IN THE FLORIDA SUPREME COURT
CASE NO. SC05-1423

ANTONIO LEBARON MELTON, *Petitioner*

v.

JAMES V. CROSBY, *Respondent*.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, James V. Crosby, by and through undersigned counsel and responds as follows to the petition for writ of habeas corpus. For the reasons discussed, the petition should be denied.

FACTS AND PROCEDURAL HISTORY

The facts of the case and its procedural history are recited in the accompanying answer brief. Melton was represented in his direct appeal by Assistant Public Defender W. C. McClain, who was admitted to the Bar in 1975. Appellate counsel raised four issues in the direct appeal: (1) Whether the trial court erred in not empaneling separate guilt and penalty phase juries; (2) whether the trial court erred in not declaring a mistrial after the prosecutor made several improper comments to the jury; (3) whether the trial court erred in instructing the jury on and later finding the aggravating circumstance that the homicide was committed for pecuniary gain; and (4) whether the death sentence is disproportionate in this case. *Melton v. State*, 638 So.2d 927, 929 n.1 (Fla. 1994). Actually, appellate counsel raised six issues because issue II had three subparts to it regarding three separate prosecutorial comments. The initial brief was 47 pages with 19 of those pages dedicated to the facts. Appellate counsel also wrote a reply brief rearguing Issue I.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

This Court noted that a habeas petition is the proper vehicle to assert ineffective assistance of appellate counsel. *Davis v. State*, 2005 WL 2671258, *25 (Fla. October 20, 2005). In *Rutherford v. Moore*, 774 So.2d 637 (Fla. 2000), this Court explained that the standard for proving ineffective assistance of appellate counsel mirrors the standard for proving ineffective assistance of trial counsel established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The *Rutherford* Court explained that to show prejudice, petitioner must show that the appellate process was compromised to such a degree as to undermine confidence in the correctness of the result. *Rutherford*, 774 So.2d at 643. Appellate counsel's performance will not be deficient if the legal issue that appellate counsel failed to raise was meritless. *Spencer v. State*, 842 So.2d 52, 74 (Fla. 2003)(observing that appellate counsel will not be considered ineffective for failing to raise issues that have little or no chance of success.) Appellate counsel has a "professional duty to winnow out weaker arguments in order to concentrate on key issues" even in capital cases. *Thompson v. State*, 759 So.2d 650, 656, n.5 (Fla. 2000)(citing *Cave v. State*, 476 So.2d 180, 183 n. 1 (Fla. 1985)). Appellate counsel is not

"necessarily ineffective for failing to raise a claim that might have had some possibility of success; effective appellate counsel need not raise every conceivable nonfrivolous issue." *Valle v. Moore*, 837 So.2d 905, 908 (Fla. 2002).

Additionally, in the appellate context, the prejudice prong of *Strickland* requires a showing that the appellate court would have afforded relief on appeal. *United States v. Phillips*, 210 F.3d 345, 350 (5th Cir. 2000). A habeas petitioner must show that he would have won a reversal from this Court had the issue been raised.

The standard of review of an ineffectiveness claim is *de novo*. *Stephens v. State*, 748 So.2d 1028, 1034 (Fla. 1999); *Holladay v. Haley*, 209 F.3d 1243, 1247 (11th Cir. 2000).

ISSUE I

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THAT THE TESTIMONY THAT MELTON WAS THE SHOOTER IN THE PRIOR MURDER/ROBBERY CASE INTRODUCED AS AN AGGRAVATOR PROPERLY WAS INADMISSIBLE AND A VIOLATION OF THE CONFRONTATION CLAUSE?

Melton asserts that appellate counsel was ineffective for failing to raise the admissibility of the facts of the prior violent felony aggravator in the penalty phase. Habeas counsel asserts that the prosecutor's testimony was "irrelevant", "prejudicial" and "misleading"

Melton had been convicted of the first degree felony murder and armed robbery of a taxi cab driver. The taxi cab murder occurred approximately two months prior to the murder/robbery in this case. The prosecutor from the Saylor taxi cab murder case, Mr. Schiller, testified in this case in the penalty phase. Mr. Schiller testified that the evidence in the taxi cab case was that Melton was the triggerman in that murder as well.

This testimony is highly relevant. Habeas counsel does not even make an argument explaining why such testimony would not be relevant and does not cite a single case holding that the facts of the prior felony are not relevant. The caselaw firmly establishes that testimony regarding the facts and

details of the conviction being used as a prior violent felony aggravator are admissible. *Jones v. State*, 748 So.2d 1012, 1026 (Fla. 1999)(holding that a police officer may give hearsay testimony concerning a defendant's prior violent felonies during the penalty phase); *Rhodes v. State*, 547 So.2d 1201, 1204 (Fla. 1989)(concluding that the testimony of the officer regarding a prior conviction including a tape recording of the victim was admissible at the penalty phase and observing that: "[t]his Court has held that it is appropriate in the penalty phase of a capital trial to introduce testimony concerning the details of any prior felony conviction involving the use or threat of violence to the person rather than the bare admission of the conviction" citing *Tompkins v. State*, 502 So.2d 415 (Fla. 1986) and *Stano v. State*, 473 So.2d 1282 (Fla. 1985)). Indeed, this Court has held that the testimony of the prosecutor who prosecuted the prior conviction is admissible. *Dufour v. State*, 905 So.2d 42, 63 (Fla. 2005)(holding that testimony from attorney who prosecuted defendant for a murder, in which the attorney summarized the testimony of pathologist who testified at the prior trial regarding wounds suffered by prior victim and the force necessary to inflict such wounds, was admissible during penalty phase and noting that defendant was given an

opportunity to rebut testimony given by the prosecutor). The *Dufour* Court explained that such testimony assists the "jury in evaluating character of defendant and circumstances of the crime so that jury could make an informed recommendation as to the appropriate sentence." This testimony is relevant and admissible. Appellate counsel is not ineffective for knowing that the caselaw, such as *Rhodes*, permitted its admission. Appellate counsel is not ineffective for not raising a meritless claim. *Pietri v. State*, 885 So.2d 245, 273 (Fla. 2004)(explaining that appellate counsel cannot be ineffective for failing to present a meritless claim.); *Rutherford v. Moore*, 774 So.2d 637 (Fla. 2000)(observing that if a legal issue would in all probability have been found to be without merit had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective).

Habeas counsel argues that prosecutor Mr. Schiller's testimony regarding the Saylor taxi cab murder trial was "misleading", without explaining what was misleading about the testimony. It was not misleading. It was a perfectly accurate and true description of the evidence in that trial. Both the co-perpetrators, Houston and Lewis, testified at trial that Melton was the shooter. Houston, who testified for

the State, testified that Melton shot the taxi cab driver. Lewis, who testified for the defense, also testified that, while he ran away prior to the shooting, Melton told him that he shot the taxi cab driver later that night.

Melton also asserts his appellate counsel was ineffective for failing to raise a Confrontation Clause argument to this testimony based on *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). *Crawford*, which was decided in 2004, was not available to appellate counsel at the time of briefing in 1993. Appellate counsel is not ineffective for failing to anticipate changes in the law. *Mansfield v. State*, 911 So.2d 1160 (Fla. 2005)(noting that appellate counsel is not required to anticipate changes in the law citing *Walton v. State*, 847 So.2d 438, 445 (Fla. 2003).[1]

[1] If habeas counsel is raising a straight *Crawford* claim, *Crawford* is not retroactive. This Court has held *Crawford* is not retroactive. *Chandler v. Crosby*, 30 Fla. L. Weekly S661 (Fla. Oct. 6, 2005). Numerous federal courts have also held that *Crawford* is not retroactive. *Mungo v. Duncan*, 393 F.3d 327, 336 (2d Cir.2004); *Dorchy v. Jones*, 398 F.3d 783, 788 (6th Cir. 2005); *Murillo v. Frank*, 402 F.3d 786, 790 (7th Cir. 2005); *Bintz v. Bertrand*, 403 F.3d 859, 867 (7th Cir. 2005); *Brown v. Uphoff*, 381 F.3d 1219, 1227 (10th Cir. 2004); *but see Bockting v. Bayer*, 399 F.3d 1010 (9th Cir. 2005). Melton's conviction became final on October 31, 1994 when the United States Supreme Court denied his petition for writ of certiorari, which was ten years prior to the *Crawford* decision. *Melton v. Florida*, 513 U.S. 971, 115 S.Ct. 441, 130 L.Ed.2d 352 (1994).

ISSUE II

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE PROSECUTORIAL COMMENTS?

Melton contends that his appellate counsel was ineffective for failing to raise numerous unpreserved prosecutorial comments in the direct appeal. Appellate counsel, in fact, raised three preserved prosecutorial comments in ISSUE II of the direct appeal. IB at 27-37. While not the same prosecutorial comments that habeas counsel thinks appellate counsel should have raised, appellate counsel does not have to raise every conceivable issue on appeal to be effective. *Valle v. Moore*, 837 So.2d 905, 908 (Fla. 2002)(noting that appellate counsel is not "necessarily ineffective for failing to raise a claim that might have had some possibility of success; effective appellate counsel need not raise every conceivable nonfrivolous issue.").

Many of the prosecutorial comments that habeas counsel highlights were not preserved. Appellate counsel is not ineffective for failing to raise unpreserved issues. *Davis v. State*, 2005 WL 2671258, 25 (Fla. 2005)(stating "[g]enerally, appellate counsel cannot be ineffective for failing to present claims which were not preserved due to trial counsel's failure to object."); *Johnson v. Singletary*, 695 So.2d 263, 266 (Fla.

1996) (observing appellate counsel cannot be ineffective for failing to raise claims which were not preserved due to trial counsel's failure to object.). Appellate counsel, no doubt, chose the three prosecutorial comments that he raised in his initial brief because they were preserved. It is not deficient performance to raise only the preserved prosecutorial comments.

Habeas counsel complains that the prosecutor described the victim's wounds. Petition at 10. This is perfectly proper. Those were the facts of the case. A prosecutor may describe the victim's wounds. Appellate counsel is not ineffective for not raising a meritless claim. ***Pietri v. State***, 885 So.2d 245, 273 (Fla.2004)(explaining that appellate counsel cannot be ineffective for failing to present a meritless claim.); ***Rutherford v. Moore***, 774 So.2d 637 (Fla. 2000)(observing that if a legal issue would in all probability have been found to be without merit had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective).

Habeas counsel complains that the prosecutor made an impermissible golden rule argument. Petition at 10. This is not fundamental error. ***Davis v. State***, 604 So.2d 794, 797

(Fla.1992) (holding that comment by prosecutor during penalty phase closing argument that "it might not be a bad idea to look at [the knife] and think about what it would feel like if it went two inches into your neck" was improper, but it was not so egregious as to undermine jury's recommendation).

Habeas counsel quotes the prosecutor’s comments regarding the professional conduct of the officer as vouching for the credibility of the officers. Petition at 10. The prosecutor was describing the swift actions of the officers responding to the call. The officers “were in the right spot at the right time”. They caught the defendants as they were coming out of the pawn shop. He explained that the officer got “control of the situation and the individuals”. This is not vouching. This is characterizing the officers’ actions at the crime scene, not the credibility of their testimony at trial. This claim is meritless. Appellate counsel is not ineffective for not raising a meritless claim. *Pietri*, *Rutherford*.

Habeas counsel quotes the prosecutor’s description of the medical examiner’s testimony and argues that this is bolstering. Petition at 12. The prosecutor may highlight an expert’s qualification. This is not improper bolstering. This claim is meritless and appellate counsel is not ineffective for recognizing this. *Pietri*, *Rutherford*.

Habeas counsel quotes the prosecutor's argument in rebuttal to the proposed mitigation for several pages. Petition at 13-15. Focusing on the lack of mitigation is not "aggravation" - it is focusing on the lack of mitigation. A prosecutor may rebut the proposed mitigation in his argument without this amounting to an argument in support of non-statutory aggravation. The prosecutor's rebuttal of the proposed mitigation was perfectly proper and appellate counsel is not ineffective for recognizing this. Appellate counsel is not ineffective for not raising a meritless claim. *Pietri*, *Rutherford*.

Habeas counsel does not cite any case holding that any of these prosecutorial comments were fundamental error at the time this case was briefed in 1993. Habeas counsel cites *Urbin v. State*, 714 So.2d 411, 418 n. 8 (Fla. 1998) which was decided years after this case was briefed. Habeas counsel also cites *Robinson v. State*, 520 So.2d 1 (Fla. 1988) which involved a prosecutor's improper cross-examination of an expert during penalty phase. This Court held that questions were a deliberate attempt to insinuate that defendant had a habit of preying on white women. Robinson was a black defendant being tried for the rape and murder of a white woman by an all white jury. Here, none of the alleged improper

prosecutorial comments has any racial overtones. Moreover, defense counsel objected to the questions in *Robinson*. So, *Robinson* was not a fundamental error case.

Nor was there any prejudice. The error, if any, was not sufficient to vitiate the entire trial or penalty phase. Any error in the prosecutor's comments are minor compared to the facts of the murder and the aggravators.

Contrary to Melton's argument, there was no violation of the Eighth Amendment. Petition at 16. The introduction of non-statutory aggravation is not a violation of the Eighth Amendment. Non-statutory aggravation is constitutionally permissible. *Barclay v. Florida*, 463 U.S. 939 (1983)(noting that the trial judge's consideration of a non-statutory aggravating circumstance was improper as a matter of state law because Florida law prohibits consideration of nonstatutory aggravating circumstances but noting "nothing in the United States Constitution prohibited the trial court from considering Barclay's criminal record"); *Wainwright v. Goode*, 464 U.S. 78 (1983) (holding that the trial court's reliance on an extra-statutory aggravating factor did not violate the Eighth Amendment); *Zant v. Stephens*, 462 U.S. 862, 878 (1983)(explaining that while statutory aggravating circumstances play a constitutionally necessary function, the

Constitution does not require the jury to ignore other possible aggravating factors); *Fox v. Coyle*, 271 F.3d 658, 666 n. 3 (6th Cir. 2001)(noting that it is Ohio's capital punishment scheme that prohibits consideration of the nature and circumstances of the crime as aggravating factors, not the federal constitution); *Babbitt v. Calderon*, 151 F.3d 1170, 1178 (9th Cir. 1998)(concluding to the extent that the defendant is arguing that the prosecutor's comments misled the jury into considering his background as aggravating, his argument fails because nothing in the Constitution limits the consideration of nonstatutory aggravating factors). Indeed, the Federal Death Penalty Act explicitly allows consideration of non-statutory aggravation. *United States v. Allen*, 247 F.3d 741, 758 (8th Cir. 2001), *remanded for reconsideration on other grounds*, *Allen v. United States*, 536 U.S. 953, 122 S. Ct. 2653, 153 L. Ed. 2d 830 (2002)(finding no Eighth Amendment infirmity with the provision of the Federal Death Penalty Act (FDPA) which allows consideration of non-statutory aggravation once one statutory aggravator is found). Other states, such as Georgia, also permit non-statutory aggravation. It is only Florida law, not the constitution, that prohibits non-statutory aggravation. So, the error, if any, was not of constitutional magnitude.

ISSUE III

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A CLAIM THAT THE JURY INSTRUCTION ON PECUNIARY GAIN WAS VAGUE ?

Melton contends that his appellate lawyer was ineffective for failing to argue the jury instruction on pecuniary gain was vague in violation of *Espinosa v. Florida*, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992) and *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988).

There was no deficient performance. This Court has rejected the argument that the pecuniary gain aggravator instruction is unconstitutionally vague. *Gorby v. State*, 819 So. 2d 664, 686, n.41 (Fla. 2002)(rejecting the contention that the pecuniary gain standard instruction violates *Espinosa*). Appellate counsel is not ineffective for not raising a meritless claim. *Pietri v. State*, 885 So.2d 245, 273 (Fla.2004)(explaining that appellate counsel cannot be ineffective for failing to present a meritless claim.); *Rutherford v. Moore*, 774 So.2d 637 (Fla. 2000)(observing that if a legal issue would in all probability have been found to be without merit had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's

performance ineffective).

The constitutional claim was not preserved. A vagueness challenge was not made in the trial court. While trial counsel objected to the giving of pecuniary gain aggravator instruction during the jury instruction conference, he objected on the basis of lack of evidence, not on the basis of unconstitutional vagueness. (T. 907-908). Nor did trial counsel propose an alternative unvague jury instruction in writing (or even orally) as required to preserve such a claim. Fla. R. Crim. Pro. 3.390(c); *Watkins v. State*, 519 So.2d 760, 761 (Fla. 1st DCA 1988)(holding when a jury instruction is requested that is not part of the Florida Standard Jury Instructions, the requested instruction must be submitted in writing to the trial court if the issue is to be preserved for appellate review.); *Gavlick v. State*, 740 So.2d 1212 (Fla. 2d DCA 1999)(noting failure to file a written request for a special jury instruction precludes appellate review). Appellate counsel is not ineffective for failing to raise unpreserved claims. *Davis v. State*, 2005 WL 2671258, 25 (Fla. 2005)(stating "[g]enerally, appellate counsel cannot be ineffective for failing to present claims which were not preserved due to trial counsel's failure to object."); *Johnson v. Singletary*, 695 So.2d 263, 266 (Fla. 1996) (observing

appellate counsel cannot be ineffective for failing to raise claims which were not preserved due to trial counsel's failure to object.).

Habeas counsel does not provide any real explanation of exactly what attack appellate counsel should have advanced against the pecuniary gain aggravator. What more “meaningful guidance” does the jury need than that the crime was committed forfinancial gain. Habeas counsel does not bother to propose an alternative instruction that he would consider not to be vague even now.

Appellate counsel’s performance is not deficient for not attempting to expand the law. Melton relies on *Espinosa v. Florida*, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992); *Sochor v. Florida*, 504 U.S. 527, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992); *Stringer v. Black*, 503 U.S. 222, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992); *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). *Espinosa* concerned Florida’s "wicked, evil, atrocious or cruel" aggravator, not the pecuniary gain aggravator. *Sochor* concerned Florida’s HAC aggravator, not the pecuniary gain aggravator. *Stringer* concerned Mississippi’s HAC aggravator, not Florida’s pecuniary gain aggravator. *Maynard* concerned

Oklahoma's HAC aggravator, not Florida's pecuniary gain aggravator. None of these cases would have directly supported appellate counsel's attack on Florida's pecuniary gain aggravator.

There was no prejudice. This was not a good case to raise a constitutional challenge to the pecuniary gain aggravator. A pawn shop robbery where the owner is shot is, by definition, a murder committed for pecuniary gain. The trial court had emphasized the fact that Melton had robbed and killed another victim in a taxi cab murder a couple of months prior to this robbery/murder in finding the pecuniary gain aggravator. This rebutted Melton's defense that the killing was accidental. Even if appellate counsel could have persuaded this Court to find the pecuniary gain instruction unconstitutionally vague, the error would have been found to be harmless based on these facts. Moreover, the pecuniary gain aggravator was merged with the during the commission of a robbery aggravator. So, even if the evidence to support the pecuniary gain aggravator was found insufficient, the evidence to support the commission during a robbery aggravator was indisputable. One aggravator merely would have been substituted for another aggravator. Appellate counsel is not ineffective for failing to raise a claim that amounts to

harmless error.

Melton also asserts that appellate counsel was ineffective for failing to argue that the evidence was insufficient to support the pecuniary gain aggravator. The problem with the argument is that appellate counsel did, indeed, raise this exact issue in the direct appeal. In the direct appeal opinion, this Court wrote:

> Third, Melton argues that the trial court erred in instructing the jury on and later finding the aggravating circumstance that the homicide was committed for pecuniary gain. In sentencing Melton, the trial judge found the evidence supported the aggravating factors that (1) the murder occurred in an attempt to complete the crime of robbery and to steal the victim's property of substantial value and (2) the felony murder was committed while the defendant was engaged in the commission of a robbery. He noted that the facts supporting these two circumstances are the same and cannot be used to find two aggravating circumstances. The judge chose to find that the evidence established beyond a reasonable doubt that the felony murder was committed for financial gain. The record supports this finding. This Court has held that finding pecuniary gain in aggravation is not error when felonies including robbery have occurred. *Bates v. State*, 465 So.2d 490, 492 (Fla.1985). Thus, we deny relief on this issue.

Melton v. State, 638 So.2d 927, 930 (Fla. 1994).

In a footnote, this Court observed:

> Testimony supporting this finding includes Melton's testimony that he carried a gun when he went to the pawn shop to steal some rings and he held a gun on Carter while Lewis gathered up proceeds from the robbery. After Melton shot Carter, he did not throw down the gun, but put the gun back into his

waistband.

Melton, 638 So.2d at n.5. This Court found that the evidence did support the finding of the pecuniary gain aggravator. Furthermore, the argument that appellate counsel made during the direct appeal was more detailed factually than the argument habeas counsel makes in the habeas petition. (Compare IB direct appeal at 38-40 with habeas petition 17-19).[2] Appellate counsel cannot be ineffective for failing to raise an issue that, in fact, he did raise. *Zack v. State*, 2005 WL 1578217 (Fla. July 7, 2005)(rejecting an ineffective assistance of counsel claim because the "claim simply refashions a claim that was unsuccessfully raised on direct appeal."); *Rutherford v. Moore*, 774 So. 2d 637, 645 (Fla. 2000)(rejecting a claim of ineffectiveness of appellate counsel for not convincing the Court to rule in his favor on two issues actually raised on direct appeal and concluding that if an issue was actually raised on direct appeal, the Court will not consider a claim that appellate counsel was ineffective for failing to raise additional arguments in

[2] Habeas counsel complains because the prosecutor made a conclusory statement that the murder was committed for financial gain. A pawn shop robbery where the owner is shot by the perpetrator who had entered with a gun is, by definition, a murder committed for pecuniary gain. This was the evidentiary basis for the prosecutor's comment.

support of the claim on appeal); *Swafford v. Dugger*, 569 So. 2d 1264, 1266 (Fla. 1990)(finding that if appellate counsel raises an issue, failing to convince this Court to rule in an appellant's favor is not ineffective performance). This claim of ineffective assistance of appellate counsel should be denied.

ISSUE IV

WHETHER FLORIDA'S CAPITAL SENTENCING STATUTE VIOLATES *RING V. ARIZONA*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)?

Melton contends that his death sentence violates *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). The State respectfully disagrees. First, *Ring* is not retroactive. Both the United States Supreme Court and this Court have held *Ring* is not retroactive. There is a prior violent felony conviction which exempts this case from any *Ring* claim. Furthermore, this Court has repeatedly rejected *Ring* challenges to Florida's death penalty statute in both direct appeals and collateral review. Indeed, this Court has never granted relief based on *Ring*.[3]

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[3] To the extent that Melton is raising an ineffective assistance of appellate counsel claim for failing to raise a *Ring* claim in the direct appeal, the ineffectiveness claim must fail. Appellate counsel was not ineffective for failing to raise a Sixth Amendment right to jury trial challenge to judge-based capital sentencing because there was United States Supreme Court precedent directly contrary to that position. *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989); *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). Indeed, the United States Supreme Court reaffirmed *Walton* in 2000, in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). It was not until 2002 in *Ring* that the United States Supreme Court overruled *Walton*. Appellate counsel is not ineffective for failing to raise an issue with controlling precedent directly against the claim. Nor is appellate counsel ineffective for failing to anticipate a change in law. *State*

Ring is not retroactive.[4] Both the United States Supreme Court and this Court have held *Ring* is not retroactive. *Schriro v. Summerlin*, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004); *Johnson v. State*, 904 So.2d 400, 405 (Fla. 2005)(concluding that *Ring* does not apply retroactively in Florida to cases that are final, under the test of *Witt v. State*, 387 So.2d 922 (Fla.1980)); *Windom v. State*, 886 So.2d 915, 935 (Fla. 2004)(Cantero, J., concurring)(concluding that *Ring* should not apply retroactively in Florida under either *Teague* or *Witt*). Melton may not raise a *Ring* claim in this postconviction case.

The death sentence in this case is exempt from the holding in *Ring*. The trial court found the prior violent felony aggravator. The prior violent felony aggravator is a

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v. Lewis, 838 So.2d 1102, 1122 (Fla. 2002)(rejecting an ineffective assistance of appellate counsel claim for failing to raise an *Apprendi* challenge citing *Nelms v. State*, 596 So.2d 441, 442 (Fla. 1992)(stating defense counsel cannot be held ineffective for failing to anticipate the change in the law)). This Court has rejected similar ineffective assistance of appellate counsel claims in the wake of *Ring*. *Cole v. State*, 841 So.2d 409, 429-430 (Fla. 2003)(rejecting an ineffectiveness of appellate counsel claim for failing to raise a constitutional challenge to Florida's death penalty statute based on *Apprendi*).

[4] Melton's conviction became final on October 31, 1994 when the United States Supreme Court denied his petition for writ of certiorari, which was eight years prior to the *Ring* decision. *Melton v. Florida*, 513 U.S. 971, 115 S.Ct. 441, 130 L.Ed.2d 352 (1994).

recidivist aggravator. Such aggravators are exempt from the holding in *Ring* and may be found by the judge alone. *Ferrell v. State*, 2005 WL 1404148, *13 (Fla. 2005) (stating: “[t]his Court has recognized that a defendant is not entitled to relief under the "prior-conviction exception" to *Apprendi* where the aggravating circumstances include a prior violent felony conviction); *Belcher v. State*, 851 So.2d 678, 685 (Fla. 2003)(explaining that the prior violent felony aggravator is exempted from an *Apprendi* analysis); *Davis v. State*, 2003 WL 22722316 (Fla. Nov 20, 2003)(stating: “[w]e have denied relief in direct appeals where there has been a prior violent felony aggravator, citing *Duest v. State*, 855 So.2d 33, 49 (Fla. 2003) and *Doorbal v. State*, 837 So.2d 940, 963 (Fla. 2003)(stating that prior violent felony aggravator based on contemporaneous crimes charged by indictment and on which defendant was found guilty by unanimous jury "clearly satisfies the mandates of the United States and Florida Constitutions"), *cert. denied*, - U.S. -, 123 S.Ct. 2647, 156 L.Ed.2d 663 (2003)); *Allen v. State*, 854 So.2d 1255, 1262 (Fla. 2003)(rejecting a *Ring* challenge where one of the aggravating factors was under a sentence of imprisonment because “[s]uch an aggravator need not be found by the jury”).

This Court rejected a *Ring* challenge to Florida's death penalty statute in *Bottoson v. Moore*, 813 So. 2d 27 (Fla. 2002), *cert. denied*, 537 U.S. 1070 (2002), reasoning that the United States Supreme Court had not receded from its prior precedent upholding the constitutionality of Florida's death penalty scheme. Furthermore, this Court has repeatedly rejected *Ring* challenges to Florida's death penalty statute in the wake of *Bottoson* in both direct appeals and collateral cases. *Duest v. State*, 855 So.2d 33, 48-49 (Fla. 2003)(rejecting a *Ring* challenge in a direct appeal).

Melton incorrectly asserts juries do not make fact findings in the penalty phase. The United States Supreme Court has concluded otherwise. The United States Supreme Court in *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), a case that was a precursor to *Apprendi* and *Ring,* explained that if there is a jury recommendation of death, the Sixth Amendment right to a jury trial is not violated. The *Jones* Court explained that in *Hildwin*, a jury made a sentencing recommendation of death, thus necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved. *Jones*,

526 U.S. at 251, 119 S.Ct. at 1228.

Melton also contends that the jury must weigh aggravators against mitigators in the wake of *Ring*. This is an argument that the Sixth Amendment entitles a capital defendant to jury sentencing. Justice Scalia, in his concurring opinion, specifically noted that *Ring* did not establish jury sentencing. *Ring*, 122 S.Ct. at 2445 (Scalia, J., concurring)(stating that "today's judgment has nothing to do with jury sentencing" and "[t]hose States that leave the ultimate life-or-death decision to the judge may continue to do so . . ."). Thus, *Ring* does not require that the jury do the weighing in the selection phase. The *Ring* claim should be denied.

ISSUE V

WHETHER THE *ROPER V. SIMMONS*, - U.S. -, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) APPLIES TO AGGRAVATORS?

Melton contends that *Roper v. Simmons*, - U.S. -, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) should be extended to preclude the State from using a conviction committed when he was under 18 years old as an aggravator. Melton committed the murder/robbery, that was used as the prior violent felony aggravator in this case, when he was seventeen years old. *Roper* does not apply to aggravators, only convictions. Melton

was eighteen when he committed this capital murder and therefore, *Roper* does not apply.

In *Moreno v. Dretke*, 362 F.Supp.2d 773, 812 (W.D.Tex. 2005), a federal district court rejected a similar claim. Moreno argued that *Roper*'s prohibition on the execution of juvenile offenders should apply to him because, although he committed the murder when he was eighteen, the plan to commit the murder was formed when was under eighteen. Moreno was seventeen years old when he plotted to abduct and kill someone for money. *Moreno*, 362 F.Supp.2d at n.80. The Court concluded that despite the fact that Moreno may have engaged in certain preparatory acts while he was seventeen years of age, the undisputed fact remains that he committed the murder when he was eighteen years of age. The district court reasoned that adopting such an argument "would eviscerate the bright line drawn by the Supreme Court."

Melton also asserts that because he was only 25 days over eighteen years old when he committed the capital murder, it is arbitrary not to apply *Roper* to him. All bright line age classifications are arbitrary in this sense but they are not constitutionally infirm. The United States Supreme Court was well aware that a person that was eighteen years plus one day when he committed the murder could be executed when it

established the bright line rule of *Roper*. The *Roper* Court explicitly addressed this issue:

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn.

Roper, 125 S.Ct. at 1197-1198. Of course, a defendant who was one month over eighteen years when he committed the murder makes the same argument as Melton.

The *Roper* Court chose this age because it was the legal age of majority. Melton's argument ignores this rationale. As the *Roper* Court explained those over eighteen years old can vote, serve as a juror and marry without parental consent including those merely one day over eighteen. The *Roper* claim should be denied.

CONCLUSION

The State respectfully requests that this Honorable Court deny the habeas petition.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing response to petition for writ of habeas corpus has been furnished by U.S. Mail to D. Todd Doss, 725 SE Baya Drive, Suite 102, Lake City FL 32025-6092 this 15th day of November, 2005.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12 point font.

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