



2. In *Ring v. Arizona*, 536 U.S.584 (2002) the Court extended the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to capital cases, holding that the Sixth Amendment requires a jury to find the aggravating factors necessary for imposing the death penalty.

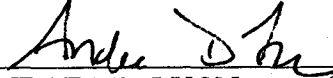
3. Although the Florida Supreme Court in *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), seemed to reject a challenge to the constitutionality of Florida's capital sentencing statute, a majority of the Court expressed concerns that the advisory role of the jury did not comply with *Ring. Id.* In addition, a majority of the justices expressed the need for revisions to the instructions because of the questionable issues of constitutionality. *Id.*, See accompanying Memorandum of Law.

4. The concerns expressed by some members of the Florida Supreme Court highlight what is patently clear – that jury cannot be advisory only, at least not as to the aggravating factors. (See Def.'s Mem. Declare Fl. Stat. 921.141 Unconstitutional under *Ring v. Arizona*).

5. The denial of this motion would deny Miss Anthony due process of law pursuant to Article I, Sections 2, 9, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

WHEREFORE, Defendant, Miss Anthony, hereby moves this Honorable Court to issue its order prohibiting references to the jury's role as "advisory" or the jury's penalty verdict as a "recommendation."

Respectfully submitted,



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



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

Dated: 11/25, 2009

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished to the Office of the State Attorney, 415 North Orange Avenue, Orlando, Florida 32801; via facsimile and /or U.S. Mail on this 26 day of November, 2009.



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## ARGUMENT

**I. Any reference to the jury's role as "advisory" or its verdict as being a "recommendation" violates the Florida and United States Constitutions because it diminishes the jury's sense of responsibility.**

In *Ring v. Arizona*, 536 U.S. 584 607 (2002), the Supreme Court held that the Sixth Amendment requires a jury to find the aggravating factors necessary for imposing the death penalty, thus expanding the rule in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to include capital cases. *Ring's* holding means that the *jury*, not the judge, is required to make findings of fact, unanimously, and beyond a reasonable doubt as to the aggravating circumstances that may exist in order to justify the death sentence. *Id.*; *see also* Def.'s Mem. Declare Fl. Stat. 921.141 Unconstitutional under *Ring v. Arizona*<sup>1</sup>. *Ring* emphasizes the importance of the jury's role in the sentencing phase. In order to comply with the Sixth Amendment's guarantee of a trial by jury, this Court must also emphasize that the jury's role is vital, as expressed by Justices in *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), and in *In Re: Standard Jury Instructions in Criminal Cases – Penalty Phase of Capital Trials*, No.SC05-1890 (Fla. Oct. 29, 2009).

In *Caldwell v. Mississippi*, the Supreme Court of the United States specifically held that it "is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. 320, 328, (1985). The Court reasoned that this diminishes the jurors' sense of responsibility and leads them to choose death over life. *Id.* at 330.

If the jury were to find Miss Anthony guilty, a separate sentencing proceeding would be held at which time the jury would weigh the aggravating and mitigating circumstances and render an advisory sentence. Fla.Stat. § 921(2) (2009), *see also In re: Standard Jury Instructions*

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<sup>1</sup> If this Court denies Defense Motion to Declare Fla. Stat. 921.141 Unconstitutional Under *Ring v. Arizona*, then in order to ensure compliance with the Florida and United States Constitutions, it must grant this motion.

*in Criminal Cases*. The trial judge then independently weighs the aggravating and mitigating factors. *Id.* However, the recommendation by the jury, which represents the judgment of the community as to whether the death sentence or life imprisonment is appropriate, is entitled to “great weight.” *McCampbell v. State*, 421 So.2d 1072, 1075 (Fla. 1982) (per curiam) (finding that the jury’s recommendation of life in prison should not have been overturned by the judge and so the case was remanded). *See also In re Standard Jury Instructions* (authorizing an amendment stating that “the jury recommendation must be given great weight and deference”). The recommendation may be rejected by the trial judge only if the facts are “so clear and convincing that virtually no reasonable person could differ.” *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975).

The Florida sentencing scheme must comply with both the United States and Florida Constitutions. In order to do so, this Court must preclude any references to the jury’s role as “advisory” or their verdict as a “recommendation.”<sup>2</sup>

**A. Defining the role of the jury as “advisory” or a “recommendation” creates a diminished sense of responsibility inconsistent with the law.**

In *Caldwell*, the prosecution’s closing arguments at sentencing assured the jury that its sentencing decision would be subject to automatic review. *Caldwell v. Mississippi*, 472 U.S.

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<sup>2</sup> This memo does not in any way concede or retreat from Miss Anthony’s position that the Florida statute is constitutional. *See*, Motion to Declare Fla. Stat. 921.141(5)(l) And/Or the Standard (5)(l) Instruction Unconstitutional Facially and As Applied [victim Under 12 Aggravator]; Motion to Declare Fla. Stat. 921.141 Unconstitutional Under *Ring v. Arizona*, Motion to Declare Sections 921.141(1) Unconstitutional Because it Precludes Consideration of Mitigation by Imposing Improper Burdens of Proof; Motion to Declare Fla. Stat. 921.141 Unconstitutional Due to Its Failure to Narrow the Scope of the Death Penalty; Motion to Declare Fla.Stat. 921.141(5)(h) And/Or The Standard (5)(h) Instruction Unconstitutional facially And As Applied [Heinous Atrocious & Cruel Aggravator]; Motion to Declare Fla. Stat. 921.141(5)(i) And/Or the Standard (5)(i) Instruction Unconstitutional facially and as Applied [Cold, Calculated, Premeditated Aggravator]; Motion to Declare Fal.Stat. 921.141(5)(d) And/Or the Standard (5)(d) Instruction Unconstitutional Facially and as Applied [while in commission of aggravated child abuse]

320, 325 (1985). The trial judge overruled the defense's objections and reinforced the point that the jury did not make the final decision. *Id.* Following the instructions, the jury sentenced the defendant to death. *Id.* The Supreme Court decided that the sentence was invalid because the sentencer was led to believe that the decision for determining appropriateness of death lay elsewhere. *Id.* at 328. This violated the Eighth Amendment because it diminished the jury's sense of responsibility and it created a bias in favor of the death penalty. *Id.* The Eighth Amendment requires a heightened standard of reliability, which the prosecution did not meet in *Caldwell*, and therefore the Court held that the death sentence was invalid. *Id.*

In order to comply with the law established in *Caldwell*, the controlling case in this matter, this Court must prohibit any reference to the jury's role as advisory or the verdict as a recommendation. As in *Caldwell*, in which the prosecution persuaded the jury to believe that its sentencing determination was not final, in Miss Anthony's case, the jury will be led to believe that its decision as to life or death is not final and subject to automatic review by the trial judge. Any reference to the jury's role as advisory or its verdict as being a recommendation would diminish the jury's sense of responsibility. This, according to the Supreme Court, violates the Eighth Amendment.

The constitutionality of Florida's Standard Jury Instructions has been questioned in previous cases and the Florida Supreme Court has attempted to distinguish the instructions from *Caldwell*, however the distinctions are not persuasive. In *Globe v. State*, the Court correctly identified the two distinct issues posed in *Caldwell* and *Ring*; however, because the defense did not raise the *Ring* issue before trial, the Court only considered the *Caldwell* issue. *Globe v. State*, 877 So.2d 663 (Fla., 2004). The Court should have analyzed how the two cases interrelate and harmonized them. In doing so, the Court would find that the instructions are unconstitutional (*see* Def.'s Mem. Declare Fl. Stat. 921.141 Unconstitutional under *Ring v.*

Arizona) - or at the very least - that the use of words such as “advisory” or “recommendation” are impermissible.

Other cases in Florida have held that the Miss Anthony’s position on this issue is incorrect. *See, e.g., Philmore v. State*, 937 So.2d 578, 590 (deciding that the claim for habeas relief based on the jury instructions as advisory was procedurally barred because it was not raised on direct appeal). However, the opinions in cases such as *Philmore* rest on the precedent set by cases such as *Card v. State*, 803 So.2d 613, 628 (Fla. 2001). The difficulty in relying on this precedent is that *Card* specifically states that this claim is incorrect because *Apprendi* does not extend to capital cases. Previous rejections of this claim relied on cases decided before *Ring*; relying on that precedent now is an error. “Blind adherence to prior authority, which is inconsistent with *Ring*, does not...adequately respond to, or resolve the challenges presented by, the new constitutional framework announced in *Ring*.” *Bottoson*, 833 So. 2d at 725 (Lewis, J. concurring). The integration of *Caldwell* and *Ring* is necessary to properly interpret the precedent. It is inconsistent with Florida and United States Supreme Court precedent to rely on cases that do not consider *Ring*.

This Court should do everything possible to keep from minimizing the role of the jury; instead, it should reinforce the importance of their decision pertaining to the sentencing phase. Although the trial judge independently weighs the aggravating and mitigating factors during a sentencing hearing, the judge *must* give great weight to the jury’s decision. *In re Standard Jury Instructions in Criminal Cases – Penalty Phase of Capital Trials*, No. SC05-1890 (Oct. 29, 2009). *Tedder* creates a limitation for the judge’s ability to disregard a decision by the jury. *Tedder*, 322 So.2d at 910. This limitation states that a judge may reject the jury’s decision only when the facts are “so clear and convincing that virtually no person could differ.” *Id.* Therefore, a jury does make the decision as to life or death and it is not merely a recommendation. The

jury's decision can only be reviewed by the judge and rejected if it meets the *Tedder* limitation. See also Def.'s Mem. Declare Fl. Stat. 921.141 Unconstitutional under *Ring v. Arizona* (highlighting how complicated the judge's role is versus the jury's role because the judge can only speculate as to what factors the jury finds in making their recommendation). It is important to note that the *Tedder* limitation is a "crucial protection" for the defendant. *Dobbert v. Florida*, 432 U.S. 282, 295, 97 S.Ct. 2290, 2299, 53 L.Ed.2d 944 (1977). Based on the complex limitation on a judge's final decision in a sentencing phase and the ultimate decision by the jury, it is misleading to inform the jury that their decision is a recommendation or merely advisory. Allowing the jury to believe that the final decision does not rest with them, but in the hands of the judge, would undermine this crucial protection and the role of the jury as ultimate determiner of the sentence.

Because *Caldwell* controls this case and the jury's role is a vital part of sentencing that should not be minimized by instructions leading them to believe that the final decision rest elsewhere, the motion to prohibit reference to the jury's role at the penalty phase as being "advisory" or to the jury's penalty verdict as being a "recommendation" should be granted.

**B. Changes to the instructions that heighten the jury's sense of responsibility are necessary in light of *Ring*.**

Although *Bottoson v. Moore* seemed to reject a challenge to the constitutionality of the Florida sentencing statute, four Justices advocated changes to Florida's Standard Jury Instructions in light of *Ring*. 833 So. 2d 693 (Fla. 2002). Justice Anstead was concerned that "Florida's sentencing scheme is at risk because of the scheme's express reliance upon findings of fact made by the trial judge rather than findings of fact made by a jury." *Id* at 704. Additionally, Justice Quince expressed concern as to whether the jury override procedure is constitutional but stated that this issue was not before the Court in *Bottoson*. *Id.* at 701-702.

Justice Lewis most clearly expressed the need for prospective revisions of the jury instructions in light of *Ring*. He stated:

I write separately to express my view that in light of the dictates of *Ring v. Arizona*, it necessarily follows that Florida's standard penalty phase jury instructions may no longer be valid and are certainly subject to further analysis under the United States Supreme Court's *Caldwell v. Mississippi*...

I recognize that this Court has held that Florida's standard jury instructions are constitutional under *Caldwell*. See *Combs*, 525 So. 2d 853. However, in light of the decision in *Ring v. Arizona*, it is necessary to reevaluate both the validity, and, if valid, the wording of these jury instructions. The United States Supreme Court has defined the reach of *Caldwell* by stating that "*Caldwell* is relevant only to certain types of comment--those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Darden v. Wainwright*, 477 U.S. 168, 183 n. 15, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). In *Ring*, the high Court made the jury's role in capital sentencing absolutely clear--the jury must find the aggravating factors. See *Ring*, 536 U.S. at \_\_\_, 122 S.Ct. At 2443.

As the Court in *Ring* stated, "[T]he right to trial by jury...would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." *Id.* Clearly, under *Ring*, the jury plays a vital role in the determination of a capital defendant's sentence through the determination of aggravating factors. However, under Florida's standard penalty phase jury instructions, the role of the jury is minimized, rather than emphasized, as is the necessary implication to be drawn from *Ring*.

*Bottoson*, 833 So. 2d at 725.

*Caldwell* focuses on how essential it is to make sure the jury has a sense of responsibility when making a decision between life and death, and *Ring* focuses on the jury's vital role in determining what factors to consider when sentencing someone to life or death. It therefore follows, as Justice Lewis argues, that a jury instruction should assure the jury that they carry the responsibility for making the decision and any words that diminish this sense of responsibility violate *Caldwell* and *Ring*.

The amendments made by the *per curiam* decision in October are a sign that the Florida Supreme Court does in fact recognize the need for a change in the Standard Jury Instructions. The Court went further to say that “this authorization forecloses neither requesting additional or alternative instructions nor contesting the legal correctness of the instructions.” *In Re Standard Jury Instructions* at 13. Although these recent amendments attempted to clarify the instructions by re-ordering them and adding definitions of key terms, they did not address the issue raised in this memorandum. The clarification of the instructions, as described by the Court, was simply not sufficient to cure the instructions of its constitutional fallacies. Despite the attempt of the Court to clarify the confusions caused by the statute, they did not address the conflict its instructions have with *Caldwell* or *Ring*.

In order to address the ABA findings that a substantial percentage of Florida capital jurors believed that they were required to recommend death, the Court authorized a proposed amendment stating that the jury is “neither compelled nor required to recommend death.” *Id.* at 10. However, the Court admitted that the amended language is “less stringent than the proposal, which provides: ‘Regardless of your findings with respect to aggravating and mitigating circumstances you are *never* required to recommend a sentence of death.’” *Id.* The amendments leave the language of the statute concerning the jury’s role as “advisory” or a “recommendation” untouched. In fact, the instructions say those precise words more than 34 times throughout the instructions. Furthermore, the instructions explain that the final decision about punishment is the responsibility of the judge, and adds a sentence that says “in this case, as the trial judge, that responsibility will fall on me.” *Id.* at 24. This entire section completely eliminates the jury’s sense of responsibility and is the clearest example of a violation of *Caldwell*.

The concerns of all of these Justices should be taken into consideration by this Court. Although in *Bottoson* the Justices did not agree that the case met the requirements for reversal,

they did acknowledge the deficiencies in the current sentencing structure. Further, the recent changes to the instructions indicate that the court recognizes those deficiencies and is moving in the direction of further change. *See In Re Standard Jury Instructions* (concurring Justices stated that an overhaul of the entire statute was needed.). If this Court denies the Defendant's Motion to Declare Florida Statute 921.141 Unconstitutional under *Ring v. Arizona*, in order to ensure that Miss Anthony's constitutional rights are protected, this Court should at least take the precautions necessary by prohibiting any references to the jury's role as being "advisory" or the penalty verdict as being a "recommendation."

### CONCLUSION

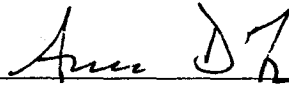
WHEREFORE, this Honorable Court must prohibit any reference to the jury's role being "advisory" or to the jury's penalty verdict as being a "recommendation" because these references violate Article I, Sections 2, 9, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. These references diminish the jury's sense of responsibility for the sentence and favors death over life by misleading them to believe that the decision rests elsewhere.

Therefore, in the interests of Casey Marie Anthony's rights under the Florida and United States Constitution, the Defense respectfully asks this Honorable Court to:

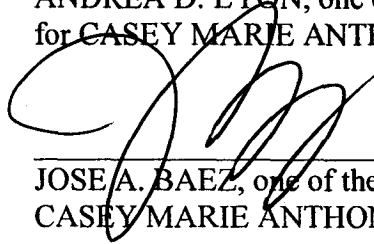
- a. Order the State to file a response motion and memorandum of law within thirty days of the filing of this motion and accompanying memorandum of law;
- b. Allow the defense ten business days from the State's filing of its responsive motion and memorandum of law to file a reply motion and memorandum 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. Prohibit the any reference to the jury's role at the penalty phase as being 'advisory' or to the jury's penalty verdict as being a 'recommendation.'

Respectfully submitted,



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



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

Dated: 11/25, 2009

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished to the Office of the State Attorney, 415 North Orange Avenue, Orlando, Florida 32801; via facsimile and /or U.S. Mail on this 25 day of November, 2009.



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# **EXHIBIT A**

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**

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

STATE OF FLORIDA

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

Plaintiff,

DIVISION: 16

vs.

CASEY MARIE ANTHONY

Defendant.

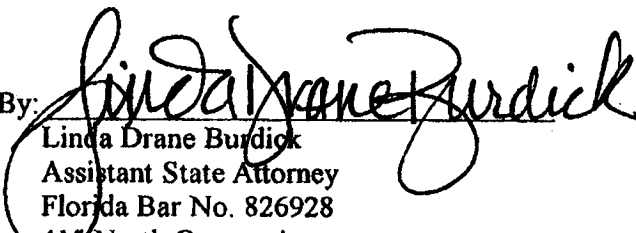
**NOTICE OF INTENT TO SEEK THE PENALTY OF DEATH**

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 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 13th day of April, 2009.

LAWSON L. LAMAR  
STATE ATTORNEY

By:

  
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