

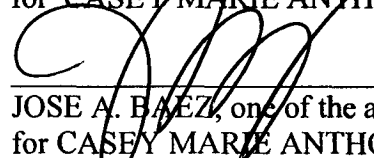
7. Fla. Stat. § 921.141(5)(l) fails to narrow the class of death eligible defendants in a meaningful way. Focusing solely on the age of the victim, rather than the specific culpability of the defendant does not ensure that those who are death eligible are the “worst of the worst”, and therefore the most severe offenders. By allowing the existence of such an overbroad, overly inclusive, aggravator a significant degree of discretion is interjected into the sentencing process. The penalty of death is not likely to be applied in a consistent manner, raising the constitutional concerns of *Furman* and *Proffitt*. See *Furman v. Georgia*, 408 U.S. 238 (1972) and *Proffitt v. Florida*, 428 U.S. 242 (1976).
  
8. Fla. Stat. § 921.141(5)(l) amounts to strict liability for a particular type of offense. The Supreme Court has rejected statutes that impose a mandatory sentence of death for particular types of crimes. See *Woodson v. North Carolina*, 428 U.S. 280 (1976).
  
9. In the only instances where the constitutionality of Fla. Stat. § 921.141(5)(l) has been challenged on appeal, the claims have been dismissed due to procedural errors. Also, those cases all include the finding of other additional aggravating circumstances. The Florida Supreme Court has yet to examine the constitutionality of the aggravator when presented alone.

WHEREFORE, for the foregoing reasons, and to protect her rights as guaranteed by the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution, Miss Anthony, by and through undersigned counsel, 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 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)(l) 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  
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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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**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S  
MOTION TO DECLARE FLORIDA STATUTE § 921.141(5)(L) UNCONSTITUTIONAL  
FACIALLY AND AS APPLIED, AND TO  
PRECLUDE ITS USE IN THE CASE AT BAR**

COMES NOW the Defendant, CASEY MARIE ANTHONY, by and through undersigned counsel, and submits this Memorandum of Law in support of her Motion to declare Fla. Stat. § 921.141(5)(l) unconstitutional and to preclude its use in the instant case. The defense, and Miss Anthony, state the following:

**STATEMENT OF FACTS**

1. On October 14, 2008 a Grand Jury Indicted Miss Anthony on seven counts relating to the disappearance of her daughter, Caylee Anthony. The seven charges include first-degree murder, aggravated child abuse, aggravated manslaughter of a child, and four counts of providing false information to a police officer.

2. On December 5, 2008, the State filed a Notice of Intention Not to Seek the Death Penalty.

3. On April 13, 2009, citing the availability of additional information, the State filed a Notice of Intention to Seek the Death Penalty. To date, the "new information" has not been disclosed to Miss Anthony.

4. Although the State has not disclosed which aggravating circumstances they intend to pursue under Fla. Stat. § 921.141(5), it is clear that only four of the enumerated aggravators can be said to even remotely apply. These aggravators include: (1) that 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 aggravated child abuse, (2) that the victim of the capital felony was less than 12 years of age, (3) that the capital felony was especially heinous, atrocious, or cruel, and (4) that the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

## ARGUMENT

### **I. The existence of Fla. Stat. §921.141(5)(l) as an independent aggravator is a violation of Defendant's due process rights and right against cruel and unusual punishment.**

Miss Anthony argues that allowing two separately enumerated aggravating factors to exist, which both result from a single factual element of the capital crime, is unconstitutional. Moreover, the Florida Statutes, as written, allow an automatic finding of both factors any time the victim of a capital crime is under the age of twelve. A defendant accused of such a crime begins with two strikes against him, significantly increasing the likelihood of a death sentence. This is in violation of the Fifth, Eighth, and Fourteenth Amendments of the Constitution.

#### **A. There can be no instance where Fla. Stat. § 921.141(5)(l) applies but § 921.141(5)(d) does not.**

Despite being enumerated as two separate aggravating circumstances, Fla. Stat. § 921.141(5)(l) and § 921.141(5)(d) will always be found together. No defendant can engage in a

capital crime where the victim is under the age of twelve and have it not also be aggravated child abuse. The Florida Statutes define aggravated child abuse as occurring when a person:

- “(a) Commits aggravated battery on a child;
- (b) Willfully tortures, maliciously punishes, or willfully and unlawfully cages a child; or
- (c) Knowingly or willfully abuses a child and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to the child.” *Fla. Stat. § 827.03(2)*

Under subsection (c) of the statute, any time a person abuses a child and causes great bodily harm they are committing aggravated child abuse. Looking at subsection (1) of Fla. Stat. § 827.03, abuse of a child means:

- “(a) Intentional infliction of physical or mental injury upon a child;
- (b) An intentional act that could reasonably be expected to result in physical or mental injury to a child; or
- (c) Active encouragement of any person to commit an act that results or could reasonably be expected to result in physical or mental injury to a child.” *Fla. Stat. § 827.03(1)*

Combining the definition of child abuse and the definition of aggravated child abuse, it is clear that any time a person intentionally inflicts physical injury on a child, and that injury results in great bodily harm, then aggravated child abuse has occurred. So, anytime someone murders a child, they are intentionally inflicting a physical injury upon that child. Furthermore, if one kills the child, then the gravest of bodily harm has resulted, that being death. Both elements of aggravated child abuse have been met and the capital offender has not only committed murder, but aggravated child abuse as well. There can be no situation in which one murders a child and is not also engaged in aggravated child abuse.

**B. Allowing the aggravating factors in Fla. Stat. § 921.141(5)(d) and § 921.141(5)(l) to be found together constitutes improper doubling.**

The doubling of aggravating factors improperly skews the sentencing procedure toward death in cases where a defendant is accused of murdering a child. The Florida Capital sentencing regime requires a jury to find that there are sufficient aggravating circumstances to outweigh any mitigating circumstances that might exist. *See Fla. Stat. § 921.141(2)*. Allowing the murder of a child to support the automatic finding of two of the fifteen statutory aggravating circumstances, in every instance, unduly prejudices those defendants.

The Supreme Court has held that to be constitutional an aggravating factor 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). While it may be argued that the killing of a child is especially deplorable, the same can be said of any time a human life is purposely taken. By looking solely to the age of the victim, there is no individual consideration of the defendant, the motive for the crime, the mental state of the defendant, the means by which the victim was killed, the surrounding circumstances, all are left out of the sentencing calculus. As long as the victim is under twelve years of age, even if just by a day, the defendant begins the sentencing procedure with two strikes against him where others only have one.

It cannot be said that there is a reasonable justification for singling out capital offenses in which there is a child victim for an immediate finding of two statutory aggravators, when all other aggravating circumstances operate as addressing individual aspects of the capital crime. For example, the murder of thirty people, if there is no other accompanying felony, only triggers one statutory aggravator, while the murder of a single child triggers two solely because of the victim’s age. The doubling of aggravators and subsequent bias toward death, in cases with a

child victim, almost certainly ensures that the penalty will be imposed in an arbitrary and capricious manner. The concerns of *Furman* and *Zant*, in ensuring a consistent and justified imposition of death, make the doubling of aggravators in Florida's statute constitutionally impermissible. See *Furman v. Georgia*, 408 U.S. 238 (1972) and *Zant*, 462 U.S. 862.

The Florida Supreme Court has specifically held that a separate finding of the aggravators that the murder was committed while a person was engaged in child abuse and that the victim was under twelve years old, constitutes improper doubling. *Lukehart v. State*, 776 So.2d 906, 925 (Fla. 2000). Aggravators are improperly doubled when they refer to the same aspect of the capital crime. *Provence v. State*, 337 So.2d 783, 786 (Fla. 1976). This is of particular concern because it prejudices a defendant by beginning the sentencing process with two aggravating circumstances against him where others committing a similar crime would only have one. *Id.* In order for multiple aggravators to be found against a defendant they must be "separate and distinct" and "not merely restatements of each other." *Rose v. State*, 787 So.2d 786, 801 (Fla. 2001) citing *Banks v. State*, 700 So.2d 363, 367 (Fla. 1997).

In *Provence*, *Rose* and *Banks*, the court looked to whether a factual difference could exist that would make one aggravator invalid. In *Banks* the court found that a finding of the heinous, atrocious, and cruel (HAC) aggravator along with the aggravator for a crime done while committing sexual battery, was not improper doubling even though both were based on the sexual battery. The reasoning the court gave was that the HAC aggravator focuses on the impact on the victim while the other aggravator looks solely to whether the defendant was committing another crime. *Banks*, 700 So.2d 367. Had the victim been unconscious during the assault there would be no mental impact on the victim and no basis for the HAC aggravator. *Id.* The court distinguishes this from a case where improper doubling occurs such as a finding that the murder

was both committed during a burglary or robbery and that it was done for pecuniary gain. *Id.* In that instance, both aggravators result from the same feature or aspect of the crime. *Id.*

As the court held in *Lukehart*, finding two aggravators, that the murder was done while committing aggravated child abuse and that the victim was under twelve years of age, constitutes improper doubling. This easily follows from the reasoning of *Banks* and *Rose*. The age of the victim and the commission of child abuse both are the same aspect of the crime. Unlike the other aggravators discussed in *Banks*, *Rose*, and *Provence*, however, there can never be an instance where the aggravated child abuse aggravator and the victim under twelve aggravator are found independently. A person can commit a murder for pecuniary gain and have it not also be during the course of a robbery, however, a person can never murder a child under twelve and have it not also be aggravated child abuse under the Florida Statutes. For this reason the victim under twelve aggravator, Fla. Stat. § 921.141(5)(l), is unconstitutional and its use in the case at bar should be precluded.

**C. The mere existence of Fla. Stat. § 921.141(5)(l) impermissibly doubles a single fact of the capital crime because it cannot be known upon which theory the sentencing jury rendered its decision.**

The Florida sentencing regime does not require the jury to specifically state which factors were found in aggravation or mitigation<sup>1</sup>. See *Bottoson v. Moore*, 833 So.2d 693, 716 (Fla. 2002). All that is required of the jury upon completion of their deliberations is a recommendation of life imprisonment or a recommendation of death. *Id.* at 717. Since the rationale behind the jury's decision is not known it must be assumed that they used both the aggravated child abuse and the victim under twelve aggravators in their calculus.

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<sup>1</sup> Also see Defense's Motion to Declare Florida Statute 921.141 Unconstitutional Under *Ring v. Arizona*, incorporated here by reference.

The Supreme Court has previously held that a sentence of death is to be set aside if the jury's verdict could be supported by both a valid and invalid rationale and the court is uncertain of which was actually relied upon. *Mills v. Maryland*, 486 U.S. 367, 376 (1988). The fact that a Florida sentencing jury does not have to disclose which aggravators they found means that there is always the possibility that improper doubling of the aggravated child abuse and victim under twelve aggravators occurred.

The finality of a sentence of death requires even greater certainty that the jury made their decision upon a proper rationale. *Id.* at 377. Accordingly, one cannot ever set aside the possibility that the aggravators were combined. The mere existence of both the aggravated child abuse and the under twelve aggravator on the list of aggravating circumstances, which the jury is entitled to find, allows a jury to consider them together, despite whether the State only chooses pursues one. The only way to remedy this constitutional deficiency is to declare the under twelve aggravator, Fla. Stat. § 921.141(5)(l), unconstitutional as it allows a jury to impermissibly double aggravators by simply restating the exact same crime already covered under Fla. Stat. § 921.141(5)(d). Furthermore, to prevent the jury from possibly impermissibly doubling aggravators in its sentencing recommendation, the State should be precluded from using the under twelve aggravator, Fla. Stat. § 921.141(5)(l), in the case at bar.

**II. By focusing solely on the age of the victim, Fla. Stat. § 921.141(5)(l) fails to give defendants the meaningful individualized determination of death eligibility that is constitutionally required.**

A particular concern of the Supreme Court, when considering the constitutionality of the death penalty, has been the degree of individualized consideration offered to a defendant's unique case. *See Zant*, 462 U.S. 879. The Supreme Court specifically considered the degree to

which the Florida statute does this when it upheld the statute against a constitutional attack in *Proffitt v. State*. 428 U.S. 242, 251 (1976). The elements of the Florida statute that the court lists as sufficiently addressing the constitutional deficiencies of *Furman* all relate to characteristics of the individual defendant. *Id.*

The victim under twelve aggravating factor, Fla. Stat. § 921.141(5)(l), is unique in that it does not consider anything having to do with the defendant or his conduct (beyond the fact of the murder itself), rather, it is based solely upon the age of the victim. All other aggravating factors enumerated under Fla. Stat. § 921.141(5) relate to the individual defendant or his motive in committing the capital felony. Determining death eligibility based solely upon the age of the victim fails to give a defendant the individualized factual inquiry that the court was concerned with in *Zant* and *Proffitt*. In consideration of the other age based aggravator, which also requires an inquiry into the relationship the defendant had with the victim, the Florida Supreme Court stated that considering the aggravator is a “fact sensitive inquiry requiring more than just a birth certificate.” *State v. Woodel*, 804 So.2d 316, 325 (Fla. 2001).

In order to pass constitutional muster, the victim under twelve aggravator must include some sort of individualized consideration of the defendant to ensure that the defendant is the worst of the worst and worthy of the imposition of death when others similarly situated are not. This could include a finding that the defendant specifically targeted the victim because of their age or that the defendant stood in a particular position of authority with the victim because of the victim’s age. In any case, the aggravator needs to do more than simply require a birth certificate. Lacking consideration of the defendant individually, Fla. Stat. § 921.141(5)(l) fails to ensure that the death penalty is not imposed in an arbitrary and capricious manner. It should be declared unconstitutional and its use precluded in the case at bar.

**III. Fla. Stat. § 921.141(5)(l) fails to narrow the class of death eligible defendants in a meaningful way, allowing the sentence of death to be imposed in an arbitrary and capricious manner.**

A death penalty statute must provide a “meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not,” to protect a defendant’s due process rights and right against cruel and unusual punishment under the Fifth, Eighth and Fourteenth Amendments of the United States Constitution. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972). In examining an aggravator that might be overbroad, the Court looks to whether there is a risk that the statute will result in capricious or arbitrary imposition of death. *Gregg*, 428 U.S. 201. Fla. Stat. § 921.141(5)(l) does not satisfy those concerns. By failing to narrow the class of death eligible persons in a meaningful way, Fla. Stat. § 921.141(5)(l) interjects enormous discretion into the sentencing procedure thereby allowing arbitrary and capricious application of the death penalty.

Statistics show that Fla. Stat. § 921.141(5)(l) results in an arbitrary and capricious imposition of the death penalty. In 2007 there were 1,202 persons murdered in the state of Florida. *1971-2008 Florida Uniform Crime Report* (Florida Department of Law Enforcement, 2009). According to a committee promulgated by the Florida legislature, during the same year there were 171 instances of children killed as a result of child abuse. *Florida Child Abuse Death Review* (State Child Abuse Death Review Committee, 2007). Of these 171 deaths, 55 were deemed to be the result of homicide. *Id.* Comparing the 55 instances of homicide involving children to the 1,202 total homicides, anywhere from fourteen to five percent of the total class of murderers are instantly eligible under Fla. Stat. § 921.141(5)(l) alone. This is not a meaningful narrowing of the class of death eligible offenders as contemplated under *Gregg*. The statistics

become even more telling when compared to the total number of defendants who actually received a death sentence for a crime they committed in 2007. For crimes committed in 2007, only six defendants actually received a death sentence. *Death Row Roster* (Florida Department of Corrections, 2009) available online at <http://www.dc.state.fl.us/activeinmates/deathrowroster.asp>. These six defendants were out of the total class of 1,202 offenders and didn't specifically commit a capital crime with a victim under the age of twelve. When comparing the 55 offenders who are death eligible under Fla. Stat. § 921.141(5)(l) to the six who actually ended up receiving a death sentence, it is clear that the aggravator does not sufficiently narrow the class of eligible offenders. If Fla. Stat. § 921.141(5)(l) was indeed meant to distinguish the worst offenders, to whom death is an appropriate sentence, all 55 offenders who killed children under the age of twelve would have received death sentences. The statistics show the opposite, that such offenders are not the worst of the worst, and that they are not worthy of death. The consistency in sentencing that the Supreme Court is so often concerned with is simply not present here. The victim under twelve aggravator, Fla. Stat. § 921.141(5)(l), allows arbitrary and capricious imposition of the death penalty, thus making it unconstitutional on its face and as applied. The use of Fla. Stat. § 921.141(5)(l) by the State in the instant matter should be precluded.

In determining the proportionality of a death sentence to the underlying crime, courts have traditionally looked to society's judgment as evidence of the evolving standards of decency. *See Coker v. Georgia*, 433 U.S. 584 (1977). In invalidating death as a punishment for rape, the Court in *Coker* found society to have rejected the punishment since, "in the vast majority of cases, at least 9 out of 10, juries have not imposed the death sentence." *Id.* at 597. Similarly, there appears to be a consensus among juries in Florida finding that the age of the victim, alone,

is not enough to render a defendant worth of the death sentence. The imposition of a sentence of death for defendants eligible under Fla. Stat. § 921.141(5)(l) occurs just as, if not more, infrequently than the sentence for rapists in *Coker*. The statistics make it clear that the public has decided that the age of the victim, alone, is not enough to render a defendant worthy of death when other defendants, also guilty of murder, are not. For this reason, this Court should find Fla. Stat. § 921.141(5)(l) unconstitutional as being in violation of the Eighth Amendment guarantee against cruel and unusual punishment.

**IV. Fla. Stat. § 921.141(5)(l) amounts to strict liability and an unconstitutional mandatory imposition of the death penalty.**

The text of Fla. Stat. § 921.141(5)(l) is so overbroad and over-inclusive that it amounts to an automatically applicable factor imposing strict liability on defendants any time a victim is under twelve. The Supreme Court has found mandatory death sentences for particular classes of offenses to be unconstitutional. *Woodson v. North Carolina*, 428 U.S. 280 (1976). Because Fla. Stat. § 921.141(5)(l) focuses solely on the victim's age, it amounts to mandatory proscription of a certain class of offense. There is no consideration of the individual defendant necessary in order to find the aggravator applicable and to begin the death proceedings. This type of aggravator has the exact same effect as an unconstitutional mandatory imposition of the death penalty. Furthermore, the fact that Fla. Stat. § 921.141(5)(l) improperly doubles the conduct also covered under Fla. Stat. § 921.141(5)(d) further ensures that a death sentence is likely. Defendants convicted of murdering a child under twelve begin sentencing with the scales unjustly weighed against them. When standing so close to the brink of death the distinction between discretionary and mandatory imposition is blurred.


The improper doubling of identical aggravators and use of language that is overbroad and fails to account for individual defendants has the same effect as if the legislature had automatically imposed death for those convicted of murdering a child under twelve years old. Such a statute would not be constitutional and the Fla. Stat. § 921.141(5)(1) cannot be either. Because it violates defendants' due process rights and right against cruel and unusual punishment, Fla. Stat. § 921.141(5)(1) should be held unconstitutional and its use precluded in the case at bar.

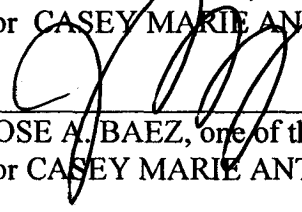
### CONCLUSION

WHEREFORE, in light of the multiple constitutional deficiencies of Fla. Stat. § 921.141(5)(1), and to protect her rights as guaranteed by the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution, Miss Anthony, by and through undersigned counsel, 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 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;
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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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