IN THE SUPREME COURT OF FLORIDA

NO.SC05-1423

ANTONIO LEBARON MELTON,

Petitioner,

v.

JAMES V. CROSBY,
Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

D. TODD DOSS
Florida Bar No. 0910384

725 Southeast Baya Drive
Suite 102
Lake City, FL 32025-6092
Telephone (386) 755-9119
Facsimile (386) 755-3181

COUNSEL FOR PETITIONER

PRELIMINARY STATEMENT

This is Petitioner's first habeas corpus petition in this Court. Article 1, Section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed to address substantial claims of error, which demonstrate Mr. Melton was deprived of his right to a fair, reliable, and individualized sentencing proceeding and that the proceedings which resulted in his conviction and death sentence violated fundamental constitutional imperatives.

Citations shall be as follows:

The record on appeal from Mr. Melton's trial is referred to as "R." followed by the appropriate page number.

All other references will be self-explanatory or otherwise explained herein.

INTRODUCTION

Significant errors which occurred at Mr. Melton's capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. For example, significant errors regarding Mr. Melton's right to a fair and individualized sentencing, as well as other Eighth Amendment errors, are presented in this petition for writ of habeas corpus. Furthermore, Mr.

Melton's fundamental rights to a fair trial were violated.

Appellate counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Melton involved "serious and substantial" deficiencies. Fitzgerald v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). The issues which appellate counsel neglected to raise demonstrate that his performance was deficient and the deficiencies prejudiced Mr. Melton. "[E]xtant legal principle[s] . . . provided a clear basis for . . . compelling appellate argument[s]," which should have been raised in Mr. Melton's appeal. Fitzpatrick, 490 So. 2d at 940. Neglecting to raise such fundamental issues, as those discussed herein, "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985). Had counsel presented these issues, Mr. Melton would have received a new trial, or, at a minimum, a new penalty phase. Individually and "cumulatively," Barclay v. Wainwright, 444 So. 2d 956, 969 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So. 2d at 1165

(emphasis in original).

As this petition will demonstrate, Mr. Melton is entitled to habeas relief.

REQUEST FOR ORAL ARGUMENT

Due to the seriousness of the issues involved, Mr. Melton respectfully requests oral argument.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). See Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla. R. App. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents issues which directly concern the constitutionality of Mr. Melton's conviction and sentence of death.

Jurisdiction in this action lies in the Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Melton's direct appeal. See Wilson, 474 So. 2d at 1163; Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Melton asserts that his capital conviction and sentence of death were obtained and then affirmed, by this Court, in violation of his rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

THE STATE ENGAGED IN PROSECUTORIAL MISCONDUCT WHEN IT INTRODUCED HIGHLY PREJUDICIAL AND IRRELEVANT TESTIMONY IN PRESENTING MR. MELTON'S PRIOR MURDER CONVICTION AS AN AGGRAVATING FACTOR. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY RAISE THIS ISSUE ON APPEAL. FURTHER, THIS TESTIMONY VIOLATED MR. MELTON'S SIXTH AMENDMENT RIGHT TO CONFRONTATION.

During Mr. Melton's penalty phase, the State introduced a prosecutor's irrelevant and highly prejudicial testimony in presenting Mr. Melton's prior murder conviction as an aggravating circumstance. The testimony was presented in such a way that it could only be rebutted by the defendant's testimony, and some of the testimony could not be rebutted at all. The testimony included hearsay statements which denied Mr. Melton his right to confrontation. The prejudice to Mr. Melton is readily apparent when the only other aggravating circumstance argued was that the murder was committed for pecuniary gain.

The State presented evidence of Mr. Melton's prior murder conviction through Mr. Joseph Schiller, one of the attorneys who prosecuted the case. Mr. Schiller testified, over defense objection, that there was no evidence whatsoever that anyone other than Antonio Melton was the triggerman (R. 939-40).[1] Mr. Schiller was then asked, "How did the evidence show that Mr. Saylor was killed?" (R. 940). The defense objected on the basis of relevance, which the trial judge overruled (R. 941).[2] Mr. Schiller then related the facts of the previous crime, including indicating precisely where in the head the previous victim was shot and that it was at close range (R. 941).[3]

During the defense recross, the judge made Mr. Schiller a defense witness for reasons of judicial economy (R. 946-7). The

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[1]Mr. Schiller made this statement after it was brought out that the jury in the underlying case rejected the question of premeditated murder and circled the words "felony murder" for count I (R. 925-6). Mr. Schiller had acknowledged that he thought the question the jury had was whether or not someone else could have used the gun during the cab robbery (R. 938).

[2]In response to the objection, the prosecutor stated, "Your Honor, I have the case right here that I can show the Court where the Supreme Court has ruled that were {sic} not limited to the boundaries of all his convictions, but we can submit evidence concerning the events surrounding the conviction (R. 941).

[3]Here, the witness was testifying as to what the pathologist stated at the previous trial.

defense offered Tony Houston's plea agreement into evidence and asked Mr. Schiller to summarize it.[4] Instead of summarizing the terms, Mr. Schiller testified:

> Mr. Houston was a difficult witness. His lawyer indicated to me that he was going to testify regardless of what happened in his case, that they were thinking about going to trial in his case for first degree murder and he thought he has a shot at beating it or having at least a reduced charge of the jury convicting him of a reduced charge and it got to the point where he went ahead and testified. This agreement was given to him and he didn't sign it until after the trial, as I indicated.

(R. 949-950).

Not only was the response by Mr. Schiller unresponsive, it was irrelevant and introduced "evidence" that had not been heard by either jury. Furthermore, Mr. Schiller's testimony on this point would have been difficult if not impossible for Mr. Melton to rebut.

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[4]Mr. Houston was Mr. Melton's co-defendant in the underlying felony case.

Without being asked, Mr. Schiller went on to summarize his version of all the pertinent testimony from the previous trial and Ben Lewis' many statements (R. 953-6).[5] His description of Mr. Lewis' testimony included the irrelevant and highly prejudicial statement, "The next day they got up and the girlfriends came over and they went shopping." (R. 956). In essence, the prosecution was able to introduce non-statutory aggravating factors from the previous conviction instead of just one aggravating factor, that the defendant was convicted of the crime.

At one point the defense asked Mr. Schiller if "any evidence has ever been developed that would justify the prosecution of Ben Lewis for robbery and murder in the death of Ricky Saylor?" (R. 963). Mr. Schiller's response was again disingenuous and misleading, especially in light of the fact that he was the sole source of information on the previous crime for the jury. He argued that Mr. Lewis couldn't be prosecuted for anything except perhaps petty theft for beating the cab bill, that he would not be liable under a principle theory (R.

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[5]Ben Lewis was Mr. Melton's co-defendant in the Carter murder case. Subsequent to his arrest for the Carter murder, Lewis gave a statement to the authorities implicating Mr. Melton and Tony Houston in the killing of cab driver Ricky Saylor (PCR. 54,

963-4).

Mr. Schiller also opined that Mr. Lewis, who admitted under oath to committing perjury, could possibly be prosecuted for that, but that the perjury statutes are complicated and that he would have received a very light sentence (R. 964). Then Mr. Schiller retreated from that position:

> And in addition, Mr. Lewis recanted his first lie, the lie that he said he gave here, he recanted it from July 26th to September the 7th, whatever that is, six weeks or so, he recanted, and there is a provision under Florida law for recantation of perjury, and there is some cases that say periods of up to four weeks a person can recant, and that was the reason why he wasn't charged with perjury.

(R. 964-965).

Mr. Schiller subsequently misled the jury again in response to a defense question as to whether the previous jury had heard everything he'd testified to that day. He responded, "Well, there is a lot more facts that we haven't brought about it, but that's correct." (R. 965). In fact, the previous jury hadn't been privy to all this information, and the clear implication is that there was yet more information damning Mr. Melton that this jury was not going to hear.

Much of this evidence could only have been rebutted if the

57-8, 203).

defendant had testified in the previous trial, or was pure speculation and could not be rebutted at all. Appellate counsel was ineffective for failing to properly raise this issue on appeal.

Additionally, the recent case of Crawford v. Washington, 541 U.S. 36 (2004), establishes that Mr. Schiller's testimony also violated Mr. Melton's right to confrontation. In Crawford, the United States Supreme Court announced that:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law–as does [Ohio v.] Roberts[, 448 U.S. 56 (1980)], and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. **Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination**. We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or **at a former trial**; and to police interrogations. These are the modern practices with the closest kinship to the abuses at which the Confrontation Clause was directed.
>
> In this case, the State admitted Sylvia's testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment. Roberts notwithstanding, we decline to mine the record in search of indicia of reliability. **Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actual prescribes: confrontation**.

541 U.S. at 68-69 (emphasis added)(footnote omitted). The significance of the Supreme Court's pronouncement was underscored when the Court concluded that as to testimonial hearsay, the Court's own rationale in Ohio v. Roberts deviated from "the historical principles" upon which the Confrontation Clause rested. Id. at 39. The Court further called into question its decision in White v. Illinois, 502 U.S. 346 (1992). Id. at 40 ("Although our analysis in the case casts doubt on that holding, we need not definitively resolve whether it survives our decision today"). Thus, the Supreme Court in Crawford discarded the notion that the Confrontation Clause could be satisfied where rules of evidence permitted the introduction of testimonial hearsay.

In Mr. Melton's case, the State presented testimonial hearsay at Mr. Melton's penalty phase in its successful effort to obtain a sentence of death. This occurred in contravention of Mr. Melton's constitutional right to confront his accusers, as Crawford now makes clear. The State was permitted to present hearsay testimony through Mr. Schiller which incriminated Mr. Melton. This was a clear violation of the Confrontation Clause. Habeas relief is warranted.

CLAIM II

THE PROSECUTORS' MISCONDUCT DURING THE COURSE OF MR. MELTON'S CASE RENDERED MR. MELTON'S DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. THE STATE ENCOURAGED AND PRESENTED MISLEADING EVIDENCE AND IMPROPER ARGUMENT TO THE JURY. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY RAISE THIS ISSUE ON APPEAL.

Unchallenged prosecutorial argument during Mr. Melton's trial violated the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The prosecutor's arguments were fraught with improper and misleading comments.

Closing argument "must not be used to inflame the minds and passions of the jurors so that [the] verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law." Bertolotti v. State, 476 So. 2d 130 (Fla. 1985). On more than one occasion during closing arguments, the State fostered sympathy for the victim. The prosecutor described the circumstances of the crime such that it appealed to the jury's sympathy, bias, passion, and prejudice: The victim was "needlessly beaten on or about the face" (R. 785); "savagely beaten . . . about the face" (R. 792); "beat . . . on and about the face" (R. 793).

The prosecutor also made an impermissible "golden rule"

argument when he described the victim's death, "He executes Mr. Carter while Mr. Carter is on his knees pleading, please don't shoot me. He executes Mr. Carter summarily at point blank, gunshot wound to the head." (R. 810-811). Further, the prosecutor argued that the victim, "was a dead man the moment the defendant . . . walked in the front door of . . . (the) Pawn Shop . . ." (R. 811). These comments are all prejudicial, and made more so considering the fact that the victim's death was not caused by premeditated design.

The prosecution improperly vouched for the credibility of the police witnesses and their testimony.

> Then we come to the testimony of (the officers) and this was obviously a situation where (the officers) were at the right spot at the right time to perform very, very admirably and level headed, and you just can't expect more professional conduct, I don't think, on behalf of the police department.

(R. 787).

During the guilt phase closing, the prosecutor speculated as to why Mr. Melton kept the victim's gun and put the gun Lewis had given him back in Lewis' black bag:

> He gives the one with one bullet to Lewis, then puts it back in the bag. Why would he do that? Obviously he wanted a fully loaded gun rather than a gun with one bullet.

(R. 810).

Mr. Melton testified and was subject to cross-examination by the prosecutor, but was never asked why he switched guns. Further, there was no evidence indicating that either Mr. Melton or Lewis had any idea that the victim's gun was fully loaded. In rebuttal argument, the State came up with a new theory:

> I submit to you the reason that there was the transfer from the Parker gun to Mr. Carter's gun, that that was the murder weapon, is because the defendant did not want the murder weapon traced back to Carter, to Lewis, to him and that's why they switched the guns.

(R. 854). This argument was not only speculative, the State Knew it was false. Phillip Parker, the young man who supplied the gun, had just turned 16 a few days before Mr. Carter was killed, so obviously the gun was not registered in his name. In his deposition of January 3, 1992, Parker stated that he "bought it off the street" a month or two before this happened. Tracing a gun to an anonymous person buying and selling guns illegally on the street, and from that person to Parker, and from Parker to Lewis to Melton seems an unlikely prospect.

The prosecutor mischaracterized the testimony of Klaus Groeger, one of the two witnesses from the marine business next door to the pawn shop. According to the prosecutor:

> Mr. Groeger also testified that when he was along the middle of the wall, because this wall borders Wills Marine, he could hear similar screams or words to the

> effect apparently by Mr. Carter, don't kick me anymore, I'm already down. Because he heard those similar words, too.

(R. 786). In fact, Mr. Groeger said that he was unable to make out any words, only "screaming" or "hollering" and "noise." (R. 492-3).

In discussing the testimony of the ballistics expert regarding the trigger pull, the prosecutor said the amount of pull required was "normal," and "So this was not a gun with a hair trigger that could easily go off by accident." (R. 789). This assessment of hair triggers was not in the expert testimony or any other evidence.

The prosecutor tried to bolster the medical examiner's testimony:

> Fenner McConnell is not an ordinary doctor, he's not an ordinary pathologist. He's the medical examiner for the Florida First Judicial Circuit. As a medical examiner his special training–he has special forensic training, which is just this type of thing. And he's well experienced in these matters having–under the law it's his duty to perform autopsies in criminal cases and give opinions based on them.

(R. 789-790).

This bolstering is particularly damaging because the prosecutor solicited expert opinions from the medical examiner that were outside his realm of expertise, opinions about the distance from the gun to the victim's head that the witness by

his own admission was not qualified to render (R. 554). The prosecutor's comments in closing further misled the jury and greatly prejudiced Mr. Melton:

> He said he can't say for sure–I'll be clear, I'm not saying Dr. McConnell said it was shot point blank, but he said in his opinion as an expert, as a forensic pathologist, that's what makes him different from other pathologist, that gun was shot at point blank range of four to twelve inches away. In other words, the physical evidence itself doesn't fit with the defendant's testimony either.

(R. 808).

During the penalty phase closing, the prosecutor asked the jurors to "fulfill your duties by recommending to this Court the appropriate punishment for this murder, that Antonio Lebaron Melton be sentenced to die." (R. 1082). The prosecutor also stated, "... [t]he only proper recommendation to this court is a recommendation of death." (R. 1082). Suggestions that it is a juror's duty to sentence a defendant to death are impermissible. See Pacifico v. State, 642 So. 2d 1178 (1994); Urbin v. State, 714 So. 2d 411 (Fla. 1998).

Additionally, the State focused on the lack of mitigation as an aggravator. The prosecution, in comments made in penalty phase closing arguments and the sentencing hearing, stated:

> Some of the statutory mitigating are -- this is mitigating, I believe the Court will instruct you on, Antonio Lebaron Melton had no significant history of

prior criminal conduct. I am not going to argue to you that Mr. Melton had, and I know there is no proof of it, an extensive history of numerous crimes, but I submit to you this is not a mitigating circumstance, because on the limited crimes, the death and robbery of Mr. Saylor, Ricky Saylor, when you commit crimes of that magnitude, you cannot say I do not have a significant streak of prior criminal activity. That is not a mitigating factor. No. 2, that may be given to you. The defendant acted under extreme duress or under the substantial domination of another person. In this particular case I don't think that it has been shown by a preponderance of the evidence.

I would specifically point out to you that at all times -- at all relevant times the gun -- at least I conclude that you conclude this, the person -- the man with the gun was the defendant. The man in charge was the man with the gun. The capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired. I guess that would go to the -- there was some testimony as to drinking and smoking some marijuana or dope, but as I recall -- and what I recall is not important, it’s what you recall that’s important. The defendant told you he was not drunk, intoxicated or under the influence at the time of the commission of the robbery. And do you remember Mr. Carter, there was only testimony that there had been some consumption.

The age of the defendant at the time of the crime. Now, that’s a statutory mitigating circumstance. I want to address it this way. I don’t know specifically what is meant there or what -- that goes to a myriad of different situations, but I’m not sure once -- one of it would be useful ignorance and not appreciating the possible consequences of what your actions will lead to. I suggest to you you don’t consider the age of the defendant at the time of the crime, because what better way would there be for this defendant to know what the possible consequences of a robbery of Mr. Carter and the possibility of his death was that had done a robbery which resulted in the

death of another person some less than two months and 10 days before the second robbery? The age of the defendant is not significant in this case, because the defendant had to be fully or well aware of the consequences of his actions. There is another sort of a catch-all provision for mitigating. Any other aspect of the defendant's character or record and any other circumstances of the crime.

(R. 1077-1079).

* * * *

We then look to the mitigating circumstances as advanced by Mr. Terrell. Mr. Terrell said in Ricky Saylor's case that Mr. Melton was acquitted of premeditated murder and makes some arguments that Mr. Melton, therefore, was not viewed as being the triggerman or something of that effect. Your Honor, this is involved in pure speculation as to what went on in the minds of the jurors in Ricky Saylor's case, because I would point out to you that in Mr. Carter's case, the jury also found felony murder, but that same jury went on to recommend the death sentence by a vote of eight to four.

Mr. Terrell says the age of the defendant is a clear mitigating circumstance. And I suppose the reason age of the defendant is one of the mitigating circumstances is so the Court can take into consideration maybe the innocence of youth and the failure to fully appreciate the consequences of your actions. I submit to the Court that the defendant in this case, Mr. Melton, had to know the consequences and possible consequences of his actions when he was involved in the robbery and death of Mr. Carter because he had been involved in a very similar robbery and death of Rick Saylor only 70 or so days before. He had lost his innocence of youth. He knew what it was like and the results of armed robbery with weapons.

Mr. Terrell also went through a long litany of

> Mr. Lewis' involvement in Mr. Carter's death. Mr. Lewis had the bag, Mr. Lewis had the bullet, Mr. Lewis did this. But Mr. Melton is the one -- the evidence overwhelmingly shows Mr. Melton put a bullet in Mr. Carter's brain.
>
> Mr. Terrell made some general arguments as to proportionalities. I'm not familiar with every case, every one that he handles. I'm not sure there's even appellate records on many of them. But I did not recall him citing any case where in the case that was plea bargained or agreed to or other disposition the defendant had already been convicted of a previous first-degree murder, especially one that occurred only 70 days before the incident case. I don't think that those cases can be fairly argued for proportionality.
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> Your Honor, the jury heard the aggravating, the jury heard the mitigating, the general mitigating. The jury considered all the evidence. The jury voted eight to four to recommend death for the death of Mr. Carter. The State asks you to follow that recommendation of death and find the aggravating outweighed the mitigating and sentence the defendant, Antonio LeBaron Melton, to death.

(R. 1344-1346).

The sentencers' consideration of improper and unconstitutional non-statutory aggravating factors starkly violated the Eighth Amendment, and prevented the constitutionally required narrowing of the sentencer's discretion. See Stringer v. Black, 112 S. Ct. 1130 (1992); Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988). As a result, these impermissible aggravating factors evoked a sentence that was based on an "unguided emotional response," a

clear violation of Mr. Melton's constitutional rights. Penry v. Lynaugh, 108 S.Ct. 2934 (1989).

The cumulative effect of the prosecutor's comments was to "improperly appeal to the jury's passions and prejudices." Cunningham v. Zant, 928 F.2d 1006, 1020 (11th Cir. 1991). "Although this legal precept -- and indeed the rule of objective, dispassionate law in general -- may sometimes be hard to abide, the alternative, -- a court ruled by emotion -- is far worse." Jones v. State, 705 So. 2d 1364, 1367 (Fla. 1998). Such remarks prejudicially affect the substantial rights of the defendant when they "so infect the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 647 (1974); See also Ruiz v. State, 743 So. 2d 1, 4 (Fla. 1999)("The role of counsel in closing argument is to assist the jury in analyzing the evidence, not to obscure the jury's view with personal opinion, emotion, and nonrecord evidence.")

Appellate counsel was ineffective for failing to properly raise this issue, even in the absence of an objection by defense counsel. Egregious prosecutorial misconduct, like that which occurred here, constitutes fundamental error. Robinson v. State, 520 So. 2d 1, 7 (Fla. 1988)("Our cases have also recognized that

improper remarks to the jury may in some instances be so prejudicial that neither rebuke nor retraction will destroy their influence, and a new trial should be granted despite the absence of an objection below or even in the presence of a rebuke by the trial judge."); see also Urbin, 714 So. 2d at 418, fn8 (Fla. 1998).

CLAIM III

THE JURY WAS IMPROPERLY INSTRUCTED ON THE PECUNIARY GAIN AGGRAVATING FACTOR, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY RAISE THIS ISSUE ON APPEAL.

The jury was given the following instruction regarding the pecuniary gain aggravating factor:

> Now, the second aggravating circumstance that you may consider is whether or not the crime for which the defendant is to be sentenced was committed for financial gain.

(R. 1103).

This instruction violates Espinosa v. Florida, 112 S. Ct. 2926 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992); Maynard v. Cartwright, 108 S. Ct. 1853 (1988), and the Eighth and Fourteenth Amendments. The jury instruction failed to give the jury meaningful guidance as to what was necessary to find this aggravating factor

present.

This Court has repeatedly held that in order for this aggravator to be applicable, it must be shown to exist beyond a reasonable doubt. Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988); Peek v. State, 395 So. 2d 492, 499 (Fla. 1980); Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987).

The evidence fails to support a finding of this aggravating circumstance. To find this aggravating circumstance, the State must prove beyond a reasonable doubt that financial gain was the primary motive for the killing. See Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988). This aggravator applies only "where the murder is an integral step in obtaining some sought-after specific gain." Hardwick v. State, 521 So. 2d 1071, 1076 (Fla. 1988).

The court's determination in Mr. Melton's case is not supported by the evidence adduced at trial. There was no evidence that obtaining the victim's property was the predominant motive, or even a motive, for the killings. The trial court's order failed to apply the standard of proof necessary to support a finding of pecuniary gain. The evidence failed to show that the murder was an "integral step" in obtaining Carter's possessions.

As a result, Mr. Melton's jury relied upon an improper aggravating factor in arriving at its recommendation of death. The trial court erroneously found this aggravating circumstance to exist, and applied an erroneous standard of proof. In his penalty phase argument, the prosecutor made conclusory statements without an evidentiary basis, that the crime for which Mr. Melton was to be sentenced was committed for financial gain (R. 1077). In its penalty phase instructions, the trial court misinformed the jury. The failure of appellate counsel to properly raise this issue denied Mr. Melton the effective assistance of counsel.

CLAIM IV

FLORIDA'S CAPITAL SENTENCING STATUTE VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Ring v. Arizona, 122 S.Ct. 2428 (June 24, 2002), held unconstitutional a capital sentencing scheme that makes imposing a death sentence contingent upon the finding of aggravating circumstances and that assigns responsibility for finding that circumstance to the judge. The United States Supreme Court based its holding and analysis in Ring on its earlier decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), in which it held that "[i]t is unconstitutional for a legislature to remove from

the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." Id. at 490 (quoting Jones v. United States, 526 U.S. 227, 252-253 (1999) (Stevens, J., concurring)).

Section 775.082, Fla. Stat. (1991) provides that a person convicted of first-degree murder must be sentenced to life in prison "unless the proceeding held to determine sentence according to the procedure set forth in FFRing, 122 S.Ct. at 2432. ("Capital defendants ...are entitled to a jury determination of any fact on the legislature conditions an increase in their maximum punishment.")

To the contrary, the court shifted to Mr. Melton the burden of proving whether he should live or die by instructing the jury that it was their duty to render an opinion on life or death by deciding whether sufficient mitigating circumstances existed to outweigh any aggravating circumstances found to exist.

The instruction given Mr. Melton's jury violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution and the Sixth Amendment's right to trial by jury because it relieves the State of its burden to prove beyond a reasonable doubt the element that "sufficient aggravating circumstances" exist that outweigh mitigating circumstances by

shifting the burden of proof to the defendant to prove that the mitigating circumstances outweigh sufficient aggravating circumstances. Mullaney v. Wilbur, 421 U.S. 684, 698 (1975).

CLAIM V

BASING AN AGGRAVATING CIRCUMSTANCE ON A PRIOR VIOLENT FELONY COMMITTED WHEN MR. MELTON WAS SEVENTEEN YEARS OLD VIOLATES THE EIGHTH AND FOURTEEN AMENDMENTS OF THE UNITED STATES CONSTITUTION UNDER ROPER V. SIMMONS, 125 S.Ct. 1183 (2005). ADDITIONALLY, THE FACT THAT MR. MELTON WAS EIGHTEEN YEARS, TWENTY FIVE DAYS OLD, WHEN HE COMMITTED THE OFFENSE IN THE INSTANT CASE, AND IS ELIGIBLE FOR THE DEATH PENALTY, IS ARBITRARY AND CAPRICIOUS AND VIOLATES THE EIGHTH AMENDMENT CONSTRAINTS AGAINST CRUEL AND UNUSUAL PUNISHMENT.

A. Introduction.

On March 1, 2005, in Roper v. Simmons, 125 S.Ct. 1183 (2005), the United States Supreme Court declared:

> The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, **even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.** In some cases a defendant's youth may even be counted against him. In this very case, as we noted above, the prosecutor argued Simmons' youth was aggravating rather than mitigating.

2005 U.S. LEXIS 2200 at *39-40 (emphasis added).

Accordingly, the Supreme Court concluded that the Eighth

Amendment precluded reliance upon criminal acts committed before the age of eighteen from serving as a basis for the imposition of a sentence of death.

> Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and illconsidered actions and decisions." [Citation] * * * In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.
>
> The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. [Citation] This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. * * *
>
> The third broad difference is that the character of a juvenile is not as well formed as that of an adult. * * *
>
> These differences render suspect any conclusion that a juvenile falls among the worst offenders. * * * From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.

2005 U.S. LEXIS 2200 at *32-35.

As the Supreme Court in Roper v. Simmons also explained:

> Capital punishment must be limited to those offenders who commit "a narrow category of most serious crime"

> and whose culpability makes them "the most deserving of execution." [Citation} This principle is implemented throughout the capital sentencing process. States must give narrow and precise definition to the aggravating factors that can result in a capital sentence.

2005 U.S. LEXIS 2200 at *31.

B. Use of Convictions for Crimes Committed by a Juvenile.

At the penalty phase, the State introduced a prior conviction of murder committed by Mr. Melton when he was seventeen years old. The State relied upon Mr. Melton's action at the age of seventeen to establish the prior conviction of a crime of violence aggravating circumstance. The use of prior convictions premised upon acts committed by the defendant when he was under the age of eighteen violates Roper v. Simmons and the Eighth Amendment. The introduction of such convictions as a basis for the imposition of a death sentence violates the principles of the Eighth Amendment enunciated in Roper v. Simmons.

The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment. The United States Supreme Court has addressed the Eighth Amendment and explained its dynamic character:

> Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the

> mischief which gives it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly human institutions can approach it."
>
> * * *
>
> The [cruel and unusual punishment clause], in the opinion of the learned commentators, may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.

Weems v. United States, 217 U.S. 349, 373, 378 (1910). The United States Supreme Court has now spoken and determined that the Eighth Amendment precludes the imposition of a sentence of death for acts committed before the age of eighteen.

Here, the use of this prior conviction to support a sentence of death violated the Eighth Amendment. This Court has held that a re-sentencing is required when a prior conviction is erroneously introduced. Armstrong v. State, 862 So.2d 705 (Fla. 2004). Certainly, the circumstances here parallel those in Armstrong. The conviction for a crime committed by Mr. Melton when he was under the age of eighteen was used as a basis for a sentence of death.[6] The remedy for the use of the prior at Mr. Melton's penalty phase must be a new sentencing proceeding at which evidence of the prior is excluded.

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[6]In fact, this is a case in which there were only two aggravating

C. Melton's Age at the Time of the Instant Offense.

Mr. Melton was 18 years, 25 days old at the time of the instant offense.[7] Several of the factors cited in Roper, *infra*[8], in differentiating juveniles under age 18 and adults, are indistinguishable from Mr. Melton's situation, as demonstrated at the postconviction evidentiary hearing. By the time he reached middle adolescence, Mr. Melton was fairly isolated from his peers (T. 374). Subsequently, Mr. Melton went from a situation of being isolated to being with a bunch of criminals by the time he got to high school (T. 374). Mr. Melton immediately fell in with these people (T. 374). He looked up to these kids because he was sheltered and they had so much street knowledge (T. 664). Mr. Melton began to skip school, use drugs, and talk back (T. 374).

Testimony at the evidentiary hearing established that Mr. Melton could be easily manipulated (T. 383), and he viewed the other two men involved in his cases, Lewis and Houston, as more sophisticated than himself (T. 383). Testimony was also

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circumstances, the prior violent felony and pecuniary gain.

[7]Mr. Melton's date of birth is 12/29/72. The offense in the instant case occurred on 1/23/91.

[8]Such as lack of maturity and being susceptible to negative influences and peer pressure.

introduced that even when Mr. Melton reached the age of 18, he was strikingly immature (T. 381).

These circumstances did not change because Mr. Melton had barely reached the age of 18 at the time of the offense. For all intents and purposes, Mr. Melton was still a juvenile at the time of this offense. He should not be excluded by Roper's mandate simply because an extra 25 days had passed by in his life. Mr. Melton asserts that such a hard line rule which does not examine the circumstances of his individual case is arbitrary and capricious and violates the Eighth Amendment. Relief is warranted.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Melton respectfully urges this Court to grant habeas corpus relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS has been furnished by United States Mail, first-class postage prepaid to Charmaine Millsaps, Office of the Attorney General, 400 South Monroe Street, PL-01, Tallahassee, FL 32399-6536 this 12th day of August, 2005.

CERTIFICATE OF FONT

This is to certify that the Petition has been reproduced in 12 point Courier type, a font that is not proportionately spaced.

D. TODD DOSS
Florida Bar No. 0910384

725 Southeast Baya Drive
Suite 102
Lake City, FL 32025-6092
Telephone (386) 755-9119
Facsimile (386) 755-3181

COUNSEL FOR PETITIONER