IN THE SUPREME COURT OF FLORIDA

ANTONIO LEBARON MELTON, :

Appellant, :

v. : CASE NO. 79,959

STATE OF FLORIDA, :

Appellee. :

_____/

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Procedural Progress of the Case

On February 5, 1991, an Escambia County grand jury indicted Antonio Lebaron Melton for first degree murder and armed robbery. (R 1117) Also charged in the same indictment for the same offenses was Bendleon Lewis. (R 1117) Melton proceeded to a jury trial at which Lewis testified as a State witness. (R 1623)

Before jury selection, Melton filed a motion for separate guilt phase and penalty phase juries. (R 2-11, 1263) Melton argued that separate juries were needed to preserve his right to voir dire a penalty phase jury about their attitudes concerning imposition of the death penalty when a defendant had a previous conviction for murder without revealing to the guilt phase jury the inadmissible fact of the previous conviction. (R 1263-1265) The court denied the motion. (R 11-12) A single jury was selected.

The jury found Melton guilty of first degree felony murder and armed robbery on January 30, 1992. (R 895-896, 1275-1276) Circuit Judge William Anderson adjudged Melton guilty on the same day. (R 1277) The penalty phase commenced on February 5, 1992. (R 906-1112) After the State and the defense presented additional evidence, the jury recommended a death sentence by a vote of 8 to 4. (R 1112, 1285) Judge Anderson sentenced Melton on May 19, 1992, imposing a death sentence for the murder and a sentence of life imprisonment on the armed robbery. (R 1380-1401, 1413-1422) In his sentencing order rendered in support

of the death sentence, Judge Anderson found two aggravating circumstances: (1) Melton was previously convicted of a violent felony, first degree murder and armed robbery; and (2) the homicide was committed for financial gain. (R 1414-1415) The court found two nonstatutory mitigating circumstances to which it assigned little weight. (R 1420-1421) Those mitigating circumstances were: (1) Melton had exhibited good conduct while incarcerated awaiting trial; and (2) Melton's difficult family background while growing up. (R 1419-1420) The court specifically rejected a number of other suggested mitigating circumstances. (R 1415-1421)

Melton filed his notice of appeal to this Court on May 22, 1992. (R 1420)

Facts - Guilt Phase

George Carter owned a pawn shop in a high crime area of Pensacola. (R 465-466, 472, 479) Jackson Wills owned the marine equipment store which was adjacent to Carter's Pawn Shop and actually shared the same building. (R 465-467) Around 5:15 p.m. on January 23, 1991, Wills heard a noise through the wall separating his store from Carter's Pawn Shop. (R 468) The noise sounded as if someone or something fell. (R 469) Wills said he heard noises from Carter's pawn shop from time to time. (R 474-475) However, this noise got his attention. (R 475) He said it sounded like something heavy hitting or falling. (R 475-476) Additionally, he heard someone say something like "Don't hit me, don't kick me, I'm already down." (R 476-477)

Klaus Groeger, Wills' employee, was present when Wills heard the noise. (R 484) Groeger heard some screaming, but he could not make out the voice or what was being said. (R 484, 492-494)

Wills walked out of the front door of his store and passed in the front of the pawn shop. (R 469-470) He saw two black males in the rear of the pawn shop. (R 470-471, 477) They were located in about the place where the noise had come through the wall. (R 477-478) Wills turned around and walked back across in front of the pawn shop, and this time, he saw only one black male wearing gloves behind the counter taking items from the display case. (R 470-471, 478) Wills walked back to his store and asked Groeger to call the police (R 470-471) Wills walked outside of his store again and positioned himself across from the pawn shop. (R 471-472) While making the emergency call on the 911 line, Groeger heard a bang. (R 485) He later realized that it was probably a gunshot. (R 485, 492) The 911 call lasted for a minute to a minute and a half. (R 485) After listening to the 911 call tape-recording, Groeger said he could not hear the gunshot on the tape. (R 488-489) When Wills again obtained a view inside the pawn shop, he saw two black males walking toward the front. (R 471) A police officer, Timothy Gaudet, arrived at about that same time. (R 472) Gaudet's response time was almost immediate, since he heard the dispatch to Carter's Pawn Shop as he was on routine patrol in the alley behind the shop. (R 499-501)

Officer Guadet proceeded to the front door of the shop where he saw two black males coming toward the door. (R

501-502) Gaudet stood to the west side of the door and the first black male, later identified as Lewis, looked out of the door toward the east. (R 502) At that time, another patrol car was arriving, and Gaudet pulled his gun on the two men. (R 502) He patted down and arrested the second man, Antonio Melton, and retrieved a .38 caliber pistol from the waistband of Melton's pants. (R 502-504) Officer Harris, who had arrived to assist, arrested Lewis. (R 503) Lewis and Melton both wore latex surgical gloves. (R 405-406, 512) Lewis carried a black nylon bag, which a later inventory revealed to be full of jewelry and six guns. (R 414, 417-424, 511-512, 515) Gaudet and a third police officer, Doug Baldwin, proceeded to the rear of the pawn shop where they found Carter. (R 503-504, 517) Carter had been shot once in the head. (R 503) He wore a blue jumpsuit and had two pistols on his person, a loaded .22 caliber automatic in his hip pocket and an unloaded .22 caliber Derringer in his left front pocket. (R 425-433) There was an empty holster in his right rear pocket. (R 390) His body was leaning on some bicycles and his feet were near a piano bench. (R 448-453) A pair of glasses was under the bench and a palm print in blood and drops of blood were in front of the bench. (R 448-453) (State's photograph exhibit No. 24) The palm print in the blood proved to be Carter's. (R 462, 531-535) A set of keys belonging to Carter was retrieved from in front of a display case. (R 383)

Dr. Charles McConnell performed an autopsy on Carter on January 24, 1991. (R 546-549) He found superficial lacerations

around the right eye along with some abrasions. (R 550) These lacerations involved the right cheek and upper eyelid and appeared to have been caused by blunt force by a broad object. (R 550-552) McConnell said that the wounds could have been produced by a fist. (R 552) Because the injuries were to facial tissue, there would have been profuse bleeding. (R 551-552) McConnell also found a gunshot wound to the head. (R 552-553) The entrance wound was approximately one inch above the top of the area where the ear attaches to the scalp. (R 553) He found stippling at the entrance wound indicating that the firearm would have been four to twelve inches from the body at the time the shot was fired. (R 553-554) The bullet traveled in a slightly downward and forward direction and lodged in the left jaw bone area. (R 555-556) The trajectory was downward and forward approximately 10 to 15 degrees. (R 556) The bullet traveled through the right half of the cerebral hemisphere causing extensive injury to the center of the brain. (R 557-558) Death would have occurred quickly and conscious movement would have ceased immediately. (R 560) McConnell said Carter was about 5'10" tall and weighed approximately 200 pounds. (R 561-563) He could not tell from the angle of the gunshot wound whether it occurred during a struggle over the gun or not. (R 568)

A ballistic expert, Edward Love, examined the bullet removed from Carter's jaw and the .38 caliber Charter Arms revolver removed from Melton's waistband at his arrest. (R 521-527) This firearm contained five unfired cartridges and

one fired cartridge when taken from Melton. (R 392-399) Love concluded that the bullet removed from Carter was fired from that weapon. (R 524-526) During his examination of the firearm, he found the trigger pull to be within standard range and that virtually anyone could have easily discharged the weapon. (R 526-529) Two loaded firearms were found inside the black nylon bag. (R 422-424, 435-437) Another Charter Arms .38 caliber revolver was found containing one unfired cartridge and five unloaded chambers. (R 422-424) A .32 caliber five-shot revolver was discovered containing four unfired cartridges with one empty chamber. (R 434-437) The ballistics expert did not testify about any comparisons with these firearms. (R 521-529)

Blood stains were found on various items obtained during the investigation of the case. Lonnie Ginsberg, a forensic serologist, examined these items and compared the stains to known blood from Carter. (R 575-587) Three items taken from Melton had blood stains. One of the latex gloves Melton wore when arrested had a blood stain on both side of the fingers which was consistent with Carter's blood. (R 576-581, 583-584) The white pants Melton wore had a blood stain which appeared to have been applied from the outside since it did not soak through to the inside of the material. (R 579-580, 584) This stain was also consistent with Carter's blood. (R 579-581) A small stain on Melton's shoe was of insufficient quantity to test and Ginsberg could not even determine if it was human or animal blood. (R 585-587) Ginsberg also examined the latex gloves Lewis wore and found no blood stains. (R 578)

Bendleon Lewis was granted use immunity to testify for the State. (R 624, 641) Although he testified he had no promises from the State in exchange for his testimony, Lewis stated he was testifying with his attorney's knowledge and hoped for favorable treatment on his charges. (R 624-625, 641-645) He related a version of the crime in which Melton initiated the robbery and fired the fatal shot. (R 623-660)

According to Lewis, Melton telephoned him at his girl-friend's house around 11:30 or 12:00 on the morning of January 23, 1991, and asked him to help rob the pawn shop. (R 626-627) Lewis agreed. (R 627) They made plans to borrow a pistol from Phillip Parker who lived in Lewis's neighborhood. (R 627) Parker loaned the pistol in exchange for some jewelry and another gun from the proceeds of the robbery. (R 627) Lewis was to obtain the pistol and meet Melton at Joe Mims' house which is where Melton lived. (R 628-629) These plans were made via telephone conversations. (R 628) Lewis acquired the pistol but said it was not loaded. (R 630, 647-648) He asked Parker about ammunition but Parker said he did not have any. (R 630, 647-649) However, the book bag in which Lewis carried the gun away had one bullet inside which Lewis said Parker must have place there. (R 630) Lewis said he met Melton at Joe Mims' house where Lewis gave the gun to Melton and they both obtained rubber gloves. (R 629-630) Lewis said he did not know if the pistol was ever loaded. (R 631) Between 5:00 and 5:30 p.m., the two of them began walking to the pawn shop. (R 629) Along the way, Lewis said they talked to someone named Mike, and

Melton asked him to take them somewhere after the robbery. (R 631) When they reached the pawn shop, Lewis said he carried the bag, and Melton had the pistol in his pants. (R 629-630)

Once inside the pawn shop, Lewis pretended to be interested in pawning one of his necklaces. (R 632) Carter tested the necklace and told Lewis he would give him $18. (R 632) Lewis saw that Carter had a pistol in a holster on his side. (R 632-633) In order to get Carter to stand so that he could more easily take the gun, Lewis asked Carter to weigh the necklace. (R 633) When Carter stood to place the necklace on his scales, Lewis grabbed Carter's arm and Melton pulled the gun he carried on Carter. (R 633) Lewis took Carter's gun from the holster and gave it to Melton. (R 634, 651) Melton placed one of the guns in the bag and gave the bag to Lewis, telling him to get the jewelry from the display case. (R 634) Lewis said Carter was cooperative and told them to take anything they wanted. (R 635) Melton allegedly called Lewis away from the display cases to come to the safe where more jewelry was located. (R 635) After taking items from the safe, Lewis returned to finish the cases. (R 636) Melton then asked him to take the guns from the cases. (R 636) Lewis asked Carter about leaving through the back door, but Carter said that was not possible. (R 636) Carter gave Lewis keys to use on a side door. (R 636) As he was attempting to unlock the side door, Lewis heard a shot. (R 636) He did not see or hear a fight or a scuffle before the shot. (R 636-637, 652-653) Lewis denied ever hitting Carter with his fist. (R 653) Lewis turned around and saw Carter

falling forward from his knees. (R 638) Lewis threw the keys down and ran toward the front of the shop where he met the police officers. (R 639)

The defense presented two witnesses to impeach Lewis. (R 669, 675) Investigator Steve Ordonia testified about a tape recorded statement Lewis gave to him. (R 674-679) On cross-examination, Lewis had testified that he had told Ordonia, during the tape recorded interview, that he obtained the gun from Parker and gave it to Melton . (R 648-650) Ordonia testified that initially Lewis told him nothing about acquiring the gun from Parker. (R 676-677) Later, after the tape recorded statement, Lewis admitted getting the gun from Parker. (R 676-677) Phillip Parker also testified. (R 669) He said Lewis borrowed a .38 caliber pistol from him on January 23, 1991. (R 670-671) Lewis obtained the gun between 3:00 and 4:00 p.m. (R 673) Parker testified that he gave Lewis no bullets for the firearm. (R 672-674) He specifically denied placing a single bullet in the bag in which Lewis carried the gun. (R 673)

Melton testified in his own defense. (R 679) On January 23, 1991, Melton planned to spend the day at his girlfriend's house since she had not gone to school that day. (R 680) Lewis called Melton at his girlfriend's house and asked Melton to meet him at Joe Mims' house to drink and smoke marijuana. (R 680) Melton told Lewis he would meet him later, but Melton said he was not planning to do so since he wanted to stay with his girlfriend. (R 681) Lewis called two more times. (R 681) The third time, Lewis called from Mims' house about 4:30 p.m.

(R 681-682) This time, Melton agreed to meet Lewis, and he went to Mims' house about 4:30. (R 682) Lewis asked Melton to go for a walk. (R 682-683) They drank a bottle of MD 20/20, smoked marijuana and talked about needing money. (R 683) During the walk, they had a conversation with someone named Mike, but there was no discussion about him taking Melton and Lewis anywhere. (R 683) Melton and Lewis went to Carter's Pawn Shop. (R 683-684)

Inside the shop, Lewis began talking to Carter about jewelry and had asked Carter to open a case to show him a ring. (R 685) Lewis also discussed pawning a necklace. (R 685) While Lewis was talking to Carter about wanting a ring, Melton said he decided to take a ring while Carter was distracted. (R 685) Melton put on the gloves which he had in his back pocket. (R 685) He reached over the case to pick up the ring when Carter turned quickly and saw him. (R 686) Carter reached for his gun, but Lewis grabbed his hands. (R 686) Melton pulled the pistol he had in the waistband of his pants. (R 686) Melton took Carter's gun and put the gun he carried into the shop into the black bag Lewis had on his shoulder. (R 686) He did not know Carter had other guns on his person. (R 687) Lewis released Carter's hands and told him to open the display cases. (R 685-687) Carter complied. (R 687) The three of them then went down a hallway to the area where the safe was located. (R 688) Lewis removed valuables from the safe and returned to the front of the shop to finish taking jewelry there. (R 688) Melton held the gun on Carter in the hallway. (R 690-691)

Holding the gun in his right hand, Melton began backing Carter out of the hallway. (R 689) Melton glanced toward the front of the store, and at that time, Carter rushed at him. (R 691) Melton nearly lost his balance but regained it just as Carter reached him. (R 691) Melton spun around and he and Carter fell to the floor. (R 691) Carter fell on his left side with his head near the piano bench. (R 692) At that time, Lewis came to them and struck Carter in the right eye, knocking Carter's glasses off and causing him bleed. (R 692) Blood dripped from Carter's eyes to the floor. (R 692-693) Melton told Carter to be still and that he was not going to shoot him. (R 692-693) Lewis returned to the jewelry cases. (R 693) Carter remained on the floor for a period of time. (R 693-694) However, when Melton looked away briefly, Carter pushed up from the floor and grabbed Melton's right hand in which he held the pistol. (R 694-695) They struggled. (R 695) Melton's finger was on the trigger of the gun and the gun discharged. (R 695) Carter was shot and fell over on some bicycles. (R 695) Melton and Lewis tried unsuccessfully to open a side door and then fled to front of the shop where they were arrested. (R 696)

Melton testified that he had no intention of harming Carter when he went into the pawn shop. (R 697) He carried the gun in the shop because Lewis had given it to him, but he had no intent to use it. (R 699-700) In fact, he said he had no intention of committing a robbery, only to surreptitiously steal. (R 697-698) He said that if he had been able to steal

the rings as he first attempted when Carter was distracted, he would have left at that time. (R 697)

Penalty Phase and Sentencing

During the penalty phase of the trial, the state presented only one witness, Assistant State Attorney Joe Schiller. (R 921) Schiller had prosecuted Melton for first degree murder and armed robbery of a taxicab driver which had occurred on November 17, 1990. (R 921-922) Melton was arrested for this offense after the homicide of Carter. (R 923) The State introduced a certified copy of the judgement and sentence convicting Melton for the murder and robbery of the taxicab driver. (R 924) On cross-examination, defense counsel asked Schiller about the jury's verdict. (R 925) The defense also introduced the verdict into evidence without objection. (R 925). Schiller testified there was a specific finding by the jury of felony murder. (R 925-926). He also testified that Melton was sentenced to life with a mandatory 25 years for the murder and to life for the armed robbery. (R 926-928). The sentences were consecutive. (R 931). The defense also asked Schiller if the jury in the first case came back with a question. (R 936). He testified that they did. (R 936). Defense counsel introduced as Exhibit No. 3 a copy of the jury's questions. (R 936).

On redirect, Schiller was asked about the questions the jury returned. (R 937) The questions wanted clarification on the charge. (R 937) The questions was, "Does it mean the defendant had the gun during the robbery and fired it or if

someone else could have used the gun? Does it and/or mean we can choose simple felony?" (R 937-938) Schiller was of the opinion that the jury wanted clarification about whether Melton could be convicted under principle theory if he did not fire the gun. (R 938-939) The prosecutor then asked Schiller, "...in that case you just testified to, could this exhibit that was introduced, was there any evidence received whatsoever then anyone other than Antonio Lebaron Melton, the defendant in this case, was the trigger man?" Defense counsel immediately objected that the prosecutor was trying to impeach the verdict, and that this constituted a comment on the defendant's right to remain silent. (R 939-940) The court overruled the objection and allowed the prosecutor again ask the question. (R 940) Schiller then answered the question negatively. (R 940) The prosecutor then asked what the evidence showed regarding how the victim in that case was killed. (R 940) Over objection, Schiller detailed the evidence in the previous case. (R 941-942)

On recross, Schiller testified that Bendleon Lewis and Tony Houston were also involved in the case. Lewis was never charged and Houston was allowed to plead guilty to second degree murder for a sentence of 20 years. (R 942-951) Lewis' version of the offense was that the three of them had intended to merely run and not pay the cab fare. (R 954) Lewis said that when the taxi cab stopped, he ran, leaving Houston and Melton in the car. (R 955) He did state that when he met up with Melton again, he split the proceeds of the robbery. (R

955) Houston's version of the offense was that the three intended to merely not pay the cab fare. (R 957) He stated that when the cab stopped, Melton pulled his pistol and told him to help rob the cab driver. (R 957) Houston took the driver's bank bag and ran from the car. (R 957) He left Melton, the gun, and the cab driver. (R 957) Houston said he then met up with Melton and Lewis, and they split the money. (R 958-959) Schiller testified that an argument to the jury was that Lewis and Houston had fabricated the story against Melton after learning that Melton had admitted his involvement in the death of Carter. (R 959)

The defense presented six witnesses in addition to Melton's own testimony. (R 977, 987, 1000, 1012, 1015, 1040, 1062) Jim Jenkins, Lewis' lawyer, stated that Lewis testified in this case on his advise that it would be in his best interest. (R 977-980) Jenkins said he hoped for a deal where Lewis would be convicted an offense less that first degree premeditated murder and armed robbery. (R 980-982)

Lawrence Gilgun, a clinical psychologist, examined Melton. (R 987-990) His examination and testing disclosed that Melton functions with a full scale I.Q. of 90, which would place him in the bottom 25 percent of the population. (R 992-993) School records indicated that Melton went from an average student to a failing student indicating a discrepancy between his intellectual level and performance. (R 993-994) Melton said his attitude about school changed during this time and he stopped paying attention or trying. (R 994) He began abusing drugs,

primarily marijuana and alcohol. (R 994) This was in late middle school and continued into high school. (R 994) He was a daily drug and alcohol user. (R 995) Melton dropped out of school in the eleventh grade. (R 995) He completed his GED while awaiting trial in the Escambia County Jail. (R 995) Gilgun concluded that Melton suffered from no major psychiatric or emotional disorder. (R 996-997) He felt Melton had potential for rehabilitation. (R 997-998) As far as family background, Melton's father had left early in his life and his stepfather was not a positive influence. (R 999)

Melton's biological father, Frank Jessie Stoutemire, testified. (R 1000-1001) He said he had very minimal involvement in his son's life. (R 1001) He was 17-years-old and Melton's mother was 16-years-old when she became pregnant. (R 1001) They never married. (R 1002) As soon as he graduated from high school, Stoutemire joined the army and moved away. (R 1002) After three years in the army, he required two years of recuperative surgery from a back injury in a VA hospital in Alabama. (R 1003-1004) Stoutemire then moved to Chicago for a period of time. (R 1005) When he returned to Pensacola he began some regular contact with his son. (R 1005-1007) In November of 1990, his son came to him looking for work. (R 1007) They talked and Stoutemire advised to consider joining the service. (R 1007) He said he did not see his son again until his arrest. (R 1007-1008) Stoutemire said he thought he could have had better influence on his son if he had spent time with him. (R 1008-1009)

Melton's mother, Laticia Davis, also testified. (R 1016-1017) She was 16-years-old, living with her mother and not married when Melton born. (R 1018) Melton's father never lived in the home with him. (R 1019) Melton was born a month premature, but he suffered no other complications. (R 1019-1020) Davis admitted using alcohol to some extent during the pregnancy. (R 1020) When she was eighteen, Davis moved out of her mother's house with her son. (R 1020-1022) She later married David Booker after living with him for two years. (R 1023-1024) The relationship was a stormy one, and they were separated. (R 1023-1024) They lived at Truman Arms Apartments for about six years. (R 1026) Her second son was born when Melton was about four. (R 1027)

Melton was involved in football and performed well academically during his early schools years. (R 1025) When he reached middle school, however, the peer pressure began and he began having difficulties -- poor grades, skipping school and suspensions. (R 1028) His mother asked for help handling him because she was single and held two jobs. (R 1029) Melton was required to take care of his younger brother by the time he was 10 to 13 years old. (R 1029-1030) He would cook and clean house before his mother came home from work. (R 1030) When he was 15 or 16 years old, he stopped living with his mother and began living with his mother's sister, Margaret Johnson. (R 1030-1031). His mother removed him from school during the eleventh grade because he was disrupting class, and the school was continually calling her on the job. (R 1031-1032) She

reasoned that if he was not going to be in school to learn, he should not be there preventing or interfering with other children. (R 1032) She thought he could do something else. (R 1032) Melton worked at a seafood restaurant and a Kentucky Fried Chicken restaurant. (R 1033) Davis remarried and had recently moved to Mobile at the time of these homicides. (R 1033-1034)

Elouise Melton, Melton's grandmother, also testified. (R 1062) Melton lived with her for a period of time until he was 17 1/2 years old. (R 1064) He was in and out of the house during that time period. (R 1064) Elouise Melton worked at the University Hospital. (R 1065) She said that Melton worked at a restaurant for a period of time while he lived with her, but he did not go to school. (R 1064-1065) Because he continued to bring certain of his friends into her house after she disapproved, his grandmother told him to move out. (R 1067) Melton left that day. (R 1067-1068)

Melton also testified. (R 1040) Initially, Melton testified about the prior murder/robbery conviction. (R 1040-1041) He denied all involvement in that crime and concluded that Lewis and Houston implicated him in order to obtain favorable treatment for themselves. (R 1040-1041) Melton described his school experiences. (R 1041-1046) In middle school his problems began. His grades dropped because he got involved in more activities outside of school. (R 1043) He started drinking and smoking marijuana in the ninth grade. (R 1043-1044) He said some students would bring alcohol to school, and they would

drink in the bathroom. (R 1044) Additionally, he began drinking and smoking marijuana on the weekends which continued through high school. (R 1044-1045) He said his mother took him out of the eleventh grade because she got tired of coming to the school for his disciplinary trouble. (R 1045) Melton went to Pensacola Junior College to attend the GED program. (R 1046) However, he could not complete it because of transportation problems. (R 1046) He lived with his grandmother during that time. (R 1046) His first job was in the ninth grade working at a department store cleaning out a warehouse. (R 1047) Later, he worked at a Kentucky Fried Chicken as a cook. (R 1047-1048) There was no man around his house while he was growing up. (R 1048) His biological father visited him occasionally, however, Melton never even stayed overnight at his house. (R 1049) While in jail after his arrest, Melton did have a disciplinary report for possession of a broken razor. (R 1050) He said he would break razors and put them on a comb and use them to cut other inmates' hair. (R 1050) One inmate whose hair he cut left the razor on a cell door. (R 1051) Melton finished the GED program while in jail. (R 1051) He related his prior criminal background as a juvenile charge of battery as a result of a football game fight and a charge of writing a worthless check which was tried in an adult court. (R 1052) While in jail on an earlier occasion, he was accused of taking a necklace, but that was never charged. (R 1053) He said he had no other criminal involvement. (R 1053) All of these incidents were when

he was 16 or 17 years-old and within one year of his arrest in this case. (R 1053)

SUMMARY OF ARGUMENT

1. In order to insure the fairness of his penalty phase trial, Melton wanted to voir dire the prospective jurors on the impact his prior murder conviction would have on their ability to recommend a life sentence. However, questioning the jurors on this issue would prejudice the guilt phase because the jurors would then be aware of the prior murder conviction which was irrelevant in guilt phase. To resolve the dilemma, Melton asked the court to empanel separate guilt and penalty phase juries. The trial court denied this motion. As a consequence, Melton's counsel chose not to question the jurors on the critical penalty issue. Melton's right to voir dire the prospective jurors concerning attitudes about the death penalty was restricted. He was denied his rights to effective counsel at jury selection, to due process and a fair jury trial at penalty phase and his death sentence was unconstitutionally imposed since the reliability of the bifurcated trial process was impaired.

2. The prosecutor made improper remarks during penalty phase which prejudiced Melton's trial. First, he commented on Melton's right to remain silent when he elicited testimony about the lack of evidence presented in the prior murder trial to indicate that Melton was not the triggerman. Second, the prosecutor extracted a commitment from the jury to recommend a death sentence by referencing an alleged answer to a question during jury selection about the jurors' ability to recommend death. Third, the prosecutor told the jury that disparate

treatment of codefendants should not be a sentencing consideration for the jury. The court should have granted a mistrial.

3. This Court has held that the pecuniary gain aggravating circumstance is available only where the evidence proves beyond a reasonable doubt that the murder was specifically motivated to facilitate the perpetrator's financial gain. The evidence was insufficient to support the pecuniary gain aggravating circumstance, since financial gain was not the motivation for the killing. The homicide here occurred accidentally, after the taking of the property and during a struggle, which the victim initiated. Although Melton participated in a planned robbery of the pawn shop, the plan did not include a homicide for its facilitation. The trial court should not have instructed the jury on this factor or found the factor as an aggravating circumstance.

4. Melton's death sentence is not a proportional penalty in this case. He allegedly shot the victim during the commission of an armed robbery. Evidence at trial supported Melton's admission that he unintentionally killed the victim during a struggle which the victim initiated at the conclusion of the robbery. The jury returned a verdict for felony murder, rejecting the State's premeditation theory. This Court has reversed death sentences imposed simply for murders committed during a robbery or burglary. Melton's offense is comparable to these cases and his death sentence should be reversed.

ARGUMENT

ISSUE I

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.

Melton was forced into making a difficult and untenable choice. On one hand, he could disclose during jury selection that he had a prior murder conviction and effectively voir dire prospective jurors' attitudes concerning a sentencing recommendation knowing that fact. This decision would prejudice the fairness of his guilt phase trial, since the prior murder conviction was irrelevant and inadmissible in that phase. On the other hand, he could not disclose the prior murder conviction and preserve the fairness of the guilt phase trial. This decision would result in ineffective voir dire on the impact a prior murder conviction would have on a prospective juror at sentencing. In order to avoid having the unfairness which would result at one or the other stage of the trial, Melton moved for the court to empanel two juries to hear his case. (R 2-11, 1263) The request was made to insure Melton's right to voir dire prospective sentencing jurors concerning their attitudes and possible bias regarding the imposition of the death penalty, and at the same time, insure a guilt phase jury not exposed to this prejudicial and irrelevant prior murder

conviction. With two juries, the guilt phase jury could be questioned and empaneled without reference to the prior murder, while the penalty phase jury could be questioned freely about the impact of that prior conviction. (R 1263-1265) Two juries would preserve the fairness and reliability of both phases of the trial.

The trial court denied this motion. (R 11-12) Faced with the choice of disclosing the prior murder conviction to the jurors and prejudicing 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. Melton was denied his rights to effective counsel at jury selection, to due process and a fair jury trial at penalty phase and his death sentence was unconstitutionally imposed since the reliability of the bifurcated trial process was impaired. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV, U.S. Const.

After Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the United States Supreme Court affirmed the facial constitutionality of capital sentencing statutes because they had adopted bifurcated trial procedures. In Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), the Court commented that one of the benefits of such a process is to allow the jury to hear information relevant to sentencing

which may have been prejudicial and irrelevant to the issue of guilt. The Court wrote,

> Jury sentencing has been considered desirable in capital cases in order "to maintain a link between contemporary community values and the penal system -- a link without which the determination of punishment could hardly reflect `the evolving standards of decency that mark the progress of maturing society.'" But it creates special problems. Much of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question. This problem, however, is scarcely insurmountable. Those who have studied the question suggest that a bifurcated procedure -- one in which the question of sentence is not considered until the determination of guilt has been made -- is the best answer....
>
> * * * *
>
> When a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in Furman.

428 U.S. 190-192. This Court has also recognized the importance of the bifurcated sentencing system in Florida. State v. Dixon, 283 So.2d 1, 7 (Fla. 1973), see, also, Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

An inherent part of the bifurcated trial procedure is the selection of a jury which can fairly decide the guilt and penalty issues in the case. Prospective jurors who are unable to consider death as a possible sentencing option are not permitted to serve. Wainwright v. Witt, 469 U.S. 412, 105 S.Ct.

844, 83 L.Ed.2d 841 (1985); Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980); Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Likewise, those prospective jurors who are unable to consider life as a possible sentencing option in the case are not permitted to serve. Ross v. Oklahoma, 487 U.S.81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988); O'Connell v. State, 480 So.2d 1284 (Fla. 1986); Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983); Thomas v. State, 403 So.2d 371 (Fla. 1981). This Court has held that full and adequate voir dire of prospective jurors is an important right to aid in the selection of an unbiased jury. See, e.g., Davis v. State, 461 So.2d 67 (Fla. 1985); Lewis v. State, 377 So.2d 640 (Fla. 1980). In a capital case, a defendant has the right to examine prospective jurors regarding their ability to recommend a life sentence. E.g., Fitzpatrick v. State, 437 So.2d 1072; Thomas v. State, 403 So.2d 371; Poole v. State, 194 So.2d 903 (Fla. 1967). Moreover, a defendant has the right to ask prospective jurors if particular facts or circumstances would trigger a bias rendering them unable to fairly consider a life sentence recommendation in view of that fact. Ibid. Unfortunately, in this case, the selection of a single jury could not accomplish the goal of obtaining jury fairly selected to try both phases of the case. The trial court's decision denying the motion for separate guilt and penalty phase juries effectively denied Melton of this important right to question prospective jurors. Counsel was restricted in his ability to ask the question which was the pivitol issue in the penalty

phase of the case. A prior conviction for a murder is a significant aggravating factor. Melton was entitled to have a penalty phase jury selected with that issue fully explored during voir dire. In order to adequately voir dire the prospective jurors on penalty issues, defense counsel would have had to disclose the irrelevant to guilt phase fact of a prior conviction. This, however, would have negated one of the primary benefits the bifurcated procedure was designed to accomplish -- keeping prejudicial facts which are relevant to sentencing from being injected into the guilt determining process. Gregg v. Georgia.

Melton was denied his right to a fair penalty phase trial with a fairly selected jury. He asks this Court to reverse his sentence for a new penalty phase trial with a new jury.

ISSUE II

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

(A). The Trial Court Erred In Not Granting A Mistrial When The Prosecutor Commented On Melton's Exercise Of His Right To Remain Silent.

The assistant state attorney, Joe Schiller, who prosecuted Melton resulting in his prior murder conviction testified during the penalty phase. (R 921) His testimony was about some of the details and circumstances of the prosecution. (R 921-976) On cross-examination, the defense had brought out the fact that the jury in that case returned a felony murder conviction and at one point, had a question about the principle theory which suggested the jury may not have believed Melton fired the gun. (R 924-937) On redirect, the prosecutor asked Schiller about this jury question and then 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?

(R 939)(emphasis added) At this point, defense counsel objected and argued that this question was a comment on Melton's right to remain silent since, on advice of counsel, he had not testified in the earlier trial. (R 939-940) The court overruled the objection and the prosecutor repeated the question:

> My question, Mr. Schiller in that case that you tried where the defendant, Antonio Lebaron Melton, was found guilty of murder, robbery, was there any evidence whatsoever

> that anyone other than the defendant was the triggerman?

(R 940) Schiller ultimately answered the question negatively. (R 940)

A prosecutor is prohibited from making any comment before the jury which is even "fairly susceptible" of being interpreted as a comment on a defendant's right to remain silent or failure to testify. E.g., State v. Kinchen, 490 So.2d 21 (Fla. 1985); David v. State, 369 So.2d 943 (Fla. 1979). The prosecutor's comments here fall into the prohibited category. They were not merely comments on the uncontradicted nature of the evidence. See, White v. State, 377 So.2d 1149 (Fla. 1980). Houston, Melton's codefendant in the prior murder was the key State witness and the only witness allegedly with direct knowledge about the homicide. The jury here was made aware of that fact. Consequently, when the prosecutor framed the question to ask "...was there any evidence received whatsoever that anyone other than Antonio Lebaron Melton, the defendant in this case, was the triggerman?", the only reasonable inference was that Melton, the only other person who allegedly had knowledge of the offense, did not testify. Indeed, after the comment, Melton's defense counsel felt compelled to explain to the jury that Melton did not testify in the prior on his lawyer's advice. (R 1087-1088)

In Holloman v. State, 573 So.2d 134 (Fla. 2d DCA 1991), the district court reversed a conviction because the prosecutor commented on the defendant's failure to testify. The comments

there, like the comments in this case, were framed in such a manner as to lead the jury to the conclusion that the defendant did not testify. The court wrote,

> Appellant did not take the stand at trial. During closing argument by the prosecuting attorney, appellant's attorney twice interposed objections for alleged improper comments by the prosecuting attorney on the evidence or on appellant's failure to testify. In each instance, the court denied a motion for mistrial. Finally, however, the prosecutor, attempting to persuade the jury that the voice on the tape was appellant's, stated:
>
> > There was no other female in that house when it was searched. And on that tape, selling that cocaine, was a woman's voice, and there has been no rebuttal, no evidence from that stand to say other than it was the defendant on that tape, or to establish that there was someone, some other female living there in that house.
>
> We are convinced that, under the circumstances of this case, those comments by the prosecutor were fairly susceptible of being interpreted by the jury as comments on appellant's failure to testify....

573 So.2d at 135. (emphasis added) The comments made in this case are comparable to those made in Holloman. In both, the prosecutor called the jury's attention to the defendant being the logical person who could provide testimony and then stated that there had been no testimony to support a defense position.

In Jones v. State, 260 So.2d 279 (Fla. 3d DCA 1972), the district court reversed on the basis of similar comments made by a prosecutor which drew the jury's attention to the lack of testimony a trial. The comment there was,

> `Let us look once more into the force of the robbery, whether these people were

> forced into this because nobody denies that they were in it. Their attorneys admit to you that they were in it, so there is no denial. There is not one word from the stand that says they did not participate in this crime.'

260 So.2d at 280. (emphasis the court's) Reversing for new trial, the court wrote,

> The appellants argue that the prosecutor's statement amounted to a comment on their failure to testify on their own behalf. The state argues that the comment should be regarded as having had reference only to testimony of the witnesses who testified. We hold the appellants' argument has merit.
>
> * * * *
>
> In the present case, while the comment of the prosecutor may have been susceptible of differing constructions, it well could have been regarded by the jury as having reference to failure of the defendant to take the stand and deny their participation in the crime when faced with the state's evidence indicating their participation....

Ibid. at 280-281. The prosecutor's comments in this case are also susceptible to being interpreted as a reference to Melton's failure to take the witness stand and deny participation.

The prosecutor's comment on Melton's failure to testify deprived him of due process and a fair penalty phase trial. His death sentence has been unconstitutionally impose. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const. He asks this Court to reverse his sentence for a new penalty phase trial with a new jury.

(B). The Trial Court Erred In Allowing The Prosecutor To Extract A Commitment From The Jury To Recommend A Death Sentence.

The prosecutor, while making his closing statement to the jury during penalty phase, sought to invoke an alleged prior commitment to recommend death based on responses jurors gave during jury selection. His argument proceeded as follows:

> I am not going to ask you to respond now, it would be improper. I can't remember your individual responses after being told about the trial being a guilt phase and a penalty phase, two trials. Some of the questions that were asked of you, do any of you have any personal, religious, moral or philosophical opposition to the death penalty. And you all gave a response, basically it's all the same response, maybe not specifically, but the response was no, in the appropriate case I can recommend death. Do you believe that capital punishment serves a useful place in our society? Once again, yeah, you answered, yeah. Will you promise not to consider a possible penalty during the guilt phase? I'm just showing you some of the things that you searched your conscience about and you all gave responses that qualified you as jurors. <u>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, quote, I recommend that you die? Do you remember me asking that question? Every one of you answered that question inadvertently[sic].</u> Another question you were asked is --
>
> MR. HALL: Objection, Your Honor. I don't believe that the question was specifically asked in relation to this particular defendant.
>
> THE COURT: The jury will have to use its recollection about those matters.
>
> MR. HALL: Your Honor, that would be getting a prior commitment from a juror of a specific individual, and I believe that would be an improper question. I move for a mistrial. I ask that you remind that jury to disregard that commitment.

THE COURT: The objection is overruled.

(R 1074-1075)(emphasis added)

It is improper during voir dire to secure a commitment from a juror to return a particular verdict in a particular case. See, Renney v. State, 543 So.2d 420 (Fla. 5th DCA 1989); Saulsberry v. State, 398 So.2d 1017 (Fla. 5th DCA 1981); Smith v. State, 253 So.2d 465 (Fla. 1st DCA 1971). Although the prosecutor here did not seek such a commitment at jury selection, he did so in argument when he referenced to a question he never really asked the jurors. (R 1074-1075) During jury selection, the only question the prosecutor asked the jurors, which even resembled the alleged question, pertained to the jurors' ability to consider recommending a death sentence in view of Melton's youth:

> MR. SPENCER: You know, it's a very difficult decision. Here you have an 18-year-old person accused of murder and robbery. And what the State would be asking you to do is look at this person and say because of the aggravating -- because of -- to weigh the aggravating and mitigating circumstances, I look at you and I recommend to this Court that you die in the electric chair. Any of you that would not be able to do that because of the defendant's age? Anybody that would cause them a problem? Each of you believe that you can follow the Court's instruction on the law as to be applied to the death penalty?

(R 89-90) However, at argument, he reminded the jurors that they had allegedly said on voir dire that they were emotionally capable of looking at Melton and recommending death. (R 1074-1075) Referencing this nonexistent question and response had

the effect of pressuring the jurors to vote for a death sentence because they had earlier promised they would. This violated due process, prejudiced the penalty phase of Melton's trial and rendered his death sentence unconstitutionally imposed. Art. I, Secs. 9, 16, 17 Fla. Const.; Amend. V, VI, VIII, XIV U.S. Const.

The Supreme Court of Mississippi decided a case involving a similar factual situation. Stringer v. State, 500 So.2d 928 (Miss. 1986). In that case, the prosecutor asked the jury to perform as he claimed they promised to do at jury selection and vote for a death sentence. The Mississippi court held that the prosecutor's comment improperly placed the jurors in a "box" regarding their sentencing vote and could have mislead them into believing they had promised to ignore the mitigation present in the case. The court wrote:

> During voir dire, the prosecutor asked the jurors if they could return the death penalty under the following conditions:
>
> > [H]ow many of those that have said that they are in favor of the death penalty and they could vote for the death penalty if he shot the other person -- how many of those people could not vote for the death penalty if he didn't himself pull the trigger and killed [sic] the person he is charged with killing here?
> >
> > Is there anyone that would base their decision on sympathy?
>
> The prosecutor reminded the jury of those questions during his closing argument in the sentencing phase.
>
> > Each one of you said under oath -- I can vote for the death penalty in the proper

> case. Will it matter that he's young? Will he have to have killed more than one person? Will he have to have pulled the trigger himself on this murder? Can you still do it? Can you do it based on the testimony of the two people that you convicted him on? And every single one of you said yes -- on your oath -- I can do that. If you hadn't you wouldn't be here.
>
> If one of you -- if one of you looks for an excuse and says -- I'm not gonna vote for the death penalty and I'm not gonna give you a reason -- just as Mr. Kelley said you can do -- then you can keep from giving this person the death penalty. You can forget what you promised me. You can forget what you said under oath Monday. [emphasis added.]

* * * *

During closing argument, the district attorney characterized the jurors' negative responses to his voir dire as a promise, under oath, to return the death penalty in this case. When combined with the question regarding Stringer's involvement in the crime and the question about sympathy, the jurors could have had the mistaken impression that they had pledged to ignore the only mitigating factors which he could present in his defense. Those factors were his relatively minor role in the killing of Mr. McWilliams, and his unique personal characteristics which would invoke sympathy; his age, his high school record, his troubled home life, and the domination by his father. It is an improper influence to put the jury in a "box" by voir dire tactics which extract a promise, prior to trial, to ignore evidence favorable to the defendant. This promise or pledge prevents the jurors from considering all factors relative to the verdict. The jurors are then called upon during closing argument to fulfill that promise, and the effects -- whether calculated or not -- is to shame or coerce the jury into rejecting factors which would tend to mitigate against the death penalty. We charge the jury in a capital murder case to narrow and

> distinguish the cases deserving of the death penalty from those which do not warrant such an extreme punishment. This awesome responsibility demands the freedom and flexibility to consider all relevant fac- tors. A verdict returned on the basis of anything less cannot stand.

500 So.2d at 938-939.

In this case, the prosecutor's comments likewise placed the jurors in a "box." His voir dire questioning referred to Melton's youth which was a mitigating factor for the jury to consider. Consequently, the comment in argument which the prosecutor characterized as the jurors' promise to be emotionally capable of recommending death could also have been misconstrued by the jury as a prior promise to ignore Melton's age. A new penalty phase trial with a new jury is required.

> (C). The Trial Court Erred In Not Declaring A Mistrial When The Prosecutor Told The Jury During Penalty Phase That The Disparate Treatment Of Codefendants Should Not Be A Consideration In The Jury's Sentencing Recommendation Decision.

When addressing what the jury might consider in mitigation, the prosecutor specifically told the jury that the punishment codefendants received was an irrelevant consideration. (R 1080) Defense counsel objected to this misstatement of the law and moved for a mistrial. (R 1080) The court advised the jury that it had the the discretion to consider the the sentence of the codefendant as a mitigating factor. (R 1081) The prosecutor's argument, defense counsel's motion and the court's instruction was as follows:

> Also, a very important point, a very, very important point, the issue in this case is not what punishment other people may have perceived[sic] in this case or in any other case in which the defendant was involved. I'm talking about Bendleon Houston -- Tony Houston and Bendleon Lewis. The issue in this case and the only issue in this case is the appropriate punishment for you to recommend to this court in this case.
>
> MR. TERRELL: I would object. I move for a mistrial. That's clearly a misstatement of the law. The jury is clearly entitled to consider as mitigation the consequences for co-defendants in a similar offense.
>
> THE COURT: I didn't understand your statement you objected to.
>
> MR. TERRELL: The statement that was objectd to was that the jury cannot consider the consequences of the co-defendants in the similar or same offense as a mitigating factor, and that is clearly a misstatement of the law.
>
> THE COURT: Well, ladies and gentlemen, you may within your discretion consider the sentence of the co-defendant 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'll deny your motion for mistrial.

(R 1080-1081)

Disparate treatment of codefendants is always a significant factor for the jury's consideration. See, e.g., Pentecost v. State, 545 So.2d 861 (Fla. 1989); Harmon v. State, 527 So.2d 182 (Fla. 1988); Caillier v. State, 523 So.2d 158 (Fla. 1988); Brookings v. State, 495 So.2d 135 (Fla. 1986); McCampbell v. State, 421 So.2d 1072 (Fla. 1982); Slater v. State, 316 So.2d 539 (Fla. 1975). The prosecutor's argument was improper and mislead the jury by limiting its consideration of valid

mitigation in violation of the United States and Florida Constitutions. Amends. V, VI, VIII & XIV, U.S. Const.; Art. I, Secs. 9, 16, 17 Fla. Const.; see, Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987).

Although the trial judge gave a curative instruction, the instruction failed to cure. The judge told the jury that it has the discretion to consider disparate treatment as a mitigating circumstance. Telling the jury it had the discretion to consider the fact as a mitigating factor implied that the jury did not have to consider disparate treatment merely if it chose not to do so. While the jury may be free to find or not find the mitigating circumstance based on disparate treatment of co-defendants, it did not have the discretion to not consider the factor at all. The jury, as a constituent part of the sentencing authority, was required to consider all evidence in mitigation. See, Espinosa v. Florida, 505 U.S. ___, 112 S.Ct. ___, 120 L.Ed.2d 854 (1992); Sochor v. Florida, 504 U.S. ___, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2958, 57 L.Ed.2d 973 (1978). A new penalty phase trial with a new jury is required.

ISSUE III

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

At the jury instruction charge conference, the State requested an instruction on the pecuniary gain aggravating circumstance. (R 906-908) Melton objected to the instruction on the grounds that the homicide was not committed for the purpose of pecuniary gain. (R 907-908) Since 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. (R 907-908) The court overruled the objection and gave the instruction. (R 908, 1103) Later, in the sentencing order, the court found the aggravating circumstance and made the following factual findings:

> The crime for which the defendant is to be sentenced was committed for financial gain. The evidence establishes beyond a reasonable doubt that the murder in this case was committed in an attempt to complete the crime of robbery and to steal the victim's property of substantial value. The 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 financial gain. The defendant had previously murdered the victim in a prior armed robbery committed by the defendant, and was fully aware of the risk of death to victims in

> conducting armed robberies. However, 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.

(R 1414-1415)

This Court has held that the pecuniary gain aggravating circumstance is available only where the evidence proves beyond a reasonable doubt that the murder was specifically motivated to facilitate the perpetrator's financial gain. E.g., Hill v. State, 549 So.2d 179 (Fla. 1989); Scull v. State, 533 So.2d 1137 (Fla. 1988); Peek v. State, 395 So.2d 492 (Fla. 1980). Where there is a reasonable doubt as to whether the murder was committed for financial gain, the pecuniary gain aggravating factor cannot be found. Simmons v. State, 419 So.2d 316, 318 (Fla. 1982). The proof was insufficient in this case, and the trial court should not have instructed the jury on this factor or found the factor as an aggravating circumstance. Although Melton participated in a planned robbery of the pawn shop, the plan did not include a homicide for its facilitation.

Carter would not have been harmed had he not resisted and struggled over possession of the gun. The murder was unintentional and was not motivated or intended to aid in the acquisition of the property. A number of facts support this conclusion. First, the jury returned a specific verdict for felony murder indicating Melton's testimony about his involvement was believed. (R 895-896, 1275-1276) Second, other evidence

supports Melton's account of the crime, including Carter's resistance. Jackson Wills heard something hit the floor inside the pawn shop and heard someone say, "Don't hit me, don't kick me, I'm already down." (R 476-477) Later, Klaus Groeger heard a gunshot while calling the police. (R 485, 492) This corroborates Melton's testimony that Carter resisted and was initially knocked to the floor by Lewis. Carter's glasses and blood drops were found near the piano bench which was not the same location where Carter was shot. (R 448-453) Furthermore, Carter's palm print was found near the bench which is consistent with his pushing up from the floor to grab Melton a second time. (R 448-453, 462, 531-535)

The court's order noted that the robbery could have provided an aggravating circumstance (R 1414-1415), but the prosecutor and the court chose to waive that factor and pursue the pecuniary gain circumstance. (R 908, 1414-1415) Consequently, the fact that the robbery circumstance was arguably proven does not cure the lack of proof for the pecuniary gain circumstance. The court improperly found and "attache[d] great weight to this aggravating factor." (R 1414-1415)

Melton's death sentence has been unconstitutionally imposed since an invalid aggravating circumstance was included in the sentencing process. Art. I, Secs. 9, 16, 17, Fla. Const.; Amends. VIII, XIV, U.S. Const. He asks this Court to reverse his sentence.

ISSUE IV

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

Although the State prosecuted this case as a premeditated murder during a robbery, the jury rejected the premeditation theory and convicted Melton of felony murder. This Court has consistently reversed death sentences imposed simply for murders committed during a robbery or burglary. See, e.g., Clark v. State, 609 So.2d 513 (Fla. 1992); Proffitt v. State, 510 So.2d 896 (Fla. 1987); Caruthers v. State, 465 So.2d 496 (Fla. 1985); Rembert v. State, 445 So.2d 337 (Fla. 1984); Richardson v. State, 437 So.2d 1091 (Fla. 1983). Even the complete absence of mitigating factors has not changed this result. Rembert, 445 So.2d at 340. Antonio Melton's offense is comparable to these cases. He shot the victim during the commission of an armed robbery. Evidence at trial and the jury's verdict supported Melton's admission that he unintentionally killed Carter during a struggle at the conclusion of the robbery. A death sentence is a disproportionate sentence in this case.

In his sentencing order, the trial judge agreed with the State's theory that the homicide here was not unintentional. (R 1418-1419) However, his conclusion is contradicted by the evidence. Testimony of State witnesses and the physical evidence are consistent with Melton's testimony that Carter grabbed him and struggled for the gun before the gun discharged killing him. The jury's specific verdict for felony murder indicates

that the jury believed Melton's testimony about his involvement. (R 895-896, 1275-1276) Other witnesses' testimony supports the sequence of events in Melton's account of the crime, including Carter's resistance. Jackson Wills heard something hit the floor inside the pawn shop and heard someone say, "Don't hit me, don't kick me, I'm already down." (R 476-477) Later, Klaus Groeger heard a gunshot while calling the police. (R 485, 492) This testimony corroborates Melton's statement that Carter resisted and was initially knocked to the floor by Lewis. Physical evidence at the scene also corroborates Melton's testimony. Carter's glasses and blood drops were found near the piano bench, which was not the same location where Carter was shot. (R 448-453) Additionally, Carter's palm print was found near the bench, which is consistent with his pushing up from the floor to grab Melton a second time. (R 448-453, 462, 531-535) This same evidence contradicts Lewis's testimony that Carter never resisted.

Even if the State had proven an intentional premeditated murder, a death sentence is still inappropriate. A premeditated murder during the commission of another felony, simply does not qualify for a death sentence when compared to similar cases. In Caruthers, the defendant shot a store clerk three times during an armed robbery. After disapproving the premeditation and avoiding arrest aggravating factors, this Court held that Caruthers should not die. 465 So.2d at 499. In Rembert, the defendant bludgeoned a store owner to death during a robbery. No other aggravating circumstance was present, and no

mitigating circumstances were found. His death sentence was reduced to life. 445 So.2d at 340. In Proffitt, the defendant stabbed his victim as he awoke during the burglary of his residence. The trial court found the homicide was cold, calculated and premeditated in addition to being committed during the burglary. Proffitt had no significant criminal history. This Court reduced his sentence. 510 So.2d at 898. In Richardson, the defendant beat his victim to death during a residential burglary. This Court approved four of the six aggravating circumstances found. Although the jury recommended life, no mitigating circumstances were found to exist. His sentence was reversed for imposition of life imprisonment. 437 So.2d at 1094-1095. In Menendez v. State, 419 So.2d 312 (Fla. 1982), the defendant shot a store owner twice during a robbery. No other aggravating circumstances existed, and Menendez had no significant criminal history. This Court reversed his death sentence. Finally, in Holsworth v. State, 522 So.2d 348 (Fla. 1988), the defendant stabbed two victims, killing one, during a burglary of a residence. Three aggravating circumstances were approved and no mitigating circumstances were found, but this Court concluded that jury could have based its life recommendation on evidence of childhood trauma, drug usage and past history of nonviolence. Holsworth's death sentence was reduced to life. Like the defendants in each of these cases, Melton also does not deserve to die for his offense.

Although Melton has a previous conviction for a violent felony as an aggravating circumstance, this does not render his

death sentence properly imposed on these facts. This Court has reversed death sentences as disproportional even though the defendant has a previous conviction for a violent felony. See, Livingston v. State, 565 So.2d 1288 (Fla. 1988)(previous conviction for attempted murder); Fead v. State, 512 So.2d 176 (Fla. 1987)(previous conviction for murder); Wilson v. State, 493 So.2d 1019 (Fla. 1986)(previous conviction for murder); but, see, Freeman v. State, 563 So.2d 73 (Fla. 1990)(previous conviction for murder). The facts of this crime do not qualify for a death sentence, and the previous conviction for a violent felony, when weighed against the mitigating circumstances present, does not bring this case into the parameters of a death case.

Several significant mitigating factors are present in this case. The trial judge correctly found two mitigating circumstances (Melton's good conduct while in jail and his poor childhood and lack of a father figure) (R 1415-1421), but failed to find the other mitigating factors present. Initially, in the prior murder case, the jury returned a felony murder verdict. That jury could have reached the conclusion that Houston or Lewis shot the victim. This mitigates against Melton's culpability in the prior murder aggravating factor. Second, Melton was only 17-years-old when the prior murder occurred; although 18-years-old at the time the crime in this case, Melton was only a few months older. See, LeCroy v. State, 533 So.2d 750 (Fla. 1988)(age 17 found mitigating); Bassett v. State, 449 So.2d 803 (Fla. 1984)(age 18 found mitigating);

Hargrave v. State, 366 So.2d 1 (Fla. 1978)(age 18 found mitigating); Jackson v. State, 366 So.2d 752 (Fla. 1978)(age 18 found mitigating). Third, all of Melton's criminal involvement occurred within a year of his arrest in this case. (R 1053) This activity followed Melton's being abandoned at a time of immaturity and involvement with drugs and alcohol. His mother pulled him out of school because she was tired of responding to disciplinary reports. (R 1031-1033) He was then sent to live with an aunt at age 16 and then to a grandmother's at age 17. She in turn threw him out of her house shortly before he allegedly committed the homicide of the taxi driver. (R 1030-1031, 1064) Fourth, compounding his immaturity, Melton had been abusing drugs and alcohol since he was in middle school and was using drugs and alcohol at the time of the crime. (R 683, 1043-1045) See, Livingston v. State, 565 So.2d 1288; Norris v. State, 429 So.2d 688 (Fla. 1983). Fifth, another mitigating factor is the disparate treatment of Melton's accomplice. E.g., Pentecost v. State, 545 So.2d 861 (Fla. 1989); Harmon v. State, 527 So.2d 182 (Fla. 1988); Caillier v. State, 523 So.2d 158 (Fla. 1988); Brookings v. State, 495 So.2d 135 (Fla. 1986); McCampbell v. State, 421 So.2d 1072 (Fla. 1982); Slater v. State, 316 So.2d 539 (Fla. 1975). Even though Lewis had not been convicted or sentenced at the time of the trial, he anticipated, as did the trial judge, that he would receive a lesser punishment. (R 640-645, 977-983, 1417-1418) Although Lewis was not the triggerman, his involvement was no less culpable -- he

provided a gun and fully participated in the crime. All of these factors mitigate against imposition of a death sentence.

Antonio Melton's death sentence is disproportionate and also violates the Eighth and Fourteenth Amendments and Article I Sections 9, 16 and 17 of the Florida Constitution. This Court must reverse the sentence with directions to impose a sentence of life imprisonment.

CONCLUSION

For the foregoing reasons and authorities, Antonio Melton asks this Court to reverse his death sentence and to remand his case to the trial court with directions to impose a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by delivery to Mary Leontakianakos, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Florida, 32301; and a copy has been mailed to appellant, Antonio Lebaron Melton, on this 25 day of March, 1993.

W. C. McLAIN