

	)	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.	)	
	)	

**MOTION TO DECLARE SECTION 921.141(5)(d)**  
**FLORIDA STATUTE AND/OR THE Section 921.141(5)(d) STANDARD INSTRUCTION**  
**UNCONSTITUTIONAL FACIALLY AND AS APPLIED**  
**AND TO PRECLUDE THEIR APPLICATION AT BAR**

COMES NOW the Defendant, CASEY MARIE ANTHONY, Defendant, by and through her attorneys ANDREA D. LYON and JOSE A. BAEZ, and moves to declare section 921.141(5)(d) Florida Statutes (1990) and/or its corresponding standard jury instruction unconstitutional, and to preclude its use in the instant case. In support whereof Miss Anthony states as follows upon information and belief:

1. Section 921.141(5) Florida Statutes sets out the aggravating circumstances which the trier of fact may consider in determining *whether to impose the death penalty* in a first degree murder case. It provides in pertinent part:

(5) AGGRAVATING CIRCUMSTANCES. -- Aggravating circumstances shall be limited to the following:

(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.

2. The list of enumerated aggravating circumstances in section 921.141(5)(d) is substantially similar to the list of felonies in the felony-murder portion of the first-degree murder statute. In fact, *every aggravating circumstance* in section 921.141(5)(d) - weighing in favor of a death sentence for the defendant - is also an enumerated factor that *qualifies* a defendant for a death sentence under *Fla. Stat. 782.04(1)(a)* which defines first degree murder:

782.04 Murder.--

(1)(a) The unlawful killing of a human being:

1. When perpetrated from a premeditated design to effect the death of the person killed or any human being;
2. When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any:
  - a. Trafficking offense prohibited by s. 893.135(1),
  - b. Arson,
  - c. Sexual battery,
  - d. Robbery,
  - e. Burglary,
  - f. Kidnapping,
  - g. Escape,
  - h. *Aggravated child abuse*,
  - i. Aggravated abuse of an elderly person or disabled adult,
  - j. Aircraft piracy,
  - k. Unlawful throwing, placing, or discharging of a destructive device or bomb,
  - l. Carjacking,
  - m. Home-invasion robbery,
  - n. Aggravated stalking,
  - o. Murder of another human being,
  - p. Resisting an officer with violence to his or her person,
  - q. Felony that is an act of terrorism or is in furtherance of an act of terrorism; or
3. Which resulted from the unlawful distribution of any substance controlled under s. 893.03(1), cocaine as described in s. 893.03(2)(a)4., or opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user, is murder in the first degree and constitutes a capital felony, punishable as provided in s. 775.082.

3. The felony murder aggravating factor of §921.141(5)(d), Florida Statutes, and its corresponding instruction, is unconstitutional because it serves no limiting function, and creates

an unlawful presumption of a death sentence - an unlawful death sentence presumption for the least aggravated form of first degree murder.

4. The aggravating circumstance in section 921.141(5)(d) violates the Fifth Amendment (Due Process), the Eighth Amendment (Cruel and Unusual Punishment) and the Fourteenth Amendment (Due Process and Incorporation) of United States Constitution and Article I, Sections 9 (Due Process), 16 (Rights of Accused), 17 (Cruel or Unusual Punishment) of the Florida Constitution. Under the Eighth and Fourteenth Amendments of the United States Constitution, an aggravating circumstance must comply with two requirements before it is constitutional: (1) It “must genuinely narrow the class of persons eligible for the death penalty.” *Zant v. Stephens*, 456 U.S. 410 (1982); and (2) It “must reasonably justify the imposition of a more severe sentence compared to others found guilty of murder.” *Zant, supra*.

5. The plain language of §921.141(5)(d) expands death eligibility by presenting a death sentence as presumptively appropriate for a defendant who is found guilty of first-degree murder under §782.04, even where that defendant was merely an accomplice to the felonious act.

6. Miss Anthony recognizes that the Florida Supreme Court has rejected this argument. *Blanco v. State*, 706 So. 2d 7 (Fla. 1997). However, Defendant directs this Court to Justice Anstead’s (joined by Justice Kogan) special concurrence in *Blanco* in which the Justices recognize that §921.141(5)(d) “may well be unconstitutional when applied to a defendant convicted of felony murder” because “a person convicted of felony murder who then has the same felony used against her as an aggravator does not become a member of a smaller group. Rather, the felony aggravator used there would make the entire larger group of felony murderers automatically eligible for the death penalty without proof of any additional aggravating

misconduct. Hence, the felony aggravator serves no legitimate narrowing function in such a case.” *Blanco v. State* 706 So.2d 7, 12 (Fla.,1997). See also *Douglas v. State*, 878 So.2d 1246 (Fla.2004) (Pariante, J. specially concurring).

7. The use of a capital aggravator under Fla. Stat. §921.141(5)(d) that is also the predicate felony offense charged violates Florida case law, the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I Sections Nine, Sixteen, and Seventeen of the Florida Constitution. Miss Anthony is charged with both first-degree murder and aggravated child abuse relating to the death of her daughter Caylee Anthony, and such charging is impermissible under Florida case law, and the United States and Florida Constitutions.

WHEREFORE, in the interests of Casey Marie Anthony’s right to due process, right to a fair trial, and the right to be free from cruel and unusual punishment, and for the reasons cited in her accompanying memorandum of law, the Defense respectfully asks this Honorable Court to:

- a. Order the State 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 State’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. Grant Casey Marie Anthony’s Motion to Declare Section 921.141(5)(d) Florida Statutes and/or the Section 921.141(5)(d) Standard Instruction Unconstitutional Facially and As Applied and to Preclude Their Application at Bar.

Respectfully Submitted,

  
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Dated: November 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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STATE OF FLORIDA

v.

CASEY MARIE ANTHONY,

Defendant.

) In the Circuit Court of the  
 ) Ninth Judicial Circuit, in and for  
 ) Orange County, Florida  
 )  
 ) 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 DEFENDANT’S MOTION TO DECLARE SECTION 921.141(5)(d) FLORIDA STATUTE AND/OR THE SECTION 921.141(5)(d) STANDARD INSTRUCTION UNCONSTITUTIONAL FACIALLY AND AS APPLIED AND TO PRECLUDE THEIR APPLICATION AT BAR**

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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)(d) and/or the § 921.141(5)(d) standard jury instruction unconstitutional and to preclude its use in the instant case. The defense, and Miss Anthony, states the following:

**STATEMENT OF FACTS**

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

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 State has not disclosed any “additional” or “new” information to Miss Anthony.

4. Although the State has not disclosed which aggravating circumstances they intend to pursue, only four of the enumerated aggravators under Fla. Stat. § 921.141(5) conceivably apply to the charges brought in the instant case. These aggravators are: (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. Fla. Stat. §921.141(5)(d) Impermissibly Expands Death Eligibility in Violation of Defendant's Constitutional Right to Due Process and Right to Protection Against Cruel and Unusual Punishment.**

The United States Supreme Court has held that an aggravating sentencing 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” in order to be constitutional. *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

The felony murder aggravating factor of §921.141(5)(d), Florida Statutes, and its corresponding instruction, is unconstitutional because it serves no limiting function, and in fact creates an unlawful presumption of a death sentence - an unlawful death sentence presumption for the least aggravated form of first degree murder.

Miss Anthony argues that allowing the use of a capital aggravator that is also the charged predicate offense for felony murder, where both constitute the same factual element of the capital crime, is unconstitutional. The felony murder aggravator of §921.141(5)(d) fulfills neither of the

*Zant* functions. Because every aggravator enumerated in §921.141(5)(d) is also enumerated in the first degree murder statute §782.04(1)(a)(2), more than half of all felony-murder offenses result in a presumption toward a death sentence. The statute fails to provide a reasonable method to justify the death penalty for felony murders in comparison to other persons convicted of first-degree murder.

The §921.141(5)(d) aggravator presumes the appropriateness of a death sentence, even for those defendants who were not the actual killer or if there was no intent to kill. However, persons convicted of premeditated murder are not automatically subject to the death penalty unless they act with a heightened level of premeditation that is “cold”, “calculated” and “without any pretense of moral or legal justification”. See *Fla. Stat.* 921.141(5)(i). *Rogers v. State*, 511 So. 2d 526 (Fla. 1987).

The perverse outcome of this statutory scheme was recognized by Florida Supreme Court Justice Anstead in his special concurrence in *Blanco v. State*, 706 So.2d 7, 13 (Fla., 1997) (Anstead, J. specially concurring). Justice Anstead noted that “when used to aggravate a felony murder, Florida's felony murder aggravator impermissibly favors, for sentencing purposes, a more culpable defendant convicted of intentional, premeditated murder over a defendant convicted of unpremeditated, felony murder. Hence, it provides for a ‘more severe sentence compared to others’ on a patently irrational basis. There simply is no rational basis for treating a felony-murder offender more harshly than a premeditated killer.” *Id.*

The expansive death-eligibility in *Fla. Stat.* § 921.141(5)(d) does not ensure that those who are death-eligible are the “worst of the worst” or the most severe offenders. By allowing the existence of such an overbroad, overly inclusive, aggravator, the penalty of death is not likely to be applied narrowly, raising the constitutional concerns of *Zant*.

Miss Anthony urges this Court to find that §921.141(5)(d), on its face, and as applied, violates the Eighth and Fourteenth Amendments pursuant to *Zant*, and also violates Article I, Sections Two, Nine, Sixteen and Seventeen of the Florida Constitution.

The constitutional deficiency of §921.141(5)(d) is not cured by Florida’s standard jury instructions for capital cases. Under the plain language of the applicable 7.11(2) jury instructions, there is a strong presumption that a death sentence is *always* appropriate under §921.141(5)(d). Jurors are instructed that the law requires the jury to “render to the court an advisory sentence as to which punishment should be imposed upon the defendant” after determining “whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty” and “whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any”. In addition, where the penalty phase jury is the same jury that decided the defendant’s guilt, the jury is instructed that they may take all evidence – from the guilt phase and the penalty phase – into account when determining whether the State has proven aggravating factors that outweigh defendant’s mitigating evidence, “if any”.

Thus, the finding of guilt under these jury instructions weighs heavily, and unfairly, in favor of a penalty phase jury voting in favor of death as the appropriate penalty, serving to make a finding of death the rule rather than the exception, an outcome that is thoroughly at odds with the mandate of *Zant v. Stephens*, 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1983), the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections Nine, Sixteen, and Seventeen of the Florida Constitution.

II. **The Use of a Capital Aggravator Under Fla. Stat. §921.141(5)(d) That is Also the Predicate Felony Offense Charged Violates Florida Case Law, the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I Sections Nine, Sixteen, and Seventeen of the Florida Constitution.**

Miss Anthony is charged with both first-degree murder and aggravated child abuse

relating to the death of her daughter Caylee Anthony. Such charging is impermissible under Florida case law, and the United States and Florida Constitutions.

At least three different state supreme courts have held that the use of a capital aggravator that is also the predicate felony offense is improper under state law, their state constitution, and/or the federal constitution<sup>1</sup> and the Florida Supreme court has held accordingly, in factual limited circumstances.

The Florida Supreme Court has held that where a single act forms the basis of both an aggravated child abuse aggravating factor under section 921.141(5)(d) of the Florida Statutes and a first-degree felony murder charge, the aggravated child abuse allegation “merges” with the more serious homicide charge and the State is precluded from invoking the felony murder doctrine and is limited to proving first-degree murder only on the theory of premeditation for murder. That is, in such cases “the state is prohibited from using aggravated child abuse as the felony crime.” *Brooks v. State*, 918 So.2d 181, 197-98 (Fla. 2005). (citing *Mills v. State*, 476 So.2d 172, 177 (1985).

In *Brooks*, the defendant argued that the trial court erred by finding that he committed the murders of a woman and child during the course of a felony, which was aggravated child abuse as defined by statute, and then applying the aggravated child abuse aggravating circumstance set forth in section 921.141(5)(d), Florida Statutes (2002), during sentencing. *Id.* at 197. The defendant asserted that because a single act of stabbing formed the basis of both the aggravated

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<sup>1</sup> See *McConnell v. State*, 120 Nev. 1043, 1069, 102 P.3d 606 (Nev. 2004) (finding it impermissible under federal and state constitutional guarantee of due process and the ban on cruel and unusual punishment to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated); *State v. Tucker*, 357 N.C. 633, 636, 588 S.E.2d 853, 855 (N.C. 2003); (finding the same evidence cannot be used to prove an element of a crime and to prove an aggravating factor on the same conviction, as codified in N.C.G.S. § 15A-1340.16(d)); *Engberg v. Meyer*, 820 P.2d 70, 87-92 (Wyo. 1991).

child abuse aggravating factor under section 921.141(5)(d) of the Florida Statutes and the first-degree felony murder charge, the trial court should have found that the aggravated child abuse allegation “merged” with the more serious homicide charge and the State should have been precluded from invoking the felony murder doctrine and been limited to proving first-degree murder only on the theory of premeditation. *Id.* at 198. The court made clear that the defendant in Brooks was not merely “attack[ing] the use of the underlying felony as an aggravator” but rather the defendant was “assert[ing] that the state is prohibited from using aggravated child abuse as the felony crime. *Id.* The court agreed and cited a line of cases starting with *Mills v. State*, 476 So.2d 172, 177 (Fla.1985), where the court held that convictions of first-degree murder and aggravated battery could not both stand when arising out of the same act, and vacated the defendant’s conviction for aggravated battery.

In *Mills*, the court held that in the limited context where one shotgun blast was the actus reus for both an aggravated battery charge and simultaneously for a homicide charge, the felonious conduct merged into one criminal act. *Mills*, 476 So.2d at 177. The *Mills* court explained “We do not believe that the legislature intended dual convictions for both homicide and the lethal act that caused the homicide without causing additional injury to another person or property.” *Id.* The *Brooks* court found that “because aggravated child abuse is an aggravated battery, the only difference being that the victim is a child” the holding in *Mills* applied. *Brooks*, 918 So.2d at 199.

*Brooks* is applicable to the instant case. Miss Anthony is charged with first-degree murder and, presumably based on the same act, aggravated child abuse,<sup>2</sup> and the aggravated child abuse

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<sup>2</sup> Miss Anthony respectfully directs this Court’s attention to her Motion to Dismiss Defective Indictment filed with this Court on November 3, 2009, which also speaks to constitutional violations that result from the lack of specificity of the charges in the instant case.

charge therefore must “merge” with the first-degree murder charge.

To protect a defendant’s right to due process and protection against cruel and unusual punishment under the Fifth, Eighth and Fourteenth Amendments of the United States Constitution, 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.” *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)(d) does not satisfy those concerns. Fla. Stat. § 921.141(5)(d) fails to narrow the class of death eligible persons in a meaningful way, and thereby allows arbitrary and capricious application of the death penalty.


### CONCLUSION

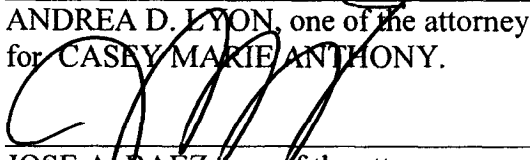
In light of the constitutional deficiencies of Fla. Stat. § 921.141(5)(d), and in the interest of Casey Marie Anthony’s right to due process, right to a fair trial, and the right to be free from cruel and unusual punishment, the Defense respectfully asks this Honorable Court to:

- a. Order the State 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 State’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. Grant Casey Marie Anthony's Motion to Declare Section 921.141(5)(d) Florida Statutes and/or the Section 921.141(5)(d) Standard Instruction Unconstitutional Facially and As Applied and to Preclude Their Application 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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