

	)	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.	)	
	)	

**SECOND MOTION TO PRECLUDE DEATH PROCEDURES FOR IMPERMISSIBLE PROSECUTORIAL MOTIVES**

COMES NOW the Defendant, CASEY MARIE ANTHONY, by and through her attorneys J. CHENEY MASON, ANDREA D. LYON and JOSE A. BAEZ, hereby moves this Honorable Court to prohibit any reference to the jury's role being "advisory" or to the jury's penalty verdict as being a "recommendation." In support of her motion, Miss Anthony states as follows:

1. The judiciary has the authority to curb prosecutorial discretion where the prosecution harbors motivations separate and apart from the prosecutorial duty to see that justice is done and that infringe the defendant's constitutional rights. *See State v. Donner*, 500 So.2d 532, 533 (Fla. 1987) ("As noted in *Bloom*, the judiciary has authority to curb pretrial prosecutorial discretion only in those instances where impermissible motives may be attributed to the prosecution, such as bad faith, race, religion or a *desire to prevent the exercise of the defendant's constitutional rights.*") (internal quotation marks omitted) (emphasis added).

2. In *United States v. Gonzales-Lopez*, 548 U.S. 140, 143 (2006), the Supreme Court held that an element of the Sixth Amendment right to counsel was the right to counsel of choice for defendants who have retained counsel. *Id.* See accompanying Memorandum of Law.

3. The Prosecution filed its Notice of Intention Not to Seek the Death Penalty on December 5, 2009. On December 11, 2009 Caylee Anthony's remains were discovered. On April 13, 2009 the Prosecution filed a Notice of Intent to Seek the Death Penalty.

4. The Prosecution waited four months after the discovery of the remains to change course and seek the death penalty. Further, nothing tendered in discovery indicates any reason to change course. *See* accompanying Memorandum of Law.

5. On March 12, 2009 a hearing was held on the Prosecution's Motion to Determine Potential Conflict of Interest. At that hearing, the Prosecution learned exactly how much money Casey Anthony had available to fund her defense. The Prosecution knew that it was insufficient to fund a death penalty case. *See* accompanying Memorandum of Law.

6. Specifically, the Prosecution knew that by seeking the death penalty, under Florida Law Casey Anthony would have to hire counsel in addition to her retained counsel Jose Baez, because he was not qualified to defend a death case. The Prosecution knew that this would financially break the defense. *See* accompanying Memorandum of Law.

7. Furthermore, the Prosecution are experienced practitioners in the area of death penalty prosecution. They were therefore, aware of the tremendous costs to the defendant in defending a death penalty case. *See* accompanying Memorandum of Law.

8. Additional circumstantial evidence exists to support the defendant's claim.

9. Therefore, it is clear that in deciding to pursue the death penalty the Prosecution exercised its discretion for the impermissible purpose of attempting to prevent Miss Anthony from exercising her constitutional right to counsel of choice. *See* accompanying Memorandum of Law.

WHEREFORE, the Defendant CASEY MARIE ANTHONY respectfully requests this


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. Allow an *in camera*, sealed hearing at which time this Honorable Court may hear additional evidence from the defense in support of its motion;
- e. Preclude the Prosecution from seeking the death penalty

Respectfully submitted,

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J. CHENEY MASON, one of the attorneys for  
CASEY MARIE ANTHONY.



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

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

Dated: \_\_\_\_\_, 2010

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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 \_\_\_\_\_ day of April, 2010.

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CASEY MARIE ANTHONY,	)	Hon. Stan Strickland
	)	
Defendant.	)	

**MEMORANDUM OF LAW IN SUPPORT OF SECOND DEFENSE MOTION TO PRECLUDE DEATH PROCEDURES FOR IMPERMISSIBLE PROSECUTORIAL MOTIVES**

COMES NOW the Defendant, CASEY MARIE ANTHONY, by and through her attorneys J. CHENEY MASON, ANDREA D. LYON and JOSE A. BAEZ, and submits this Memorandum of Law in Support of her Motion to Preclude Death Procedures for Impermissible Prosecutorial Motives. In support of her motion, Miss Anthony states as follows:

**SUMMARY OF ARGUMENT**

The Prosecution filed its Notice of Intent to Seek the Death Penalty in order to financially break the defense and thereby deny Miss Anthony’s constitutional right to counsel of choice. The judiciary has the authority to curb prosecutorial discretion where the prosecution harbors motivations separate and apart from the prosecutorial duty to see that justice is done and that infringe the defendant’s constitutional rights. *See State v. Donner*, 500 So.2d 532, 533 (Fla. 1987) (“As noted in *Bloom*, the judiciary has authority to curb pretrial prosecutorial discretion only in those instances where impermissible motives may be attributed to the prosecution, such as bad faith, race, religion or a *desire to prevent the exercise of the defendant’s constitutional rights.*”) (internal quotation marks omitted) (emphasis added). Given the constitutional requirement of heightened reliability in capital cases, *see Black v. Alabama*, 447 U.S. 625, 638

(1980), it is especially important that this Court prevent the Prosecution from seeking the death penalty for a bad faith purpose, and from the desire to prevent the exercise of the defendant's constitutional rights.

The Sixth Amendment to the United States Constitution ensures a criminal defendant the right to counsel. *United States v. Gonzales-Lopez*, 548 U.S. 140, 143 (2006). An element of that right is the right to counsel of choice for defendants who are able to afford retained counsel. *Id.*

By seeking the death penalty the Prosecution sought to financially break the defense and deprive Miss Anthony of her counsel of choice. The Prosecution decided to pursue the death penalty only after learning that Miss Anthony had insufficient funds to pay for the defense of a death penalty case. Further, the discovery of the body did not provide any evidence to justify imposition of the death penalty. Additionally, the Prosecution knew that as a result of seeking the death penalty Miss Anthony would be required to either replace her counsel of choice with a number of additional more costly "death qualified" attorneys, or to add additional costly counsel she had not required before or to accept appointed counsel. Finally, the Prosecution, being experienced in death penalty trials, knew that \$205,000 was grossly insufficient to cover the substantial costs incurred in such cases. The Prosecution knew that Miss Anthony could not afford this course of action.

Therefore, it is clear that the Prosecution decided to seek the death penalty in order financially break the defense and deprive Miss Anthony of her counsel of choice. The Court has the authority to bar the death penalty where the Prosecution exercises its discretion in bad faith, for impermissible motives and in order to prevent the Defendant from exercising her constitutional rights. *See State v. Donner*, 500 So.2d 532, 533 (Fla. 1987).

#### **STATEMENT OF FACTS**

On July 15, 2008, Cynthia Anthony, Miss Anthony's mother, called the Orange County Sheriff's Department to report that Caylee Anthony, Miss Anthony's daughter, was missing. On July 16, Detective Yuri Melich interviewed Miss Anthony regarding her daughter's disappearance. *See* Memorandum of Law in Support of Defense's Motion to Preclude Death Procedures. The next day, Miss Anthony was arrested for providing false information to Detective Melich, obstructing a criminal investigation, and neglect of a child. On October 14, 2008 a grand jury indicted Miss Anthony on seven charges including the first degree murder of her daughter, Caylee Anthony, aggravated child abuse, aggravated manslaughter of a child, and four counts of providing false information to a law enforcement officer. *See* Indictment of Casey Marie Anthony. Miss Anthony entered a plea of not guilty for all of the charges filed against her. The Prosecution filed a notice of Intention Not to Seek the Death Penalty on December 5, 2008, herein **Exhibit A**.

On December 11, 2008 Roy Kronk discovered the skeletal remains of Caylee Anthony in an area off Suburban Drive. An autopsy was performed on Caylee Anthony remains from December 11 through December 23. *See* Memorandum of Law in Support of Defense's Motion to Preclude Death Procedures. Despite the fact that there was no way to determine the cause of death the autopsy report concluded that Caylee Anthony's cause of death was "[h]omicide by undetermined means." *See Id.* The autopsy report states that no evidence of trauma was revealed by the medical examiner's examination of the remains. *See Id.* A toxicology examination was conducted on the skeletal remains and hair on May 15, 2009. *See Id.* The toxicology examination concluded that neither volatiles nor drugs were present in the child's remains. *See Id.* It is clear from the autopsy report that there is no way to determine the cause of Caylee Anthony's death.

In order to possibly remove Mr. Baez as Miss Anthony's counsel, the Prosecution filed Motion to Determine Potential Conflict of Interest on March 9, 2009. herein **Exhibit B**. Mr. Baez filed his Objection and Motion to Strike the State's Motion to Determine Potential Conflict of Interest (Objection and Motion to Strike) on March 10, 2009. herein **Exhibit C**. In that motion the defense refuted the Prosecution's allegations against Mr. Baez.

The *in camera* hearing on the State's Motion to Determine Potential Conflict of Interest was held on March 12, 2009. At this hearing the Prosecution asked whether Mr. Baez had secured a lucrative book deal regarding Miss Anthony's case and therefore had a conflict of interest as Miss Anthony's counsel. Mr. Baez emphatically denied any such deal, and the State failed to provide any evidence to support its allegations. The Prosecution also sought to learn how Miss Anthony was funding her defense. Mr. Baez explained that Miss Anthony had sold a number of photographs to ABC in exchange for \$200,000. Additionally, Mr. Baez indicated that the client had received \$5,000 from an unnamed source. Thus, as of March 12, 2009 the Prosecution knew exactly how much money Miss Anthony had available to fund her defense.

Less than a month later, on April 13, 2009, the Prosecution filed a Notice of Intent to Seek the Penalty of Death. *See Exhibit D*. The notice stated merely that "additional information had become available" since the Prosecution provided notice of its intent not to seek the death penalty in December, without providing any indication of what that "additional information" was. *Id.* Following the Prosecution's filing of this notice, Miss Anthony's counsel sent a letter to the Prosecution requesting the additional information that had become available since the Prosecution provided notice of its intent not to seek the death penalty. *See* Letter from Jose Baez to Linda Drane Burdick (April 16, 2009), herein **Exhibit E**. The Prosecution has not responded to this inquiry.

## ARGUMENT

### **I. The Judiciary has the Authority and Duty to Curb Prosecutorial Discretion Where the Prosecution has Impermissible Motives**

Although the discretion to prosecute is broad, the United States Supreme Court has recognized that is not without limits. *United States v. Batchelder*, 442 U.S. 114, 125 (1979). The Florida Constitution grants to the executive branch the decision to charge and prosecute, and the State's Attorney has discretion in deciding whether and how to prosecute. Fla. Const. art. II § 3 (establishing separation of powers between legislative, judicial and executive branches). Nonetheless, the Florida Supreme Court has recognized that the judiciary has the authority and responsibility to restrict a prosecutor's discretion in seeking the death penalty when the prosecution has impermissible motives, such as bad faith, or the desire to prevent the exercise of a defendant's constitutional rights. *State v. Donner*, 500 So.2d 532, 533 (Fla. 1987). A judge's decision to bar the prosecution from seeking the death penalty is not subject to interlocutory appeal. *See* Fla. R. App. P. 9.140(c)(1) (an order barring the Prosecution from seeking the death penalty is *not* among the list of appeals by the State that are permitted).<sup>1</sup>

Furthermore, the judiciary has the duty and responsibility to protect individuals from unconstitutional invasion of their rights by all branches of government. *United States v. Butler*, 297 U.S. 1, 62-63 (1936). Specifically the Sixth Amendment to the United States Constitution requires this court to protect the defendant's right to counsel. *United States v. Gonzales-Lopez*, 548 U.S. 140, 143 (2006). Implicit in that right is the right to counsel of choice where the defendant has retained private counsel and does not require appointed counsel. *Id.* Therefore, this Court has the authority and obligation to protect Miss Anthony's Sixth Amendment rights by

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<sup>1</sup> The Prosecution may still seek review of this decision by writ of certiorari, *see Brown v. State*, 521 So.2d 110, 112 (1988), but there is no requirement that a higher court entertain such an appeal, *see Combs v. State*, 436 So.2d 93, 96 (Fla. 1983).

precluding the Prosecution from seeking the death penalty because the Prosecution harbors bad faith motives.

**II. Given The Requirement of Heightened Reliability in Capital Cases, this Court Must Ensure that the Prosecution's Decision to Seek the Death Penalty is Not Driven by Impermissible Motives.**

Compelling circumstantial evidence supports the premise that in seeking the death penalty the Prosecution was motivated by the fact that the cost of defending a death case would financially break the defense, and thereby deprive Miss Anthony of her Sixth Amendment right to counsel of choice. The death penalty is categorically different from all other punishments. *See e.g. Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) (“From the point of view of the defendant, it is different in both severity and finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizen also differs dramatically from any other legitimate state action.”) (opinion of Stevens, Stewart, and Powell JJ.); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (“[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only one or two.”) This difference has lead the Supreme Court to place “special constraints on the procedures used to convict an accused of a capital offense and sentence him to death.” *See Murray v. Giarrantano*, 492 U.S. 1, 8-9 (1989); *see also Beck v. Alabama*, 447 U.S. 625, 638 (1980) (“[W]e have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination.”); *Woodson*, 428 U.S. at 304-05 (recognizing a heightened reliability requirement under the Eighth and Fourteenth Amendments).

While the Supreme Court upheld Florida's current death penalty statute as facially constitutional in *Proffitt v. Florida*, 428 U.S. 242, 252-52 (1976), it is unconstitutional as applied to Miss Anthony. The Prosecution initially declined to seek the death penalty, but months later, after learning exactly how much money Miss Anthony had available to pay for her defense, the Prosecution abruptly changed course and filed its Notice of Intent to Seek the Death Penalty. The Prosecution attempted to prevent Miss Anthony from exercising her constitutional right to counsel of choice. Under such circumstances, the Prosecution's actions have significantly diminished the reliability of these proceedings. See ABA Standards of Criminal Justice relating to Prosecution Function 3-3.9(f) ("The prosecutor should not bring or seek charges greater in number or degree than can reasonably be supported with evidence at trial or than are necessary to fairly reflect the gravity of the offense."); see also Florida rules of Professional Conduct 3.8 cmt ("A prosecutor has the responsibility of a minister of justice not simply that of an advocate.") Therefore, in order to support the Supreme Court's mandate of heightened reliability the Court must bar the Prosecution from seeking the death penalty.

### **III. The Sixth Amendment of the United State Constitution Guarantees the Defendant the Right to Counsel of Choice.**

The Sixth Amendment states that "in all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defence." U.S. Const. amend. XI. The right to counsel logically includes the right to counsel of choice for those defendants who do not require appointed counsel. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006) (citing *Wheat v. United States*, 486 U.S. 153, 159 (1988))

In *Gonzalez-Lopez* the Supreme Court recognized the existence of the right to counsel of choice and held that the right was of such high importance that its violation results in a structural

error requiring automatic reversal. *Id.* at 150. In *Gonzalez-Lopez*, the defendant's counsel of choice, a California licensed attorney, had been wrongfully denied *pro hac vice* admission to the Missouri court prosecuting the defendant. *Id.* Ultimately the defendant was convicted. *Id.* at 143. Before the Supreme Court, the Government argued that the violation of the right to counsel is only complete after a showing of ineffectiveness under *Strickland v. Washington*. *Id.* at 144. Alternatively the Government argued that to show error a defendant must show that the counsel of choice would have pursued a different trial strategy and that the defendant was thereby prejudiced. *Id.* at 144-45. The Court rejected the Government's argument and held that the defendant's Sixth Amendment right to counsel had been violated the moment his right was erroneously deprived regardless of effectiveness of counsel or prejudice. *Id.* at 145. Further, the court recognized the paramount importance of the Sixth Amendment guarantee of counsel of choice by holding that its deprivation was a structural error. *Id.* The court explained that such errors are indeterminate and difficult to quantify, pervade the entire trial, and cast doubt on its reliability. *Id.*

The Prosecution sought to financially break the defense and thereby deprive Miss Anthony of her Sixth Amendment right to counsel of choice.

**A. The timing of the Prosecution's Notice of Intent to Seek the Death Penalty circumstantially shows an intent to financially break the defense.**

The Prosecution's timing in filing the Notice of Intent to Seek the Death Penalty is indicative of its vindictive attempt to financially break the defense. The Prosecution initially brought first degree murder charges against Miss Anthony on October 14, 2008, and filed a Notice of Intent to Note Seek the Death Penalty on December 5, 2008. On April 13, 2009 the

Prosecution abruptly changed course and decided to seek the death penalty against Miss Anthony.

What occurred during the time between the filing of the Intent to Not Seek the Death Penalty in December of 2008 and the about face that occurred on April 13, 2009 demonstrates that the Prosecution was driven by impermissible motives. On March 9, 2009, the Prosecution filed its Motion to Determine Potential Conflict of Interest. This motion accused Mr. Baez of having secured a lucrative deal to “sell the rights” to Miss Anthony’s case. This motion was completely without basis in fact and the accusations were unequivocally denied by Mr. Baez in his Objection and Motion to Strike State’s Motion to Determine Potential Conflict of Interest.

A hearing on the motion was held on March 12, 2009. The hearing was held in chambers and under seal. Present at this hearing was Mr. Baez, Miss Anthony, Judge Stan Strickland and prosecutors Linda Drane Burdick and Jeff Ashton. During this hearing the Court first asked Mr. Baez about the any alleged deals relating to the “sale of rights.” Mr. Baez flat out denied any such deal existed and Miss Anthony agreed. Next Mr. Baez was asked how Miss Anthony was funding her defense. Mr. Baez informed the Court that Miss Anthony had secured a deal with ABC where in exchange for photos of Caylee she received \$200,000. Additionally, Mr. Baez explained, the defense had received \$5,000 from an undisclosed donor.

Therefore, as of March 12, 2009 the Prosecution knew, not only where Miss Anthony had received her money from, but *exactly* how much money was available for Mr. Baez to defend Miss Anthony through trial. On April 13, 2009, a mere *one month* after the hearing and without any additional evidence coming to light, the Prosecution abruptly reversed course and decided to pursue the death penalty against Miss Anthony.

The suspicious nature of the Prosecution's timing cannot be denied. Between the date the body of Caylee was discovered and the Prosecution's reversal of its death penalty position, no substantial evidence was discovered that would explain the sudden change of course. *See* Memorandum of Law in Support of Defense's Motion to Preclude Death Penalty Procedures Part III(B). While, only one month before the Notice of Intent to Seek the Death Penalty was filed the Prosecution learned exactly how much money was available to the defense. Further, the Prosecution knew that \$205,000, while possibly sufficient to fully fund a first degree murder trial, was a paltry fraction of the funds that would be required to defend a death penalty trial.

It is clear that the Prosecution pursued the death penalty for the bad faith purpose of trying to financially break the defense. Further, the Prosecution acted from a desire to deny Miss Anthony her Sixth Amendment right to counsel of choice.

**B. No evidence was discovered after the discovery of the body to warrant the death penalty.**

In addition to the suspicious timing of the Notice of Intent to Seek the Death Penalty no substantial evidence, changing the nature of the charges, arose as a result of the discovery of Caylee's body. No evidence was deduced from the discovery of the body to elevate the charge of first degree murder to capital murder.

Neither the autopsy report nor any other evidence resulting from the discovery of the body or otherwise changed or contributed to the charge of first degree murder. *See* Memorandum of Law in Support of Defense's Motion to Preclude Death Procedures Part III(B)(i). The autopsy report concluded that Caylee Anthony's cause of death was "homicide by undetermined means." *Id.* No evidence was uncovered as a result of the discovery of the body generally or the autopsy specifically to support any statutory aggravating factors beyond that the

victim was under 12 years of age, which was surely known to the Prosecution before the remains were discovered.<sup>2</sup> See Memorandum of Law in Support of Defense's Motion to Preclude Death Procedures Part B.

In short, after the body was found the Prosecution did not file a Notice of Intent to Seek the Death Penalty. Two weeks later when the autopsy was completed the Prosecution still did not file a Notice of Intent to Seek the Death Penalty. Three months later the Prosecution learned exactly how much money Miss Anthony had available to pay for her defense. Only then, after acquiring that information and a full four months after the body had been discovered, did the Prosecution abruptly reverse its position and file a Notice of Intent to seek the Death Penalty.

Therefore, it is clear that the Prosecution did not rely on the discovery of the body or evidence obtained as a result of that discovery in deciding to seek the death penalty. Instead, it appears that the Prosecution only filed their Notice of Intent to Seek the Death Penalty after they had learned that Miss Anthony had insufficient funds to defend a death penalty case.

**C. Additional evidence exists to support the Defense's position that the Prosecution is seeking the death penalty with impermissible motives.**

The defense submits that additional evidence exists showing the Prosecution's bad faith attempt to financially break the defense and deprive Miss Anthony of her counsel of choice. The defense requests and *in camera*, sealed hearing to present this additional evidence.<sup>3</sup>

**D. By seeking the death penalty, with knowledge of the funds available to Miss Anthony, the Prosecution sought to deny Miss Anthony her Sixth Amendment right to counsel of choice.**

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<sup>2</sup> To impose the death penalty the prosecution must prove the existence of multiple aggravating circumstances. See Fla. Stat. § 921.141.

<sup>3</sup> The defense additionally requests the opportunity to file additional exhibits under seal.

The Florida Rules of Criminal Procedure establish the criteria an attorney must satisfy in order to be “qualified” to defend a death penalty case. *See Fla. R. Crim. P. Rule 3.112.*

Specifically the rules require that lead counsel have “prior experience... in at least two state or federal cases tried to completion in which the death penalty was sought.” *Id.* at §3.112(f)(3).

Further, the rules require defendants to be represented by co-counsel in addition to lead counsel.

*Id.* Finally, the rules require lead counsel in a death penalty case to have acquired substantial trial experience as lead counsel in felony and murder cases. *Id.* at §3.112(f).

At the time the Notice of Intent to Seek the Death Penalty was filed Mr. Baez did not possess the requisite death penalty experience to serve as lead counsel. As a result Miss Anthony had three options; 1) either hire additional, new counsel that satisfied the requirements of the Florida Rules of Criminal Procedure; 2) replace Mr. Baez with at least two new attorneys; or 3) waive her right to counsel of choice and accept court appointed counsel. The Prosecution knew that this would be the result because the same Florida Rule of Criminal Procedure requires each circuit to maintain a list of all death qualified counsel. *Id.* at §3.112(f).

Naturally, hiring additional counsel would increase the costs of the case; additional counsel require additional fees. Further, new counsel would expend time and expense getting up to speed on the case; whereas, Mr. Baez had represented Miss Anthony from the very beginning and was intimately familiar with the case. *See United States v. Urbana*, 770 F.Supp. 1552 (S.D. Fla. 1991) (“Obviously, having to retain a second attorney to ‘reinvent the wheel,’ so to speak, imposes additional financial burdens on an already depleted defendant.”) The Prosecution knew that \$205,000 was insufficient to fund a death penalty case through pre-trial, the guilt/innocence phase of trial and the sentencing phase of trial with multiple experienced and costly attorneys.

Further the Prosecution knew that Mr. Baez would be unable to continue to represent Miss Anthony on his own.

Furthermore, the option of waiving her Sixth Amendment right to counsel of choice and accepting court appointed counsel presented Miss Anthony with an unconstitutional choice.

Miss Anthony's counsel of choice in this case was Mr. Baez, and she did not have the funds to pay for additional counsel. By seeking the death penalty the Prosecution sought to deprive Miss Anthony of her Sixth Amendment right to counsel, as recognized in *Gonzalez-Lopez*, by requiring Mr. Baez to leave the case or Miss Anthony to acquire additional counsel.

**E. The Prosecution knew that Miss Anthony had insufficient funds to cover the costs associated with a death penalty case.**

Death penalty cases are extremely expensive to defend and try. This is because the Supreme Court has decided "death as different" and therefore requires many additional due process protections.<sup>4</sup> Because a defendant's life is on the line death penalty defense attorneys are required to pull out all the stops at each stage of the case. At pre-trial the defense must file and argue extensive and robust motions. Further, *voir dire* is lengthy and difficult because jurors must be death qualified. Because death qualified jurors are conviction prone<sup>5</sup> the defense must tread carefully through the proceeding to see that jurors are selected that will minimize the prejudicial effect of conviction prone jurors. In addition to the hours of preparation and investigation, the defendant may also be required to hire expensive jury selection experts.

Furthermore, a death penalty case is bifurcated. Thus, unlike a defendant in any other sort of criminal trial, the death penalty defendant must simultaneously prepare to defend two distinct trials. A death penalty defendant incurs all of the normal expenses associated with

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<sup>4</sup> See Ashley Rupp, *Death Penalty Charging Decisions and County Budgetary Restrictions: Is the Death Penalty Arbitrarily Applied based on County Funding?*, 71 Fordham L. Rev. 2735, 2753 (2003).

<sup>5</sup> See Memorandum of Law in Support of Defense Motion to Preclude Death Procedures Part III(D).

defending a felony case at trial; including; costs of investigation, interviewing witnesses, locating and hiring experts on psychology and forensic pathology and preparing evidence and witnesses. However, the death penalty defendant must incur the additional costs of defending the penalty phase of trial.<sup>6</sup> For the penalty phase the defense must conduct a painstakingly complete and thorough investigation of the defendant's history. This includes interviewing anyone closely connected to the defendant; locating and interviewing doctors, teachers, and psychologists; and reviewing arrest, medical and psychiatric reports. Further, this may require the defendant to submit to examination by experts in psychology and psychiatry. Finally, the defense will need to hire investigators, mitigation experts, and other experts to defend the death penalty phase.

Being experienced in death penalty trials the Prosecution was fully aware of the expense the defendant would be required to incur in order to defend her case. Furthermore, the Prosecution knew that the \$205,000 was wildly insufficient to fund a death penalty case. It is clear that the Prosecution only sought the death penalty because they knew that the costs associated with defending the case would ultimately financially break the defense.

### CONCLUSION

The Court has the authority to curb prosecutorial discretion in seeking the death penalty where the Prosecution exercises that discretion in bad faith, for impermissible motives or from a desire to prevent the defendant from exercising a constitutional right. Here, the Prosecution only

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<sup>6</sup> Jon B. Gould, Lisa Greenman, *Update on the Cost, and Availability of Defense Representation in Federal Death Cases: Preliminary Report on Phase I Research*, available at [http://www.uscourts.gov/defenderservices/FDPC\\_Content.cfm](http://www.uscourts.gov/defenderservices/FDPC_Content.cfm) (average cost of defending a federal death penalty case is \$620,032, concluding that defendants whose representations cost the least had an increased probability of receiving a death sentence); David J. Cook, *Potential Savings from Abolition of the Death Penalty in North Carolina*, *American Law and Economics Review*, December 11, 2009 (The study shows death penalty defense cost an additional \$13,180,385 in FY 2005-2006); Annmarie Timmons, *Counting Costs in Death Penalty Cases*, *Concord Monitor*, December 5, 2009 ("The state spent an additional \$1.2 million for the public defender who represented [a death penalty defendant]... compared to the \$70,000 - \$100,000 it costs to defend a typical first degree murder case.")

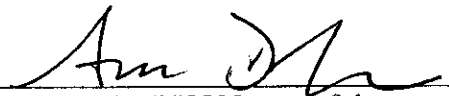
sought the death penalty in order to financially break the defense and to deny Miss Anthony her Sixth Amendment right to counsel of choice.

WHEREFORE, the Defendant CASEY MARIE ANTHONY respectfully requests this 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. Allow an *in camera*, sealed hearing at which time this Honorable Court may hear additional evidence from the defense in support of its motion;
- e. Allow additional exhibits in support of this motion to be filed under seal;
- f. Preclude the Prosecution from seeking the death penalty

Respectfully submitted,

\_\_\_\_\_  
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CASEY MARIE ANTHONY.

  
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ANDREA D. LYON, one of the attorneys  
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Dated: \_\_\_\_\_, 2010

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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 \_\_\_\_ day of April, 2010.

---

JOSE A. BAEZ, ESQUIRE  
FL Bar No.: 0013232  
JOSE L. GARCIA, ESQUIRE  
FL Bar No.: 0026020  
THE BAEZ LAW FIRM  
522 Simpson Road  
Kissimmee, Florida 34744  
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## **TABLE OF EXHIBITS**

**Exhibit A:** State's Notice of Intention Not to Seek the Death Penalty

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**Exhibit E:** Letter from Jose Baez to Linda Drane Burdick (Apr. 16, 2009)

**Exhibit A:**  
**State's Notice of Intention Not to Seek the Death Penalty**

IN THE CIRCUIT COURT OF THE  
NINTH JUDICIAL CIRCUIT, IN AND FOR  
ORANGE COUNTY, FLORIDA

STATE OF FLORIDA

CASE NO: 48-2008-CF-015606-O

Plaintiff,

DIVISION: 16

vs.

CASEY MARIE ANTHONY

Defendant.  
\_\_\_\_\_ /

**NOTICE OF INTENTION NOT TO SEEK THE DEATH PENALTY**

COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney, and gives notice that after due consideration of the facts and law applicable to this case, it is not in the best interest of the people of the State of Florida to pursue the Death Penalty as a potential sentence. Therefore, the State of Florida will not be seeking the death penalty as to CASEY MARIE ANTHONY.

I HEREBY CERTIFY that a true and correct copy of the foregoing NOTICE OF INTENT NOT TO SEEK THE PENALTY OF DEATH has been furnished to the Defendant, Casey Marie Anthony, 03/19/1986, W/F, at Orange County Jail, Cell F-DORML-12, Post Office Box 4970, Orlando, FL 32802-4970, and to Jose A. Baez, Counsel for Defendant, 522 Simpson Road, Kissimmee, FL 34744, on this \_\_\_\_\_ day of December, 2008.

\_\_\_\_\_  
Linda Drane Burdick  
Assistant State Attorney  
Florida Bar No.: 826928  
415 N. Orange Avenue, P.O. Box 1673  
Orlando, FL 32802  
(407)836-2402

**Exhibit B:**  
State's Motion to Determine Potential Conflict of Interest

IN THE CIRCUIT COURT OF THE NINTH  
JUDICIAL CIRCUIT, IN AND FOR  
ORANGE COUNTY, FLORIDA

STATE OF FLORIDA  
Plaintiff,

CASE NO: 48-2008-CF-015606-0

DIVISION: 16

vs.

CASEY MARIE ANTHONY  
Defendant.

MOTION TO DETERMINE POTENTIAL CONFLICT OF INTEREST AND WAIVER

COMES NOW the State of Florida and moves this court to make inquiry to determine the existence of any potential conflict of interest and establish the Defendants knowledge of and waiver of any such potential conflict of interest. As grounds therefore the State would request the court to take Judicial Notice of the following facts as established by prior proceedings before this Court or matter contained in the Court's file.

1. The Defendant was arrested on July 16, 2008 for charges that would later be included in CF08-10925.
2. The Defendant later filed a Motion to Set Bond that was heard before this court on July 22, 2008.
3. At that hearing, the court heard extensive testimony as to financial status of the Defendant and her parents George and Cindy Anthony, which established little, if any, net worth on the part of George and Cindy Anthony and none on the part of the Defendant.
4. In the months since that hearing, according to pleadings, approximately eight different lawyers have been retained to represent the Defendant in different aspects of this case and numerous experts have been announced as having been retained in this matter.
5. On October 14 2008 the Defendant was indicted by the Grand Jury of Orange County Florida on the charges in the instant case.

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Based upon the forgoing facts, logic dictates that certain conclusions must be drawn. First and foremost among those conclusions is that the Defendant's seeming conversion from pauper to princess did not come from the sale of some tangible asset available to her prior to her initial arrest on charges related to this case. The only asset that appears available to the Defendant is her story or otherwise valueless items, such as photographs or video tapes, which have value only because of her story. The second conclusion that logic dictates is that, based upon the Defendant's present circumstances, it would be virtually impossible for her to be personally managing those assets. The only person who appears to be in a position to do so is her counsel Jose Baez.


Such precarious financial relationships are fraught with potential for claims of conflict of interest. Hypothetically, Mr. Baez' retainer agreement establishes as his payment for services and fees, the rights to sell some aspect of the Defendant's "story". Since the value of her "story" may change based upon the outcome of this case, such an arrangement could easily be argued by the Defendant, in the inevitable post conviction motion, as giving the attorney an incentive to advise his client in a manner that increased the value of the property he held, as opposed to advising her as to the course that was in her best interest. This case would not be the first to entertain such claims. See Brown v. State 894 So. 2d 137 (Fla. 2004) and Neeley v. State 642 So. 2d 494 ( Ala. 1993).

The State is not requesting that, based upon the findings of this inquiry, the court block counsel's representation of the Defendant. We have no interest in interfering with the Defendant's right to counsel of her choice. It is important at this juncture that the court establish on the record the nature of the financial arrangements, the exact source of funds, the Defendant's knowledge of those facts, the existence of any potential conflict of interest, and the Defendant's knowing and intelligent waiver of any such conflict. To fail to make this inquiry at this time is to invite future claims, whether spurious or not, of conflict of interest. The resulting lengthy and costly hearing years down the line, when memories and loyalties have changed, is an unnecessary risk that can be avoided by a prompt and thorough inquiry now.

Should the Court be concerned that the matters to be the subject of this inquiry might be covered under the umbrella of attorney client privilege, please see U.S. v. Horn, 976 F. 2d 1314 (9<sup>th</sup> Cir. 1992); Reiserer v. U.S., 479 F. 3d 1106 (9<sup>th</sup> Cir. 2006); Finol v. Finol, 869 So.2d 666 (4<sup>th</sup> DCA 2004), Brown Distributing Company, v. Marcel, 866 So.2d 160 (4<sup>th</sup> DCA 2004).

Therefore, the State would request that the Court set a hearing. The State has no objection to an in camera hearing with only the State and the Court present should the Defendant so request. At that hearing, counsel for the Defendant should be ordered to produce the following items: 1) Any retainer agreements or correspondence that references payment, promise, anticipation of the transfer of anything of value to counsel for the Defendant from the Defendant; 2) Any document or notation that references the transfer of any literary, publication or licensing rights of any kind related to this case including but not limited to book, movie, video or photographs; 3) Any document or notation that references payment, promise, anticipation of the transfer of anything of value to counsel for the Defendant from any source other than the Defendant; 4) all records of deposits made to the business, trust, or personal accounts of counsel for the Defendant in relation to this case. The State has no objection to an appropriate order limiting the use of such documents for other purposes. In addition to the production of the aforementioned, the Court should order that counsel for the Defendant and the Defendant answer questions propounded by the Court and the State as to these matters. Once the inquiry is completed, the Court should explain any potential conflict of interest issues to the Defendant and assure her complete understanding of and waiver of any such conflict.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Jose A. Baez, 522 Simpson Road, Kissimmee, FL 34744 on this 9th day of March, 2009.

  
\_\_\_\_\_  
Jeffrey L. Ashton  
Assistant State Attorney  
Florida Bar # 318337  
415 N. Orange Avenue, P.O. Box 1673  
Suite 400  
Orlando, FL 32802

**Exhibit C:**  
Defense Objection and Motion to Strike the State's Motion to Determine  
Potential Conflict of Interest

IN THE CIRCUIT COURT OF THE  
NINTH JUDICIAL CIRCUIT, IN AND  
FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

CASE NO.: 2008-CF-015806-O  
DIVISION: 16

JUDGE: STAN STRICKLAND

CASEY MARIE ANTHONY,

Defendant.

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**OBJECTION AND MOTION TO STRIKE THE STATE'S MOTION TO DETERMINE  
POTENTIAL CONFLICT OF INTEREST**

COMES NOW the Defendant, CASEY MARIE ANTHONY, by and through undersigned counsel, and hereby files this objection to the State's *Motion to Determine Potential Conflict of Interest and Waiver* and states the following in support thereof:

1. On March 9, 2009, the State filed a Motion to Determine Potential Conflict of Interest and Waiver.
2. The State files this objection among its own speculation, possibly based on rumors of tabloid news broadcasts.
3. This Honorable Court has previously cautioned all parties from relying on news reports as a basis for its motions.
4. On the eve of a hearing on a Motion for Sanctions, against the State, the Defense questions the timing of the filing of this motion.
5. This motion also comes on the brink of releasing discovery of which Defense counsel was videotaped by law enforcement meeting with his client.
6. The Defense has raised issues with this Honorable Court before, regarding the State's interference with the Defendant's Constitutional Right to counsel.
7. It is the Defense's position that this motion has been filed solely to harass and embarrass the Defendant's counsel, and to possibly deflect attention away from the pending Motion for Sanctions as well as the future motions of misconduct stemming from the

- release of discovery which involves the unauthorized videotaping of the Defendant's counsel, while meeting with the Defendant.
8. The undersigned counsel wishes to be clear and end all speculation before this Honorable Court. The State completely speculates by stating *"Hypothetically, Mr. Baez' retainer agreement establishes as his payment for services and fees, the rights to sell some aspect of the Defendant's 'story'".*
  9. The Defense would not like this Honorable Court to have to engage in matters of speculation. The undersigned's Retainer Agreement does not contain any clauses allowing him financial gain based on selling the rights to Ms. Casey Anthony's "story", nor are there any other instruments giving Defense counsel or any third party the rights to Ms. Casey Anthony's "story".
  10. The undersigned counsel can represent to the court that it has no conflicts of interest.

WHEREFORE, Defendant, CASEY MARIE ANTHONY, by and through undersigned counsel, prays that this Honorable Court enter an order requiring the State to produce any evidence in which the State has regarding any conflicts of interest. In the event that the State cannot produce any evidence other than mere speculation, the Defense moves to strike said motion.

#### 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, by facsimile delivery on this \_\_\_\_\_ day of March, 2009.

---

JOSE A. BAEZ, ESQUIRE  
FL Bar No.: 0013232  
JOSE L. GARCIA, ESQUIRE  
FL Bar No.: 0026020  
THE BAEZ LAW FIRM  
522 Simpson Road  
Kissimmee, Florida 34744  
Tel.: (407) 705-2626  
Fax: (407) 705-2625

IN THE CIRCUIT COURT OF THE  
NINTH JUDICIAL CIRCUIT, IN AND  
FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,  
vs.

CASE NO.: 48-2008-CF-015606-O  
DIVISION: 16

JUDGE: STAN STRICKLAND

CASEY MARIE ANTHONY,

Defendant.

**SWORN AFFIDAVIT**

1. I, Casey Marie Anthony, have read the Prosecutors' motion that was filed and dated March 9<sup>th</sup>, 2009.
2. I, Casey Marie Anthony, have retained Jose A. Baez, Esq., as my attorney for the above-styled cause.
3. I signed and executed a Retainer Agreement for my attorney's services.
4. Said Retainer Agreement does not contain any clauses or parts that allow or entitle him to any rights that would allow him to sell my "story", or that of my daughter, Caylee Marie Anthony.
5. There are no other Agreements selling my "story".
6. I am executing this affidavit voluntarily and of my own free will without coercion or undue pressure from anyone.

7. I believe that Mr. Ashton is angry because I have refused to take a plea agreement for a crime that I DID NOT COMMIT.

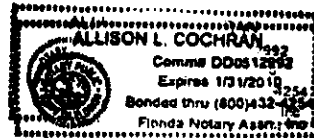
03/10/2009  
Date

[Signature]  
Casey Marie Anthony, Affiant

STATE OF FLORIDA  
COUNTY OF ORANGE

SWORN TO AND SUBSCRIBED BEFORE ME ON THIS THE 10 day of March, 2009.

[Signature]  
Notary Public



Personally known to me   
Produced identification  Type of identification produced \_\_\_\_\_

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail and or Fax/hand delivered to the Office of the State Attorney at 415 North Orange Avenue, Orlando, Florida 32801, this \_\_\_\_\_ day of March, 2009.

\_\_\_\_\_  
JOSE A. BAEZ, ESQUIRE  
FL Bar No.: 0013232  
JOSE L. GARCIA, ESQUIRE  
FL Bar No.: 0026020  
THE BAEZ LAW FIRM  
522 Simpson Road  
Kissimmee, Florida 34744  
Tel.: (407) 705-2626  
Fax: (407) 705-2625

**Exhibit D:**  
State's Notice of Intent to Seek the Penalty of Death

**NOTICE OF INTENT TO SEEK THE PENALTY OF DEATH**

THE STATE OF FLORIDA hereby notices the Defendant and the Court that, based upon additional information that has become available since the waiver of intent to seek the penalty of death filed on December 5, 2008, sufficient aggravating circumstances exist to justify the imposition of the Death Penalty pursuant to Florida Statute 921.141, as to this Defendant in this case. Therefore, the State will be seeking the imposition of the Death Penalty should the Defendant be convicted in the above referenced matter.

I HEREBY CERTIFY that a true and correct copy of the foregoing NOTICE OF INTENT TO SEEK THE PENALTY OF DEATH has been furnished to the Defendant, 03/19/1986, W/F at Orange County Jail, Cell F-DORML-22, Post Office Box 4970, Orlando, FL 32802-4970, and to Jose A. Baez, Counsel for Defendant, 522 Simpson Road, Kissimmee, FL 34744, on this 13<sup>th</sup> day of April, 2009.

LAWSON L. LAMAR  
STATE ATTORNEY

**Exhibit E:**  
Letter from Jose Baez to Linda Drane Burdick (Apr. 16, 2009)



April 16, 2009

Linda Drane Burdick, Esq.  
c/o Office of the State Attorney  
415 N. Orange Ave.  
Orlando, FL 32801

Re: State of Florida v. Casey Marie Anthony  
Case No.: 48-2008-CF-0015606-O

Dear Ms. Burdick,

I am in receipt of your *Notice of Intent to Seek the Penalty of Death* that your office filed on April 13<sup>th</sup>, 2009.

In said Notice, you mention that “..based upon additional information that has become available since the waiver of intent to seek the penalty of death filed on December 5, 2008, sufficient aggravating circumstances exist to justify the imposition of the Death Penalty..”.

Due to the seriousness of this matter, please send us immediately the copies of the “additional proof” you possess that has become available since December 5<sup>th</sup>, 2008. Taking into consideration that this is now a Death Penalty case, I would ask that the State Attorney’s Office make more of an effort in diligently providing copies of all of the Discovery to the Defense. By the way, can I have a copy of the autopsy report on this Death Penalty case?

Sincerely,

  
Jose A. Baez, Esq.

522 Simpson Road · Kissimmee, Florida 34744  
Tel.: (407) 705-2626 · Fax: (407) 705-2625  
Website: [www.BaezLawFirm.com](http://www.BaezLawFirm.com)