IN THE SUPREME COURT OF FLORIDA

ANTONIO LEBARON MELTON,

Appellant,

v.

CASE NO. 79,959

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee would accept Melton's statement of the case with the following modifications. The record reflects that due to an error in pagination, the sentencing order entered in the above-styled cause may be found at (TR 1393-1401, 1411), and repeated in the supplemental record (TR 1413-1422).

With regard to the facts of the case, the State would accept Melton's statement of the facts with the following additions.

Jackson Willis, the owner of a merchant marine equipment supply store named Will's Marina, adjacent to Carter's Pawn Shop, noticed something wrong at the pawn shop at approximately 5:15 p.m., January 23, 1991 (TR 466, 468). Mr. Willis saw two black males in the back of the store and did not see Mr. Carter (TR 470). As a result of what he saw, he returned to his store and told his employee to call 911 for help (TR 470). He returned to the front of the pawn shop and saw a black male wearing gloves leaning over the counter taking stuff out of the display case (TR 471). On cross-examination, he testified that at about 5:15 p.m., around closing time, he heard noises in the store next door and heard a thud (TR 474-475). He heard someone say, "I'm down, don't kick me" or "don't hit me" (TR 476).

His employee Klaus Groeger testified that he and Jack Willis were talking in the store when Jack indicated he heard something. Jack ran over to the wall and said he could hear screaming and someone say, "Don't kick me anymore, you already got me down." (TR 484). Mr. Willis ran to the front of the

store while Klaus went to the back door to retrieve a weapon and secure the back of that store (TR 484). Jack came back to the store and told him to call 911 because a robbery was in progress next door (TR 485). While on the phone to the police, he heard a bang which he later realized was a gunshot (TR 485).

Police Officer Timothy Gaudet with the City of Pensacola Police Department testified on January 23, 1991, he responded to a BOLO at the Carter Pawn Shop. He was told an armed robbery was in progress and since he was nearby on a normal patrol, he proceeded to the crime scene (TR 500-501). Mr. Willis contacted him and indicated that two black males were located in Carter's Pawn Shop. As he approached the store, he saw two black males coming towards the front door (TR 501). Co-defendant Lewis was first and Melton followed after him (TR 502). Lewis and Melton were immediately apprehended, patted down and handcuffed (TR 502). When Officer Gaudet patted down Melton he found a .38 caliber revolver in Melton's waistband (TR 503). Lewis was carrying a black bag full of proceeds from the pawn shop (TR 509). On redirect examination, Officer Gaudet testified that neither Lewis nor Melton had any choice with regard to cooperating with the police because they were caught coming out of the store and both were wearing latex gloves (TR 511-512). Officer Gaudet testified that he moved towards the back of the store and found Mr. Carter lying on the floor shot. He felt no pulse but did call EMS (TR 503). Edward Love, Jr., a firearm examiner with FDLE crime lab testified that the Charter Arms Undercover .38 special revolver No. 731426, taken from Melton

when he was arrested and the bullet that was retrieved from Mr. Carter's jawbone matched (TR 526).

Dr. Charles McConnell testified that he did an autopsy on Mr. Carter on January 24, 1991, at 1:30 p.m. He found four abrasions about Carter's right eye and lacerations of the lower right eyelid, right eyebrow and right forehead. Dr. McConnell testified that the facial lacerations would have bled profusely and was due to a blunt instrument hitting the skin pressing the skin in towards the bone (TR 551). While the wounds were superficial, they were likely caused by a fist or something flat hitting Mr. Carter's face (TR 552). Mr. Carter died as a result of a single gunshot wound to the right side of the head, one inch above the right ear. Although the wound was not a contact wound, it was made at close range between four to twelve inches (TR 552-553). While it passed throughout Mr. Carter's brain and ended up in the jawbone on Carter's left side, the angle of trajectory of the bullet was thirty degrees downward (TR 556). It was Dr. McConnell's view that Mr. Carter never got up after he was shot (TR 560). On cross-examination, Dr. McConnell testified that Carter was a large man weighing approximately 220 pounds. He testified that the abrasions were not related to the death, but occurred just prior to Mr. Carter's death (TR 564). On redirect examination, Dr. McConnell testified that the blows to the right eye could have been inflicted by a gun butt (TR 573).

Lonnie Ginsberg, and FDLE crime lab forensic serologist, testified that blood found on the pants and gloves Melton wore that day matched Carter's blood (TR 582).

Bendleon Lewis, Melton's co-defendant, testified that he had murder charges pending against him for Carter's death and that no promises nor threats had been made to cause him to testify against his co-defendant, Melton (TR 624-625). Lewis testified that at approximately 11:30 or 12:00, Melton called at his house and asked him if he wanted to help rob the pawn shop (TR 626). Lewis agreed and subsequently called Phillip Parker to see if Parker had a weapon (TR 627). Lewis told Melton that he could get a gun and Melton told him to get it and meet him at Joe Mims' house (TR 628). When Melton arrived at Mims' house at approximately 5:00 p.m., Melton and Lewis got some plastic gloves and at approximately 5:15 to 5:30, started walking towards the pawn shop (TR 629). When they first approached the pawn shop, they noticed that Carter had customers there so they walked around the block (TR 629-631). Lewis testified that Melton had the gun in his pants and that Lewis was responsible for carrying a black bag with which to put their loot (TR 630). Both men entered the pawn shop with latex gloves on their hands. It was Lewis' testimony that they both went there to rob the pawn shop (TR 630). When Melton and Lewis returned to the pawn shop after a little walk, Melton told Lewis to act like he wanted to pawn his necklace, to tell Carter that he wanted to pawn the necklace. Lewis did same and Carter offered him eighteen dollars ($18.00). As Carter started to fill out the paperwork and weighed the necklace, Lewis grabbed Carter's hands and Melton pulled out his gun (TR 633). Lewis took Carter's gun from his holster and gave it to Melton who placed it in the black bag. Melton told Lewis

to get the jewelry from the showcases (TR 634). Carter told them that they could have anything in the store but not to hurt him. At that point, Melton told him to go back towards the safe and open it. Lewis got jewelry out of the safe and started putting it into the black bag (TR 635). Melton then told Lewis to go into the front of the store and get the others guns from the showcases. After placing them in the black bag, Lewis tried to go out the side door because he had retrieved keys from Carter. He heard a shot (TR 636). Lewis testified that Carter always cooperated and he observed no struggle between Carter and Melton (TR 637). After he heard the shot and turned around, Lewis saw Carter from his knees falling forward (TR 638). Lewis immediately threw the keys down and ran towards the front door where he was apprehended by the police (TR 638-639). Lewis testified that neither nor Melton was using drugs or alcohol that day (TR 639).

On cross-examination, Lewis testified that he never heard a struggle but he did hear Carter screaming (TR 652). Lewis testified that Carter was scared and that Carter always cooperated with whatever Melton or he told Carter to do (TR 653).

The State rested (TR 661).

The defense first called Phillip Parker who testified that he gave a .38 caliber revolver without bullets to Lewis on January 23, 1991 (TR 671). A Pensacola police investigator Steve Ordonia testified that during Lewis' taped statements he never mentioned a gun, however, during other statements, Lewis said that Melton had a gun in his waistband before they entered the

pawn shop (TR 677). Lewis never mentioned to him during the recorded statements about getting the gun from Parker (TR 677, 678).

Melton testified on his own behalf stating that he was nineteen years old and had gone through eleventh grade at Pine Forest High School. He got his GED while incarcerated (TR 680). Melton's version of what transpired that day was that Lewis called him and told Melton that they needed to meet at Joe Mims' house (TR 681). Melton recalled that since he did not want to leave his girlfriend, Lewis had to call several more times that day to get him to go over to Joe Mims' house (TR 681). Finally, at approximately 4:30 p.m., he left for Joe Mims' house (TR 682). When he got there, Lewis asked him to go for a walk and, after meeting up with a guy named "Mike" and talking to Mike for awhile, they started walking again (TR 682-683). At that point they decided to go to Carter's Pawn Shop because they needed money for another bottle since they had "just finished one". They had smoked two joints while they were walking (TR 683). When they entered the pawn shop, Carter came out and talked to them about jewelry. Carter and Lewis were talking while Melton walked around the store. Melton took out the gloves and put them on and attempted to steal some rings from one of the counters (TR 684-685). As he reached for a ring, he thought that Carter saw him and saw Carter reach for his gun. Lewis grabbed Carter by both hands and Melton took a gun from his waistband (TR 686). Melton testified that he took his gun out of his waistband and put it in the black bag and then took Carter's gun and held

Carter at gunpoint (TR 686). Melton testified that Lewis told him to go collect the stuff around the store (TR 686). After Carter unlocked the showcases, they moved towards the back of the store where the safe was located (TR 687-688). Lewis started taking things from the safe and putting them in the black bag. At that point, Lewis returned to the front of the store, leaving Melton with Carter (TR 688). Melton testified that as they returned to the front of the store, Carter turned and rushed him. They struggled and fell to the floor (TR 691). Lewis returned and hit Carter in the right eye, knocking his glasses off. Melton testified that he kept telling Mr. Carter he was not going to hurt him (TR 693). Specifically, he told Carter, "Just be still". At this point, Carter was on the ground with his glasses off, bleeding profusely from the eye wound (TR 694). Melton stated that Carter tried to get up and grabbed his right hand and the gun (TR 694-695). A big struggle ensued at which point Carter was shot and fell forward over some bicycles (TR 695). On direct examination, Melton denied calling Lewis that day; denied telling Lewis to get a gun; said there was a scuffle between Carter and himself; said that he never put a bullet in the gun; said that he never intended to kill anyone and that it was not even his idea to rob the store but he just wanted to get some things and leave (TR 697).

On cross-examination, Melton readily admitted that he tucked the gun he got from Lewis in his pants (TR 698). Although he went to the store to steal rings, he never intended to use the gun. He could not explain why he put the gun back in his

waistband after he shot Carter nor explain why he did not leave the gun or throw it away (TR 700). Melton, on cross-examination, denied hitting Carter in the right eye and stated he had never been in the pawn shop before (TR 703). While admitting that he wore gloves and long sleeves into the store, when they left Mims' house Melton stated that they had not yet formulated the intent to rob the pawn shop (TR 703-705). Although they "smoked a couple of joints while walking around", Melton testified that he knew what was going on and that he was not very high at the time of the robbery and murder (TR 704-705). On cross-examination, Melton admitted that he knew Lewis was going to talk to Mr. Carter about the necklace and it was he who went back behind the counter and got Carter's gun (TR 708). Melton testified that Carter never got up after he was shot but also testified that Carter never begged for his life (TR 710). Melton acknowledged that they wore no masks or brought any masks with them. They did wear gloves so there would be no fingerprints in the pawn shop (TR 712-713).

At the penalty phase of Melton's first-degree murder trial, held February 5, 1992, the defense preliminarily objected to a jury instruction regarding pecuniary gain (TR 907). The trial court denied that objection, finding that even the defense's theory was that the victim was killed when he was trying to defend his property (TR 908).

The State first called Joe Schiller, an Assistant State Attorney who testified that he recognized Melton and had prosecuted Melton for the first-degree murder and armed robbery

of Rickey Saylor, a cab driver murdered on November 17, 1990. Through Mr. Schiller, the State introduced a certified copy of the judgments and sentences entered in the Rickey Saylor case (TR 922-923).

On cross-examination, the defense elicited from Mr. Schiller that the jury in the Saylor case had scratched through the word premeditation and circled the word felony murder (TR 925). Specifically, the jury had returned a verdict of felony murder in that case and Melton had been sentenced to life without parole for twenty-five years minimum mandatory as to Count I and life with regard to the robbery conviction (TR 926-929). Mr. Schiller testified that if Melton got a life recommendation in the instant murder, the trial court could sentence him to two consecutive twenty-five year minimum mandatory terms (TR 932). Defense counsel also sought to get into the issue of whether the jury had questions during the Saylor case (TR 935-936). The State objected to the admission of said evidence (TR 936).

On redirect by the State, Mr. Schiller testified that he was not present when the jury was deliberating but he thought their question concerned whether the defendant had to have a firearm in order to convict him of the first-degree murder conviction (TR 937). The State then asked Mr. Schiller, "Was there any evidence received whatsoever that anyone other than Antonio Lebaron Melton was the triggerman?" (TR 939). At that point, defense counsel objected saying the State was trying to "impeach the verdict" and then asserted that said question, "amounts to a comment on silence", because Melton did not testify

in the prior trial (TR 939). The trial court concluded that said question was not a comment on Melton's right to remain silent.

With regard to the Saylor murder, Mr. Schiller testified that Mr. Saylor was a cab driver and that on November 17, 1990, his cab was found crashed into a parked car along the roadway. Mr. Saylor was found with a bullet in his temple from a .22 caliber gun. The gunshot wound was made at close range (TR 941-942).

On recross-examination by the defense, Mr. Schiller testified that Melton had been indicted March 26, 1991, for the Saylor murder approximately two months after the death of Mr. Carter (TR 942). Melton's co-defendant Lewis gave a statement to the Florida Department of Law Enforcement and as a result was granted immunity in this Saylor case and thus was never indicted. Lewis indicated that he knew there was to be a robbery, but he jumped out of the cab before the robbery or the murder. He did receive proceeds from the robbery afterwards (TR 943). Another co-defendant in the Saylor case, Houston, entered a "plea and deal" that he would testify truthfully against Melton (TR 946-950). Houston, upon testifying truthfully, pled to a lesser charge of second-degree murder and was subject to a ten to twenty-five year sentence (TR 950). Mr. Schiller testified that Houston waived a sentencing guidelines scoresheet, received twenty years concurrent with a five year probationary sentence (TR 950).

Defense counsel, in questioning Mr. Schiller, brought out the facts surrounding the Saylor murder which reflected that

Lewis, Houston and Melton went to Houston's girlfriend's house. They ultimately called the cab, which picked them up at a Motel 6 located near the apartment. They intended to beat the cabbie out of a fair (TR 954). When the cab got near there destination, Lewis jumped out of the cab and left Melton and Houston there in the cab. Lewis ran down the street and away from the crime scene (TR 955). Houston also planned to jump from the cab and in fact did after he took the money bag. Melton, carrying the gun, remained in the cab. Houston testified that as he ran from the cab he heard a gunshot and heard the car crash. He later discussed with Melton what happened (TR 957). Mr. Schiller testified that Lewis got immunity for the Saylor murder also (TR 961). On recross by the State, Schiller testified that there was no evidence that would have supported a charge against Lewis as to the robbery or murder of Saylor (TR 963). Schiller testified that the jury found Melton guilty of first-degree murder and armed robbery (TR 965).

The State rested with regard to the penalty phase of Melton's case. Defense counsel renewed his motion for mistrial on Schiller's comment regarding whether there was any evidence that anyone else had been named the triggerman in the Saylor case (TR 976). Said motion was denied by the trial court (TR 976).

The defense first called Jim Jenkins, an attorney in Pensacola, Florida, who represents Lewis (TR 977-978). Mr. Jenkins testified that no plea offers had been made to testify in the case and that Lewis had cooperated and agreed to testify for the State. Lewis had given a statement to police the night of

the murder and Jenkins believed it was in his client's best interest to testify against Melton (TR 980). Mr. Jenkins observed that Lewis was hoping for a lesser offense charge (TR 981). On cross-examination by the State, Mr. Jenkins admitted that Lewis was caught at the scene, gave a full statement and cooperated from the very beginning. Although there was some discussion about whether Lewis had lied with regard to his attempt to get Adrian Brooks to be an alibi witness, Mr. Jenkins admitted that that lie only dealt with the Saylor murder (TR 987).

Lawrence Gilgun next testified for the defense (TR 987). Dr. Gilgun, a clinical psychologist, examined Melton on January 28, 1992. He had been supplied previously with school records, depositions and other materials (TR 991). Although he did not have any statements, he did perform several tests, finding that Melton had an IQ of 90, which fell within 25% of the normal population with average intelligence (TR 992). His school records demonstrated Melton did well in elementary school but started doing poorly in middle school and high school (TR 993). Melton went from an average student to a D student and started failing courses. Melton became truant and started using drugs, specifically marijuana and alcohol (TR 994). At age eighteen, Melton told Gilgun that he was using drugs daily and that he did not finish adult high school because he was arrested for the crimes for which he was on trial (TR 995). Melton's reading skills were low, however his spelling skills were much higher (TR 996-997). Dr. Gilgun found no psychiatric disorder or emotional

defect or mental illness. He opined that Melton was likely to have good prison adjustment and take advantage of rehabilitation in prison (TR 998).

On cross-examination, Dr. Gilgun testified that although Melton had good judgment, he acted impulsively. His childhood was mostly happy and although he received an extensive family history there was no male father figure in Melton's life (TR 998-999). Dr. Gilgun testified that Melton's stepfather was not a positive influence in Melton's life.

Frankie Stoutemire next testified that he was Melton's biological father and that Melton was born June 14, 1972. Mr. Stoutemire never married Melton's mother nor did they live together and he was not involved in the rearing of their son. Mr. Stoutemire regretted that and testified that at the time he was only seventeen years old and was in the Army (TR 1001-1003). Mr. Stoutemire indicated that he occasionally visited his son and that he knew that his son was not being reared in a good environment (TR 1004-1006). Mr. Stoutemire testified that he is now a deacon in a church and has two other children by another marriage. His son "had gotten into the Bible" and been studying the Bible while he has been in jail (TR 1008). Mr. Stoutemire was praying that the jurors believed in God and hoped that they have an open mind to a life sentence. He further opined that he believes his son regrets what he did <u>although</u> his son has not admitted anything to him (TR 1009-1010).

Debbie Thurman, a clerk and custodian of the records in Escambia County, Florida, admitted the judgments and sentences for the Saylor murder of the defendant and Houston (TR 1013).

The jury was read the testimony Melton's mother, Laticia Davis, whose testimony had been perpetuated on February 15, 1992. Her testimony reflected that she was hospitalized for thyroid tumors and was recuperating from surgery and unable to testify on her son's behalf (TR 1016). She testified that he was born December 29, 1972, and that she was sixteen years old when he was born and unwed (TR 1018). Frankie Stoutemire was the father but they never lived together nor did he provide any parental custody of Melton. Melton was born one month premature at Pensacola University Hospital and there were no complications at birth. Although Ms. Davis testified that she drank and smoked during her pregnancy, Melton walked and talked at the normal times (TR 1019-1020). He first attended Golden Elementary School and was a good student (TR 1022-1023). Davis testified that when Melton was young she married David Booker who was a good person and good worker and spent some time with Melton (TR 1023). Although the marriage lasted for a longer period of time, she and Booker only stayed together approximately one year and after Booker left, Melton no longer had contact with him (TR 1024).

When Melton went to Bellevue Middle School, he was involved in sports, specifically football and did very well (TR 1025). Melton's brother was born December 1977 and Melton and his brother Barney got along very well (TR 1027). They moved from the Truman Arms Apartments to the Cerny Village around that time. Melton did not like his new home at first but after awhile he adjusted. When he started going to Pine Forest High School he got into the wrong crowd and through peer pressure, he started

having problems (TR 1027-1028). Melton started skipping school and was suspended a couple of times. Although Melton was smart, his grades started to suffer and she and Melton went to a counselor at Pine Forest High School to talk about her son (TR 1028-1029). Mrs. Green, a counselor, said that Melton was too much to handle (TR 1029). Ms. Davis testified at the time she was working two jobs and Melton would come home from school and take care of his brother and clean the house. She believed Melton was a responsible person and she had taught him early on how to cook. At age fifteen or sixteen, he stopped living with her because he did not like the rules at home (TR 1030). He first went to live with Ms. Davis' sister, Margaret Johnson, and then moved on to her mother, Eloise Melton. At the time he was working at Hall's Seafood and Kentucky Fried Chicken (TR 1033). Ms. Davis testified Melton never asked for money. She had moved away to Mobile, Alabama, when these incidents occurred (TR 1033-1034). Ms. Davis contacted the deceased's family members and told them how sorry she was regarding Mr. Carter's death (TR 1035). She further testified that Melton had not admitted the murders to her or his involvement in the Carter murder, but rather she read it in the newspapers (TR 1036). Ms. Davis believed that a life sentence should be imposed (TR 1039).

On cross-examination, Ms. Davis testified that Melton had started Pine Forest High School in ninth grade but she took him out of the eleventh grade because of the trouble he was causing (TR 1039-1040).

Melton testified on his own behalf, stating that he was involved in the Carter murder but did not kill Mr. Saylor (TR 1040). He observed that he had pled not guilty in the Saylor and was appealing his conviction therein. Houston and Lewis, his co-defendants in the Saylor case, pointed the finger at him to get suspicion off them (TR 1041). He believed they were offered deals to testify against him (TR 1041). Melton testified that he started school at Golden Elementary School while he was living with his mother at the Truman Arms Apartments (TR 1042). He did good in school and did fairly well when he went to Bellevue Middle School. He played football and then moved on to Pine Forest High School when he entered the ninth grade (TR 1043). Melton admitted that he started drinking with school friends and started to drink on Fridays and all weekend. He experimented with marijuana and generally did what kids do (TR 1044). His mother removed him from the eleventh grade because she got tired of school calling her at her job and she got tired of him getting into trouble such as detention and disrupting class (TR 1045). He left Pine Forest High School and went to PJC to get his GED. He stopped going to school because he had no transportation. At that same time he moved out of his mother's house and started living with his grandmother (TR 1046). He started working at Bargain Time and cleaning the warehouse and then started working at Kentucky Fried Chicken on Gulf Beach Highway (TR 1047). When he lived with his mother he would cook and clean house. He observed that there was rarely any men around to give him support (TR 1047). He observed that his father periodically visited him,

that he got along well with his brother, Barney (TR 1048-1049). He admitted that he would call his mother about problems and now talks to his brother about staying straight (TR 1050). While in jail he has received one disciplinary report for possession of a razor -- contraband. As a result of having contraband he was locked up in confinement for six days but observed that he has had no other problems in jail (TR 1051). Melton got his GED while awaiting trial in prison in November 1991. Except for the two murders, Melton had only been in a fight once at a football game at which point he was charged with battery. He also admitted that he had been previously charged as a juvenile in dealing in stolen property, specifically writing bad checks, for which he had been prosecuted as an adult in November 1990 (TR 1052). Melton stated to the Saylor family, he was very sorry for what happened but he did not do anything because he was not there at the time of the murder. With regard to the Carter family, he wanted to apologize for what happened, but said that it was an accident. He did not mean to do it (TR 1054-1055). Melton observed that he knows that he could spend the rest of his life in jail but that he is now involved in religion, reads the Bible and prays and reads the literature his mother sends him (TR 1056).

On cross-examination, Melton admitted that he was involved in the murder and got caught walking out the door. He stated that he had not planned to rob the store but was just intending to steal a few rings (TR 1058).

Eloise Melton next testified (Melton's grandmother). She testified that Melton came to live with her and she did not keep track of whether he went to school although that was the reason why he came to live with her (TR 1063). She knew that Melton had worked at some restaurants and did not know Melton's associates. She knew one of them was Lewis and told her grandson that his friends could not stay at her house. She finally told Melton that they had to leave. She testified that she never saw him again until she saw him on television when he was arrested (TR 1066-1068), that was approximately one month later and she did not know where Melton was living (TR 1068).

The defense rested (TR 1069). Defense counsel sought a directed verdict asserting that the aggravation did not outweigh the mitigation (TR 1070). The trial court denied same stating that the jury should be permitted to make a recommendation (TR 1071).

The jury was instructed as to two aggravating factors, specifically that the murder was committed by a person who had been previously convicted of a capital felony and that the murder was committed for pecuniary gain (TR 1102). With regard to mitigation, the jury was instructed that they could find that the defendant had no significant history; that he was operating under extreme duress; that he could not appreciate the criminality of his conduct or conform his conduct to the requirements of law; his age, and any other aspect could be considered in mitigation (TR 1103). Before the jury returned with its recommendation, a discussion ensued with regard to whether the fact that one juror

did not believe in the death penalty at all changed the number for a majority of those required for imposing a sentence of death. The trial court ruled that at least seven of the persons had to recommend death before a death recommendation may be made (TR 1109). The jury returned a recommendation of death by an 8-4 vote (TR 1112).

SUMMARY OF ARGUMENT

POINT I: This Court, in Riley v. State, 366 So.2d 19 (Fla. 1979), determined that the empaneling of two separate juries was not necessary to ensure the benefits afforded by the bifurcated capital sentencing scheme.

POINT II: The record reflects that the alleged improper prosecutorial comments did not result in harmful error, if error at all. The trial court addressed each complaint at trial and Melton has not demonstrated the court abused its discretion in denying all relief.

POINT III: The aggravating factor that the murder was committed for pecuniary gain was proven beyond a reasonable doubt.

POINT IV: The death sentence is proportionate.

ARGUMENT

POINT I

WHETHER THE TRIAL COURT ERRED IN NOT EMPANELING SEPARATE GUILT AND PENALTY PHASE JURIES WHICH FORCED MELTON TO FOREGO HIS RIGHT TO VOIR DIRE ON THE PENALTY PHASE ISSUE OF THE JURORS OPINIONS ON IMPOSING THE DEATH PENALTY FOR SOMEONE WHO HAD A PRIOR MURDER CONVICTION, DENIED HIM EFFECTIVE COUNSEL IN JURY SELECTION AND DEPRIVED HIM OF THE BENEFITS AFFORDED BY THE BIFURCATED CAPITAL SENTENCING PROCEDURE

The record reflects that Melton pre-trial filed a motion for separate juries (TR 1263), citing no authorities but asserting that he was denied his right to voir dire prospective sentencing jurors concerning their attitudes and possible bias regarding the imposition of the death penalty where an individual has been previously convicted of a capital murder. Melton asserts, "Faced with the choice of disclosing the prior murder conviction to the jurors and prejudicing the guilt phase or not questioning the jurors about the impact of a prior murder conviction on their ability to fairly consider sentencing alternatives, Melton's counsel chose not to question the jurors on that issue (R 144-335). As a result, defense counsel's right to voir dire the prospective jurors concerning attitudes about the death penalty was restricted."

Without citing any authority for the proposition that he is entitled to separate juries under Florida's capital sentencing scheme, Melton attempts to fashion an argument that suggests he was deprived an ability to adequately inquire during voir dire prospective jurors. Such a contention is totally erroneous and in fact could surface as a problem in any capital murder case.

Specifically, a defendant can always point to some "odious" fact which could be asserted should be asked of a prospective juror as to whether it would "trigger a bias rendering them unable to fairly consider a life sentence recommendation in view of that fact."

In Riley v. State, 366 So.2d 19, 21 (Fla. 1979), this Court rejected, out-of-hand, the suggestion that two juries were necessary in bifurcated proceedings in capital cases. There the specific issue was whether the defendant was entitled to have a jury which determines guilt or innocence who are unalterably opposed to the death penalty, "because they would represent a definable cross-section of the community." The opinion reads, in material part:

> It is suggested that jurors for the first phase of our bifurcated proceeding in capital cases would serve in that proceeding only, to determine the accused's guilt or innocence, and that the alternative jurors who qualify under the standard prescribed in Witherspoon v. Illinois, (cite omitted), would serve either with them or in the stead for the second, or sentence-advisory, phase of trial. While this suggestion is novel, we have given it full consideration and find no compulsion in law or logic to so structure capital case trials. We reject Appellant's contention that this jury was impermissibly constituted.

366 So.2d at 19.

Similar arguments have been rejected in Gafford v. State, 387 So.2d 333, 334 (Fla. 1979); Herman v. State, 396 So.2d 222 (Fla. 4th DCA 1981); Maggard v. State, 399 So.2d 973 (Fla. 1981), and Hicks v. State, 414 So.2d 1137 (Fla. 3rd DCA 1982).

The notion postulated by Melton is identical to those submitted in the aforecited cases and rejected by the courts of

this state. Interestingly, Melton cites to none of the authorities cited by Appellee which specifically reject this idea.

Moreover, Melton's assertion that he was "denied his right to a fair penalty phase trial with a fairly selected jury", is curious in that although not universally thought of as desirable, Melton could have stipulated away that aggravating factor since the imposition of the death penalty is based on aggravation outweighing the mitigation. Based on the foregoing, no relief should be forthcoming as to the first claim.

POINT II

WHETHER THE TRIAL COURT ERRED IN NOT DECLARING A MISTRIAL AFTER THE PROSECUTOR MADE SEVERAL IMPROPER COMMENTS TO THE JURY

Melton next argues that the trial court erred in not granting him a mistrial during the penalty phase based on three instances of improper prosecutorial comment.

(A) Whether the trial court erred in not granting a mistrial when prosecutor commented on Melton's exercise of his right to remain silent

At the commencement of the State's penalty phase case, the State called Joe Schiller, the Assistant State Attorney who prosecuted Melton for the Saylor murder. The State elicited from Mr. Schiller the following facts between (TR 921-924). Specifically, that Joe Schiller recognized Melton as the individual he prosecuted for first-degree murder and armed robbery of Rickey Saylor; that Melton was arrested after the Carter murder on January 23, 1991, and that Mr. Schiller had a

certified copy of the judgments and sentences with regard to the Rickey Saylor murder.

Defense counsel commenced cross-examination of Mr. Schiller on (TR 924), and continued through (TR 937). Defense counsel sought to elicit from Mr. Schiller the fact that the jury, at the Saylor murder, found Melton guilty of felony murder (TR 925); that Melton received a life sentence without possibility of parole for twenty-five years (TR 926); that Melton received a life sentence under the guidelines for the armed robbery, meaning he would never be paroled (TR 929); assuming Melton received a second life sentence, he could serve two twenty-five year consecutive mandatory minimum sentences (TR 932), and in inquiry was made as to whether Schiller knew whether the jury had difficulty determining Melton was a principle in the Saylor murder (TR 935-936).

On redirect, the State asked Mr. Schiller, ". . . In that case that you just testified to, could this exhibit that was introduced, was there any evidence received whatsoever that anyone other than Antonio LeBaron Melton, the defendant in this case, was the triggerman?" (TR 939). At that point defense counsel objected stating that it was impeaching the verdict (TR 939), and then argued, "In effect it amounts to a comment on the defendant's right to remain silent. The defendant did not testify in that trial on advice of counsel, not as to any question of whether or not he did it. He maintained he did not. But we think that that's an improper inquiry and is in effect a comment on his right to remain silent." (TR 939-940). The court, in response, held:

> THE COURT: I don't think it's a comment on his right to remain silent. I think it's a question that's been raised by the defense's questions in this regard. So I think that he [sic] out to be able to answer that question.

(TR 940).

As a result of said ruling, the State questioned Mr. Schiller regarding the facts and circumstances surrounding the Saylor murder (TR 940-942).

The issue was revisited at the sentencing proceeding on March 10, 1992, when the trial court again determined that Schiller's remarks were not a comment on the right to remain silent (TR 1319).

Melton asserts that the statements made are fairly susceptible to being interpreted as a comment on the defendant's right to remain silent. First of all, the "alleged" comment on the right to remain silent had nothing to do with the instant trial but rather concerned the facts and circumstances of the Saylor murder for which Melton had already been convicted. Second, questioning whether there was any evidence that anyone other than Antonio LeBaron Melton was the triggerman is not a comment on the right to remain silent. Third, the inquiry made by the State of Joe Schiller regarding the Saylor murder was in fair reply to the inquiry of defense counsel of Mr. Schiller with regard to Melton's "culpability" in the Saylor murder. The record clearly shows that defense counsel was attempting to minimize Melton's participation in the Saylor murder by suggesting that he was only guilty of "felony murder" rather than premeditated murder. Thus, the State, on redirect, had the barn

door open by the defense's cross-examination and was permitted to inquire of Mr. Schiller as to the evidence presented in that case. See White v. State, 377 So.2d 1149 (Fla. 1980); State v. Sheperd, 479 So.2d 106, 107 (Fla. 1985) ("In order to clarify exactly when a comment is 'fairly susceptible' of being interpreted by the jury as referring to the defendant's failure to testify, we hold that a prosecutorial comment in reference to the *defense* generally as opposed to the *defendant* individually can be 'fairly susceptible' of being interpreted by the jury as referring to the defendant's failure to testify."); Dufour v. State, 495 So.2d 160 (Fla. 1986); Pastor v. State, 498 So.2d 964 (Fla. 3rd DCA 1989); Avant v. State, 538 So.2d 100 (Fla. 3rd DCA 1989); Torres v. State, 541 So.2d 1226 (Fla. 2nd DCA 1989), and Jacobs v. State, 600 So.2d 1200, 1201 (Fla. 5th DCA 1992).

Moreover, Melton suggests because of the "statement on the right to remain silent" he "felt compelled to explain to the jury that Melton did not testify in the prior [sic] trial on his lawyers advice." Such an assertion is spurious at best since it was defense counsel on cross-examination of Joe Schiller who raised the issue of Melton's culpability in another murder.

Melton's reliance on the decisions in Holloman v. State, 573 So.2d 134 (Fla. 2nd DCA 1991); Jones v. State, 260 So.2d 279 (Fla. 3rd DCA 1972), and State v. Kinchen, 490 So.2d 21 (Fla. 1985), is misplaced. Nowhere in the instant case did the prosecutor do anything more than ask the witness whether any evidence existed during the Saylor murder that demonstrated someone other than Melton was the triggerman in that murder. No relief should be forthcoming sub judice.

(B) Whether the trial court erred in allowing the prosecutor to extract a comment from the jury to recommend the death sentence

Citing to (TR 1074-1075), Melton next argues that the prosecutor, during closing argument, "sought to invoke an alleged prior commitment to recommend death based on responses jurors gave during jury selection." (Initial Brief at 31). Specifically, the comment in question reads as follows, ". . . One response, I don't know if you remember or not. Do you feel that you are emotionally capable of looking at the defendant and saying, 'I recommend that you die?' Do you remember me asking that question? Everyone of you answered that question inadvertently [sic]. . . ."

At this juncture, defense counsel objected asserting that said statement was securing a prior commitment from a jury with regard to an issue in fact. The court overruled said objection.

First and foremost, the comment made by the prosecutor in his closing arguments was not some part of a nefarious plot to secure a commitment from the jury to return a particular verdict. Secondly, the inquiry made by the prosecuting attorney and pointed out by Melton (TR 89-90), was a fair inquiry during voir dire of potential facts in the instant case that might impact the jury's ability to impose the death penalty. In the instant case specifically, Melton's age.

Lastly, Melton's reliance on the Supreme Court of Mississippi's decision in Stringer v. State, 500 So.2d 928 (Miss. 1986), is distinguishable in that the Mississippi Supreme Court determined in its opinion that the prosecutor had extracted from

the jurors based on their "negative responses to his voir dire" a promise under oath to return the death penalty in that case. No such event occurred sub judice. Moreover and more importantly, because the jury in Mississippi is the sole sentencer, any suggestion that a promise under oath to return a specific verdict as opposed to Florida where the jury is a co-sentencer in an advisory capacity, reduces any "perceived" error harmless beyond a reasonable doubt.

> (C) Whether the trial court erred in not declaring a mistrial when the prosecutor told the jury during the penalty phase that the disparate treatment of codefendant's should not be a consideration in the jury's sentencing recommendation decision

Based on the statements made by the prosecutor, it is clear the prosecutor's sole intent was not to suggest that disparate treatment of codefendant's in the instant murder could not be considered as mitigation but rather the prosecutor was pointing out the fact that disparate treatment received by Melton and his codefendants in the Saylor murder was not per se mitigation (TR 1080-1081). Defense counsel immediately objected to the statement and moved for a mistrial noting that it was "a misstatement of the law". The trial court, in a curative instruction, informed the jury, "Well, ladies and gentlemen, you may within your discretion consider the sentence of the codefendant for the same or similar acts in the same case as a mitigating factor, and that's a matter within your discretion. So I will ask that you disregard the statement to the contrary. And, I deny your motion for mistrial." (TR 1081).

Melton argues that telling the jury that he had "discretion" to consider the fact as a mitigating factor implied the jury did not have to consider disparate treatment merely if it chose not to do so. Such a contention is without merit in the instant case since there was no evidence with regard to Mr. Carter's murder as to what sentence Lewis would receive. He had not been sentenced yet (TR 640-641, 657). The jury was also told with regard to the Saylor murder that Lewis was granted immunity (TR 943), and was never indicted for the murder because Lewis jumped out of the cab before the robbery or the murder occurred (TR 943). Tony Houston, another codefendant in the Saylor murder, entered a plea to armed robbery and lesser charge of second degree murder and received a twenty year sentence concurrent with five years probation because of his lesser participation in the murder (TR 957-959).

Clearly, the trial court did not err in informing the jury that they had the discretion to consider disparate treatment as a mitigating factor. Indeed, without objection, the trial court instructed the jury that, "Among the mitigating circumstances you may consider if established by the evidence, - - - any other aspect of the defendant's character or record and any other circumstances of the offense." (TR 1103).

Even in light of Espinosa v. Florida, 505 U.S.___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), and Sochor v. Florida, 504 U.S. ___, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992), there is no basis to suggest that the jury, "as a constituent part of the sentencing authority" was properly informed about the evidence they may

consider in ascertaining the presence of mitigation. No relief should be forthcoming with regard to Point II.

POINT III

WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON, AND LATER FINDING, THE AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED FOR PECUNIARY GAIN

Melton next argues that the evidence was insufficient and the jury should not have been informed that the homicide was committed for the purpose of pecuniary gain. In support of said contention Melton argues that the "evidence demonstrated that the homicide occurred accidentally after the taking of the property and during a struggle, which the victim initiated, pecuniary gain was not the motivation for the killing." (TR 907-908).

The trial court, in its sentencing order, found that the crime for which the defendant was to be sentenced was committed for financial gain. The court opined:

> . . . Evidence also establishes beyond a reasonable doubt that the felony murder was committed while the defendant was engaged in the commission of a robbery. However, the facts supporting these two circumstances are the same and cannot be used to find two aggravating circumstances. This Court has elected to find that these circumstances establish beyond a reasonable doubt that aggravating circumstance that the felony murder was committed for pecuniary gain. . . . In this case the defendant again planned an armed robbery, armed himself with a firearm and personally undertook the job of threatening the victim with the firearm, and eventually shot and killed the victim, all for his desire for pecuniary gain. The Court attaches great weight to this aggravating circumstance.

(TR 1414-1415).

Not only did the State prove beyond a reasonable doubt that the murder was committed for pecuniary gain and that the trial court so found this aggravating factor, but Melton testified and admitted the purpose for going into the pawn shop was to steal some rings (TR 685-686).[1] While Melton held the gun on Carter and made him go back to the safe in the pawn shop, Lewis, Melton's confederate, gathered up the proceeds from the robbery. Melton admitted that he was not there to buy anything but he wanted Carter's property (TR 699), that he took a gun in there with him (TR 699), that after he shot Carter, put the gun back in his waistband instead of throwing it away (TR 700), admitted that he wore gloves (TR 703), and admitted that he knew Lewis was going to talk with Mr. Carter about buying a necklace to divert him so that Melton could steal some rings (TR 708-709). By no stretch of the imagination can Melton seriously assert that the "proof was insufficient in this case". To support this aggravating factor that the murder was committed for pecuniary gain, the instant case is a classic felony murder scenario. No relief should be forthcoming as to this issue.

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[1] The fact that the trial court merged pecuniary gain with the murder was committed while Melton was committing a robbery would have been the subject on appeal had the trial court not merged the two.

POINT IV

WHETHER THE TRIAL COURT ERRED IN SENTENCING MELTON TO DEATH SINCE THE SENTENCE IS DISPROPORTIONATE

Terminally, Melton argues that the imposition of the death penalty in the instant case is disproportionate to other cases because the murder was committed during the course of a felony.

The record reflects the trial court found two statutory aggravating factors present that the murder was committed for financial gain and that Melton had been convicted of a prior violent felony; to-wit: capital murder (TR 1414-1415). The court found two nonstatutory mitigating factors, but gave said factors little weight. Specifically, that Melton had good conduct while incarcerated and that Melton had a "difficult childhood while growing up" (TR 1420). The court specifically and "in minute detail" rejected other evidence tendered in mitigation (TR 1415-1421).

Melton's reliance on a number of cases cited in his brief are all distinguishable based on the facts therein. In fact the only case he spends little time on is the case which demonstrates why this case is a death case. Specifically, in Freeman v. State, 563 So.2d 73, 76-77 (Fla. 1990), the court held:

> Freeman further contends that the death penalty is proportionally unwarranted in his case. Yet, the cases cited in support of his argument are substantially distinguishable. Following the merger of pecuniary gain and burglary, there remained two statutory aggravating circumstances. One of these was a prior murder. There were no statutory mitigating circumstances, and the nonstatutory mitigation circumstances were not compelling. The trial judge carefully weighed and aggravating and mitigating

> circumstances and concluded that death was the appropriate penalty. It is not this court's function to reweigh these circumstances. (cites omitted). Freeman's death sentence is not disproportionate to other cases.

In Cook v. State, 581 So.2d 141 (Fla. 1991), where Mr. and Mrs. Betancourts, working as the midnight cleaning crew at a Burger King in South Miami, were murdered during an attempted late night robbery of the restaurant, the Florida Supreme Court affirmed the death penalty as proportional where there, as here, two aggravating factors existed, the defendant had previously been convicted of another capital felony and that the murder was committed for robbery/pecuniary gain and there was minimus mitigation:

> We also reject Cook's claim concerning his accomplices' sentences since their level of participation in the murder was clearly less than Cook's. See Cook. It was Cook, not his accomplices, who killed the Betancourts. We also believe that Cook's sentence is not disproportional when compared to other defendants' sentences for similar murders. The court found two statutory aggravating factors, one being a prior capital felony, and only statutory mitigating factor. We have affirmed death sentences in cases involving similar factors and circumstances.

581 So.2d at 143. See also LeCroy v. State, 533 So.2d 750 (Fla. 1988).

The trial court did not err in imposing death or is the sentence of death disproportionate to other similarly situated cases.

Melton acknowledges that the trial court correctly found two mitigating circumstances, Melton's good conduct while in jail and his poor childhood and lack of a father figure (TR 1415-1421).

However, he asserts the trial court erred in failing to find other mitigating factors present. He first point to the fact that in the other capital murder, the jury returned a felony murder verdict. The trial court, in the sentencing order, specifically rejected this "mitigation", finding "reasonable doubts as to the defendant's guilt of other crimes than those of which he has been convicted cannot be construed as a mitigating circumstance in this case." (TR 1417). Second, with regard to the fact Melton was eighteen years old at the time of the crime, the trial court again considered this mitigation and found it not be a mitigating factor because ". . . The possible innocence, immaturity or failure of understanding on the defendant's part at the time of the first murder was not a factor in the second murder for which he is now to be sentenced. Neither does the fact that the defendant has committed two separate murders by the time of obtaining the age of eighteen years, nor does any other fact proved by the greater weight of the evidence establish that the age of the defendant lessens or ameliorates the defendant's guilt. The court finds the defendant's age not to be a mitigating factor." (TR 1416).

While not unmindful that age may be a mitigating factor, this Court has never suggested that age per se is in fact a mitigating factor. As noted in Freeman v. State, supra, this Court will not reweigh facts and circumstances considered by the trial court in determining whether any mitigating factor is present. Third, Melton argues that his criminal involvement occurred within a year of his arrest in this case. The trial

court in fact found that Melton's background and rearing and lack of male guidance was a nonstatutory mitigating factor but gave it little weight. Clearly, the suggestions concerning the time when the crime occurred in relationship to Melton being taken out of school by his mother are facts and circumstances surrounding his childhood and upbringing.

Melton also argues as a fourth point that his abusing drugs and alcohol are mitigating factors. Again, the trial court necessarily in his determination of a lack of a male guidance figure and poor childhood would have considered drug and alcohol usage. However, the court specifically found that there was no evidence as to any significant amount of alcohol or drug usage the day of the offense or for that matter prior to the day of the crime. The trial court gave this "mitigating" evidence no weight, finding that if anything Melton's "use of alcohol and drugs is more suggestive that defendant was simply 'nerving' himself to commit the crimes." (TR 1420-1421). Melton, as a fifth point, points to the disparate treatment of Melton's accomplices. The trial court found:

> The Court finds that no mitigating circumstance in this regard was proven by the greater weight of the evidence. Codefendant Benleon Lewis has not been sentenced in this case. There can be little doubt that Benleon Lewis expects and will receive some degree of leniency (certainly less than the death sentence) for his cooperation, and considering the fact that the evidence in this case conclusively establishes the defendant, not Benleon Lewis, as the triggerman who committed the actual killing in this case. There are legitimate reasons for imposing a lesser sentence on Benleon Lewis, and such lesser sentence would not be disparate or constituting mitigating circumstance.

> Not charging or prosecuting Benleon Lewis in the death of Rickey Saylor is not lenient treatment and does not constitute a mitigating circumstance. The greater weight of the evidence proves the State does not have sufficient valid evidence to do so; nor does failure of the State to prosecute Benleon Lewis for perjury. Sentencing of codefendant Tony Houston in the prior case to twenty years imprisonment is not lenient or disparate treatment in that case, and would not be a mitigating circumstance in this case if it were. Again, in the prior case, Antonio Melton was proved to be the triggerman, not codefendant Tony Houston, and legitimate reasons existed for differing sentences.

(TR 1417-1418).

While disparate treatment of codefendants may be a mitigating factor, the facts and circumstances sub judice demonstrate that there was not disparate sentencing in the instant case. Melton was the triggerman, and in fact admitted shooting Mr. Carter. Even when Melton attempted to shift the blame and responsibility for planning the robbery of the pawn shop and the securing of the weapons on his codefendant Lewis, he always admitted shooting Mr. Carter.

Based on the foregoing, the State would submit that the death sentence imposed for the first-degree murder of Mr. Carter was proportional based on valid aggravating factors that outweighed the two insignificant mitigating factors found by the trial court. The judgment and sentence in the instant case should be affirmed.

CONCLUSION

All relief should be denied and the judgment and sentence entered by the trial court affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. W.C. McLain, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, on this 28th day of June, 1993.

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