IN THE SUPREME COURT OF FLORIDA

NO.SC06-1729

JASON DEMETRIUS STEPHENS,

Petitioner,

v.

JAMES R. McDONOUGH, JR.,
Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Petitioner=s first habeas corpus petition in this Court. Article 1, Section 13 of the Florida Constitution provides: AThe 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. Stephens 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. Stephens= trial is referred to as AVol. R.@, followed by the appropriate page number.

The transcript of the postconviction evidentiary hearing is referred to as AT.@, followed by the appropriate page number.

Defense exhibits introduced at the evidentiary hearing are referred to as AD-Ex.@

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

INTRODUCTION

Significant errors which occurred at Mr. Stephens= 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.

Stephens= 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. Stephens= 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. Stephens involved Aserious 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. Stephens. A[E]xtant legal principle[s] . . . provided a clear basis for . . . compelling appellate argument[s],@ which should have been raised in Mr. Stephens= appeal. Fitzpatrick, 490 So. 2d at 940. Neglecting to raise such fundamental issues, as those discussed herein, Ais 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. Stephens would have received a new trial, or, at a minimum, a new penalty phase. Individually and Acumulatively,@ Barclay v. Wainwright, 444 So. 2d 956, 969 (Fla. 1984), the claims omitted by appellate counsel establish

that Aconfidence 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. Stephens is entitled to habeas relief.

REQUEST FOR ORAL ARGUMENT

Due to the seriousness of the issues involved, Mr. Stephens 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. Stephens 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. Stephens 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. Stephens 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

MR. STEPHENS WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN THE TRIAL COURT FAILED TO CONDUCT A NELSON INQUIRY.

At a hearing held on October 20, 1997, the trial court was informed that Mr. Stephens was dissatisfied with his defense counsel, and wanted to discharge them and appoint another lawyer. (Vol. III, R. 443). Mr. Stephens then offered the judge a note which outlined his complaint. (Vol. III, R. 444). The court read the note and characterized it as complaining of a lack of contact with the defendant, his mother and his priest. (Vol. III, R. 444). The court then stated that he agreed that Mr. Stephens: counsel, Richard Nichols, should be in contact with him. The court proceeded to inquire of Mr. Stephens if he had any complaints about his other defense counsel Refik Eler, to which Mr. Stephens

replied AI ain=t never seen him.@ (Vol. III, R. 445). The court then characterized Mr. Stephens= complaints as not challenging Nichols= competence.

After asking to have a public defender appointed and being informed that the court could not do that due to a conflict, Mr. Stephens then expressed an additional concern that he was not being given copies of his paperwork (Vol. III, R. 447). Mr. Stephens indicated that all he had been given was one police report (Vol. III, R. 447). The court expressed during the hearing that Mr. Nichols should have more contact with Mr. Stephens and that he should give Mr. Stephens the documents pertaining to his case. Mr. Stephens commented at the end of the hearing AStill ain=t going to be satisfied.@ (Vol. III, R. 448).

In Nelson v. State, 274 So. 2d 256 (4th DCA 1973), the Court held:

> If incompetency of counsel is assigned by the defendant as the reason, or a reason, the trial judge should make a sufficient inquiry of the defendant and his court appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant.

Id. at 258 (emphasis added). The record in this case shows that the trial court never made an adequate inquiry of Mr. Stephens and his appointed counsel regarding the competency of

his representation.

This claim was raised on direct appeal. In its opinion, this Court stated:

> The record does not contain the handwritten note[1] Stephens presented to the trial court expressing his concerns; however, the trial court characterized the concerns as a lack of contact between Stephens and his attorneys. Additionally, Stephens, stated on the record that in addition to a lack of contact he was concerned with the failure of counsel to give him copies of paperwork. Thus, it is apparent that Stephens voiced dissatisfaction with counsel but did not actually question counsel=s competency. Under such circumstances a full Nelson inquiry is not necessary.

Stephens v. State, 787 So. 2d at 758 (citation omitted). This Court=s conclusion that Mr. Stephens did not question his counsel=s competency was an error of fact.

Postconviction counsel has obtained a copy of the note, the contents of which mandated that a full Nelson inquiry should have occurred.[2] In paragraph 3 of the note, Mr. Stephens states, AMr. Nichols has demonstrated unpreparedness and feel (sic) that his representation will be ineffective.@

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[1]Appellate counsel, on February 4, 1999, in an attempt to locate the note to be included in the record on appeal, filed Defendant=s Motion to Remand Case to Conduct an Evidentiary Hearing to Locate, Authenticate and Submit for Inclusion in the Record on Appeal a Pro Se Pleading which Asked That Appointed Counsel Be Discharged. This motion was denied by this Court on February 24, 1999.

[2]Mr. Stephens was permitted to introduce the note into evidence during his postconviction evidentiary hearing (See D-Ex. 3)

In paragraph 4 of the note, Mr. Stephens states, AMr. Nichols has also shown a lack of concern for my case and I feel that I am not receiving adequate counseling from him.@ In paragraph 5, Mr. Stephens unmistakably states, AI want a new lawyer.@

Here, the trial court erred in failing to conduct a Nelson inquiry. Because of the apparent misplacement of the note, this Court relied upon erroneous facts in deciding Mr. Stephens= direct appeal claim. This Court should now correct this factual error. This Court has habeas corpus jurisdiction to correct failings in its review process. Article V, '' 3(b)(1), (7) & (9), Florida Constitution; Parker v. State, 643 So. 2d 1032, 1033 (Fla. 1994).

To the extent the Court believes this issue was not adequately presented on direct appeal, appellate counsel=s performance was deficient, and Mr. Stephens was prejudiced. Appellate counsel has the responsibility of ensuring that the record is complete. As this Court has stated, "our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate." Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985). This issue is clearly meritorious, and counsel=s inadequate presentation therefore undermines confidence in the outcome of Mr.

Stephens:

direct appeal. Wilson, 474 So. 2d at 1165.

CLAIM II

THE EXECUTION OF JASON STEPHENS, A BRAIN DAMAGED, MENTALLY IMPAIRED INDIVIDUAL, WOULD CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT UNDER THE CONSTITUTIONS OF THE STATE OF FLORIDA AND THE UNITED STATES.

Mr. Stephens suffers from brain damage, mental impairment, and a mental and emotional age of less than eighteen years, which renders the application of the death penalty in his case cruel and unusual. His execution would therefore offend the evolving standards of decency of a civilized society, See Trop v. Dulles, 356 U.S. 86 (1958), would serve no legitimate penological goal, See Gregg v. Georgia, 428 U.S. 153, 183 (1976), and would violate the Eighth and Fourteenth Amendments to the United States Constitution. See Roper v. Simmons, 125 S.Ct. 1183 (2005). As the Supreme Court recently held in Simmons,

> Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, . . . A[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 ill-considered actions and decisions.@ * * * The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and

> outside pressures, including peer pressure. 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.**

(Emphasis added).

During the postconviction proceedings, expert psychological testimony was presented which would establish that Mr. Stephens falls within the three general differences the Supreme Court outlined between juveniles and adults. As Dr. Toomer stated:

> When individuals grow up in an environment that is not nurturing, that is not caring, that is unpredictable and is not characterized by saneness, what you have is you have fixation at an earlier stage of development while the individual continues to advance chronologically.
>
> So you have an individual who is like 18, 19, 20 years of age chronologically. Emotionally they are six, seven, eight, whatever, because what has happened is because of that - - those predispositional variables adversely impact on their development. Emotionally are still at a much younger, younger age, so as a result just like children, children at a young age have no impulse control. Children act. They don=t think. They don=t predict consequences.
>
> So you have someone who is 18, 19 or 20 and they

> are still acting as if they were much younger because of those deficits and that=s what you have with Mr. Stephens.

(T. 50-51).[3]

In Mr. Stephens= case, the abuse suffered, coupled with Mr. Stephens= possible brain damage, resulted in him operating at a mental and emotional age significantly below his chronological age at the time of the homicide.

In this case, it is mental and emotional age that warrants Eighth Amendment relief. "There is no dispute that a defendant's youth is a relevant mitigating circumstance that must be within the effective reach of a capital sentencing jury if a death sentence is to meet the requirements of Lockett and Eddings." Johnson v. Texas, 113 S. Ct. 2658, 2668 (1993) (citations omitted). The kind of characteristics attributed to youthful offenders, "a lack of maturity and an underdeveloped sense of responsibility" Id. at 2668-2669, are precisely those characteristics attributable to Mr. Stephens. And it is these very same traits that "often result in impetuous and ill-considered actions and decisions." Id. at 2669. Dr. Toomer observed the following as to Mr. Stephens

[3]Additionally, Mr. Stephens is affected by underlying neurological involvement (T. 47).

impulsivity

> Q. Could you tell us how Mr. Stephens= home environment impacted his impulsivity?
>
> A. The environment, the discipline, the lack of nurturing, all of those factors really served as a model for vacillation and capriciousness in terms of overall functioning, so if you - - if you are in an environment that is unpredictable and that=s lacking in nurturance and caring and what have you then it=s very difficult to develop the skills that will enable you to modulate your own emotional responsiveness and to function at a level that is commensurate with your chronological age because the whole idea of how you resolve conflict, the whole idea of how you resolve issues, how you plan, all of those kinds of things don=t just happen by accident. We learn those things.

(T 51-52).

Capital punishment should not be imposed where a defendant lacks the requisite "highly culpable mental state." Tison, 107 S. Ct. at 1684. Mr. Stephens lacked such a mental state. The background of the defendant reflects "factors which may call for a less severe penalty," Lockett v. Ohio, 438 U.S. 586, 605 (1978). An individual with neurological handicaps, such as Mr. Stephens, is the very opposite of the kind of offender whose "highly culpable mental state" has been held to warrant imposition of the death penalty. Simmons; Tison. During his testimony at the evidentiary hearing, Dr. Toomer observed the following:

> Q. Based on your evaluation and the totality of the

circumstances in this case, do you think that Mr. Stephens had an ability to think out the consequences of leaving the child in that car that day?

A. I don:t - - based upon my evaluation I don:t believe that his functioning is at that level. I don:t - - in other words, what you are talking about now is higher order thought which means that you weigh alternatives. You project consequences. It:s abstract reasoning. I don:t think that his reasoning is at that process - - his reasoning is not at that level and his thought process is not at that level, what we call higher order thought.

(T 62-63).

The Eighth Amendment prohibits "all punishments which by their excessive length or severity are greatly disproportionate to the offenses charged." Weems v. United States, 217 U.S. 349, 371 (1910) (citation omitted). In furtherance of this principle, the Supreme Court's Eighth Amendment decisions have made clear that "a criminal sentence must relate directly to the personal culpability of the criminal offender." Tison v. Arizona, 107 U.S. 1676, 1685 (1987). These decisions have also considered "a defendant's intention -- and therefore his moral guilt -- to be critical to the degree of criminal culpability." Enmund v. Florida, 458 U.S. 782, 800 (1982); accord Tison, 107 S. Ct. at 1687("Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious

is the offense, and therefore, the more severely it ought to be punished").

Because capital punishment is our society's ultimate sanction, "unique in its severity and irrevocability," Gregg, 428 U.S. at 187, it may be imposed only when a defendant is found to have "a highly culpable mental state." Tison, 107 S. Ct. at 1684; see also id. at 1687 ("A critical facet of the individualized determination of culpability required in a capital case is the mental state with which the defendant commits the crime"); Godfrey v. Georgia, 446 U.S. 420, 443 (holding capital punishment is inappropriate unless the crime "reflected a consciousness materially more depraved than that of any person guilty of murder").

Because Eighth Amendment proportionality principles forbid the imposition of capital punishment where a defendant lacks the requisite "highly culpable mental state," the Constitution requires an individualized inquiry into the defendant=s background and character combined with the circumstances of the offense to determine whether there exist "factors which may call for a less severe penalty." Lockett v. Ohio, 438 U.S. 586, 605 (1978). As Justice O'Connor explained:

> [E]vidence about the defendant's background and character is relevant because of the belief, long

> held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, **or to emotional and mental problems**, may be less culpable than defendants who have no such excuse.

California v. Brown, 107 S. Ct. 837, 841 (1987)(O'Connor, J., concurring)(emphasis added).

Generally, the proportionality required by the Eighth Amendment has been understood to require individualized, case-by-case assessment of the factors that may diminish culpability. See Eddings; Lockett. The Supreme Court has, however, made several categorical Eighth Amendment judgments about situations in which culpability is automatically insufficient to justify imposition of the death penalty. Some of these judgments have turned on finding categories of criminal acts insufficiently blameworthy to justify a death sentence. See, e.g., Coker v. Georgia, 433 U.S. 584 (1977)(rape); Eberheart v. Georgia, 433 U.S. 917 (1977)(armed robbery). In other instances the judgment has turned on the level of the defendant's mental state as it relates to the crime: Tison and Enmund, for example, make clear that a defendant may not be sentenced to death unless he has at least been shown to have "a reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death." Tison, 107 S. Ct. at 1688.

Further, judgments have turned on the defendant's mental capacity. See Ford v. Wainwright, 106 S. Ct. 2595 (1987)(execution of the insane violates the Eighth Amendment).

When one considers Mr. Stephens= mental capacity and level of functioning, there is no sustainable rationale for imposing the death penalty upon him and not upon the class of individuals outlined in Simmons.

CLAIM III

MR. STEPHENS WAS DENIED A FAIR TRIAL AND A FAIR, RELIABLE AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, BECAUSE THE PROSECUTOR'S ARGUMENTS AT THE GUILT/INNOCENCE AND PENALTY PHASES PRESENTED IMPERMISSIBLE CONSIDERATIONS TO THE JURY, MISSTATED THE LAW AND FACTS, AND WERE INFLAMMATORY AND IMPROPER. APPELLATE COUNSEL=S FAILURE TO RAISE THIS ISSUE ON APPEAL WAS DEFICIENT PERFORMANCE WHICH PREJUDICED MR. STEPHENS.

The prosecutor=s conduct was contrary to the law and prejudiced the jury=s consideration of the evidence in violation of the Constitution. This Court has held that when improper conduct by the prosecutor "permeates" a case relief is proper. Garcia v. State, So. 2d 1325 (Fla. 1993); Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990).

Prior to the penalty phase, the trial court reviewed a portion of the prosecutor=s proposed closing statement. (Vol. IV, R. 734). The court stated,

> The record should reflect that Mr. Shorstein has presented opposing counsel and the Court with a portion of his intended closing argument. **I find that it=s designed to appeal to the sympathy of the jury, and he can identify that this was a unique child, loved child, but that=s about it. And you should let him know if he=s going to go much further than that, he will probably receive an objection and it will be sustained.**

(Vol. IV, R. 734)(emphasis added).

Despite the court=s warning, the prosecutor did indeed go much further. During the State=s penalty phase closing argument, the prosecutor made several improper comments, specifically designed to appeal to the sympathy of the jury.

The prosecutor first commented:

> You will hear their explanations for Jason Stephens= murderous conduct. You heard some of that this morning. That he lost his father. But you also heard from Little Rob=s mother and his grandparents. And I want to talk to you about Little Rob, and I want you to remember what his mother and grandparents said. **Just as defense counsel today presented evidence of this defendant=s family, the State wants you to think about the loss of Little Rob, what this senseless murder has done to his mother and to little Kahari, who you met during the guilt phase of this trial.**
>
> **What happened to Consuelo, Kahari and others must be considered in determining Jason Stephens= personal responsibility and guilt, his blameworthiness.** The jury may consider Little Rob=s uniqueness as an individual human being, what a great loss to Little Rob=s friends, his family and the entire community. **Just as this murderer should be considered a human being, so should Little Rob.**

(Vol. IV, R. 744)(emphasis added).

The prosecutor continued his impermissible argument:

> Ladies and gentlemen, murder is the ultimate act of depersonalization. **It transforms a living person, in this case a little boy living a happy life with his mother and brother, his little boy hopes and little boy dreams, and it transforms that person into a corpse.**

(Vol IV, R. 748)(emphasis added).

The prosecutor capped off his inflammatory argument by showing the jury numerous photos of the victim, both before and after his death:

> This is what Little Rob saw happen to his mother shortly before he died (publishing photograph).
>
> This is the Little Rob who existed that morning before Jason Stephens went in and terrorized these people and murdered Little Rob (publishing photograph).
>
> **And this is the Little Rob that Jason Stephens left (publishing photograph).**

(Vol. IV, R. 748)(emphasis added).

Finally, the prosecutor summed up his argument by stating, ADon=t base your decision on sympathy,@ after having made numerous remarks all but asking the jury to consider just that. (Vol. IV, R. 749).

This Court has repeatedly condemned prosecutorial argument that invites the jury to base its decision on such emotions. See, e.g., King v. State, 623 So. 2d 486 (Fla. 1993); Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); Garron v.

State, 528 So. 2d 353 (Fla. 1988); Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985) (A[Closing argument] must not be used to inflame the minds and passions of the jurors so that their 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.@).

Also, the repeated use of the photos, coupled with contrasting Mr. Stephens= co-defendant and the victim in the case, as well as the emphasis on the impact on the victim=s family, were all designed to play upon the sympathy of the jury and invited a verdict based on emotion.

Even during the guilt phase, while showing the jury photos of the victim during the opening statements, the prosecutor repeatedly stated that the child had been Abrutally and savagely murdered,@ adding that the victim=s fate was to Aslowly fry to death.@ (Vol. X, R. 991, 996). Later, during the closing statements, the prosecutor first opined that Mr. Stephens testimony came from a Awarped concern@ for his co-defendant, then went on to query the jury, Awhere was the concern that he showed for a 3 yr old child? There=s the concern,@ **while again flashing a photo of the victim to the jurors.** (Vol. XV, R. 1820).

While photos are indeed admissible when relevancy is

shown, this Court has stated that the relevancy test is by no means Acarte-blanche@ for photographic evidence, as the photos must be Aprobative of an issue that is in dispute.@ Pope v. State, 679 So.2d 710, 713 (Fla. 1996). In this instance, repeated showings to the jury coupled with the prosecutor=s accompanying remarks, prejudiced Mr. Stephens.

Additional comments by the prosecutor during the guilt phase also crossed the line of acceptable advocacy. The prosecutor sought to bolster the credibility of the State=s case by remarking to the jury that AMy job is to represent the State of Florida to seek justice@ (Vol XIV, R. 1767), and by stating that AIf the State hasn=t proven the defendant=s guilt beyond a reasonable doubt, then I=m not sure it can be done in any case.@ (Vol. XIV, R. 1768). The prosecutor then contrasted this with his conclusions about Mr. Stephens= Atheatrical testimony, melodramatic, lying,@ further charging that Mr. Stephens= had Abragged and lied so much and so often about so many crimes.@ (Vol. XV, R. 1819). While this Court has permitted counsel to make conclusions regarding the veracity of witnesses, the prosecutor=s remarks go far beyond simply characterizing the defendant as a Aliar,@ and is therefore an improper form of argument. Craig v. State, 510 So.2d 857 (Fla. 1987). This argument goes on to imply the

existence of other crimes and instances of untruth, when there is no basis in the record for such a claim. The comments about Mr. Stephens, paired with the prosecutor=s comments about seeking justice through his conviction, extended an open invitation to the jury to convict Mr. Stephens for a reason other than his guilt. Ruiz v. State, 743 So.2d 1, 6 (Fla. 1999).

The Florida courts have held that "a prosecutor's concern 'in a criminal prosecution is not that it shall win a case, but that justice shall be done.' While a prosecutor 'may strike hard blows, he is not at liberty to strike foul ones.'" Rosso v. State, 505 So. 2d 611, 614 (Fla. 3rd DCA 1987). This Court has called such improper prosecutorial commentary "troublesome." See Bertolotti, 476 So. 2d at 132.

The cumulative effect of the prosecutor's comments was to "improperly appeal to the jury's passions and prejudices." See Cunningham v. Zant, 928 F.2d 1006, 1020 (11th Cir. 1991). 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." See Donnelly v. DeChristoforo, 416 U.S. 647 (1974); See also United States v. Eyster, 948 F.2d 1196, 1206 (11th Cir. 1991).

Even in the absence of objection by trial counsel,

appellate counsel was ineffective in failing to raise this issue as fundamental error. Egregious prosecutorial misconduct, like that which occurred here, constitutes fundamental error. Robinson v. State, 520 So. 2d 1, 7 (Fla. 1988)(AOur 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). Had the jury not been subjected to these improper arguments, there is a reasonable probability that the outcome of the trial would have been different. See Strickland v. Washington, 466 U.S. 688 (1984).

CLAIM IV

MR. STEPHENS WAS DENIED HIS RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, WHEN THE COURT FOUND ONE OF THE AGGRAVATING FACTORS IN SUPPORT OF A DEATH SENTENCE TO BE THAT THE MURDER OCCURRED DURING THE COMMISSION OF A FELONY. THAT FINDING WAS DUPLICATIVE OF THE BASIS FOR THE DEATH PENALTY, I.E., FELONY-MURDER, AND THIS WAS AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING FACTOR. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON APPEAL.

Mr. Stephens was convicted of first degree murder. Since the State did not prove the element of intent, a required

element of premeditated murder, it must be assumed that the jury's verdict rests on felony murder.[4] The trial court found as one of three upheld aggravating circumstances in support of a death sentence that the capital felony was committed while Mr. Stephens was engaged in the commission of a felony. In the penalty phase, the jury was instructed as follows:

> The crime for which the defendant is to be sentenced was committed while he was engaged in the commission, or an attempt to commit, or flight after committing or attempt to commit the crimes of armed kidnapping, armed robbery and burglary with an assault.

(Vol V, R. 786).

Aggravating factors must channel and narrow a sentencer=s discretion. A state cannot use aggravating "factors which as a practical matter fail to guide the sentencer's discretion." Stringer v. Black, 112 S.Ct. 1130 (1992). The use of this automatic aggravating circumstance did not "genuinely narrow the class of persons eligible for the death penalty," Zant v. Stephens, 462 U.S. 862, 876 (1983), and therefore the

[4] The trial court was unable to conclude in its= sentencing order that Mr. Stephens intended to kill the child. (Vol. III, R. 391). Furthermore, the jury foreman was quoted in a newspaper as saying that the jury did not believe Mr. Stephens intended to harm the victim. (Vol. II, R. 345-6).

sentencing process was rendered unconstitutionally unreliable. Id. "Limiting the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 486 U.S. 356, 362 (1988).

Compounding this error is the fact that this Court has held that the aggravating circumstance of "in the course of a felony" is not sufficient by itself to justify a death sentence in a felony-murder case. Rembert v. State, 445 So. 2d 337, 340 (Fla. 1984) (no way of distinguishing other felony murder cases in which defendants "receive a less severe sentence"); Proffitt v. State, 510 So. 2d 896, 898 (Fla. 1987) ("To hold, as argued by the State, that these circumstances justify the death penalty would mean that every murder during the course of a burglary justifies the imposition of the death penalty"). However, here, the jury was instructed on this aggravating circumstance and told that it was sufficient for a recommendation of death unless the mitigating circumstances outweighed the aggravating circumstance. (Vol. V, R. 785) The jury did not receive an instruction explaining the limitation contained in Rembert and Proffitt.

There is no way at this juncture to know whether the jury relied on this aggravating circumstance in returning its death recommendation. "[I]t is constitutional error to give weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors pertain." Richmond, 113 S. Ct. at 534. In Maynard v. Cartwright, 486 U.S. at 461-62, the Supreme Court held that jury instructions must "adequately inform juries what they must find to impose the death penalty." Espinosa v. Florida, 112 S.Ct 2926 (1992), held that Florida sentencing juries must be accurately and correctly instructed regarding aggravating circumstances in compliance with the Eighth Amendment. Mr. Stephens was denied a reliable and individualized capital sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments.

Appellate counsel=s failure to raise this issue constitutes prejudicially deficient performance. See Strickland v. Washington, 466 U.S. 668 (1984).

CLAIM V

THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY INSTRUCTING THE JURY REGARDING THE AGGRAVATING FACTOR OF HEINOUS, ATROCIOUS, AND CRUEL (HAC) WHEN, AS A MATTER OF LAW, THIS FACTOR DID NOT APPLY, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. THE COURT IN ITS= SENTENCING ORDER DID NOT FIND THE EXISTENCE OF HAC,

YET THE JURY=S APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE AS FUNDAMENTAL ERROR.

In Mr. Stephens= case, the jury instruction on the heinous, atrocious and cruel aggravating factor (HAC) was read was as follows:

> The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others. The kind of crime intended to be included and heinous, atrocious or cruel is one accompanied by additional acts to set the crime apart from the norm of capital felonies that show that the crime was conscienceless or pitiless and was unnecessarily tortuous to the victim. In order to find that the aggravating factor of especially heinous, atrocious and cruel apply to these facts, the victim=s knowledge of his impending death should be considered.

(Vol. V, R. 787)

It is well-settled that the State bears the burden of proving beyond a reasonable doubt that the defendant had the requisite mental state at the time of the murder for the application of the heinous, atrocious, and cruel circumstance. In order for the judge properly to instruct the jury, and for the judge to find established, the HAC aggravator, the State must show beyond a reasonable doubt that the defendant intended to inflict a high degree of pain, or that the defendant was indifferent to or enjoyed the suffering of the

victim. State v. Dixon, 283 So. 2d 1 (Fla. 1973), Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990).

Here, however, Mr. Stephens clearly did not have this requisite intent. As the trial court explained in its sentencing order, AThe Court, unable to conclude beyond a reasonable doubt, that the Defendant **intended** to kill the child, does not find that this aggravator was proved beyond a reasonable doubt.@ (Vol. II, R. 391)(emphasis added). Here, however, the jury was given HAC instructions.

Despite its findings, the trial court erroneously permitted the jury to be given this aggravating circumstance instruction. Trial counsel compounded the error by conceding to the jury that this aggravating circumstance applied, A**You should give very little weight to this particular aggravator** because there was no proof of enjoyment of punishment or of some kind of pleasure in making Little Robert suffer the way he did.@ (Vol. IV, R. 759) (emphasis added).

The jury, a co-sentencer, is presumed to have considered an aggravating circumstance that, as a matter of law, did not apply here. Espinosa v. Florida, 112 S. Ct. 2926, 2928 (1992). The sentencing court was in turn required to give weight to the jury=s recommendation. Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975); Walton v. Arizona, 497 U.S. 639,

653 (1990). Thus, an extra thumb was placed on the death side of the scale. Stringer v. Black, 112 S. Ct. 1130 (1992). As a result, Mr. Stephens= sentence of death must be vacated. See Espinosa v. Florida; Sochor v. Florida, 112 S. Ct. 2114 (1992).

Appellate counsel was ineffective for failing to raise this issue as fundamental error.

CLAIM VI

THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY INSTRUCTING THE JURY REGARDING THE PECUNIARY GAIN AGGRAVATOR WHEN, AS A MATTER OF LAW, THIS FACTOR DID NOT APPLY, AND THE JURY INSTRUCTION WAS UNCONSTITUTIONALLY VAGUE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. THE COURT IN ITS= SENTENCING ORDER DID NOT FIND THE EXISTENCE OF THE PECUNIARY GAIN AGGRAVATOR, YET THE JURY=S RECOMMENDATION WAS TAINTED BY HEARING THIS INSTRUCTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE AS FUNDAMENTAL ERROR.

During the penalty phase of Mr. Stephens= trial, the judge gave the jury the following instruction:

> The crime for which the defendant is to be sentenced was committed for financial gain. If you find that the killing of the victim was done for financial gain and was done during a robbery, you shall consider that only as one aggravating circumstance rather than two. Those circumstances are considered to be merged. The State may not rely upon a single aspect of the offense to establish more than a single aggravating circumstance. Therefore, if you find that two or more aggravating circumstances are supported by a single aspect of the offense, you may only consider that aspect as supporting a single

aggravating circumstance.

(Vol V, R. 787).

This instruction was unconstitutionally vague. This Court Court has held that in order for the pecuniary gain aggravator to apply, it must have been the *primary motive* for the killing. Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988). The trial court=s instruction to Jason Stephens= jury did not inform them that >primary motive= was one of the factors. Such 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 to the United States Constitution.

This Court has repeatedly held that in order for the pecuniary gain aggravator to be applicable, it must be proven beyond a reasonable doubt. Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988); Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987). This aggravating factor and the resulting instruction were not supported in Mr. Stephens= case by the evidence. See Rogers; Simmons v. State, 419 So. 2d 316 (Fla. 1982).

The trial court was well aware at the close of the guilt phase that this aggravator did not apply. In its sentencing order, the court stated that the pecuniary gain was not

applicable because the theft of any property had been completed by the time the murder happened. (Vol II, R. 390). This is information that was available to the jury by the end of the guilt phase. The court had the benefit of caselaw which instructed it that this aggravator was inapplicable.[5] The jury did not have the benefit of this same caselaw when arriving at its= recommendation. However, the jury was still instructed on the pecuniary gain aggravator.

Trial counsel compounded the error by conceding to the jury that this aggravating circumstance applied:

> They have also urged, and **I believe the judge is going to instruct you on felony murder and financial gain as an aggravator in this particular case.** The Judge also is going to tell you something else. He=s going to tell you, I believe, that these two aggravators merge into one aggravator. And why is that? For whatever - - we do not know, we don=t speculate as to whether or not you rested your verdict on premeditation or felony murder. That=s where this law comes from. Because, you see, if a homicide occurs in the course of a felony and a person dies, that=s felony murder. There is a lot of felonies that could have occurred during the homicide, kidnapping and robbery, or whatever, but since robbery is alleged in this particular

[5] The court cited to Hardwick v. State, which stated that this aggravator only applies where the Amurder is an integral step in obtaining some sought-after specific gain.@ Hardwick v. State, 521 So. 2d 1071, 1076 (Fla. 1988). The court also cited to Elam v. State, which held this aggravator does not apply if the theft of money or other property is over and the murder was not committed to facilitate it. Elam v. State, 636 So. 2d 1312 (Fla. 1994).

indictment, and he's been convicted of that, that was for financial gain, so therefore these two merge.

Have these been proven? Yes, they have been proven. Should you give them great weight? You should give them adequate weight, but they merge into one.

(Vol. IV, R. 756-7) (emphasis added).

The jury, a co-sentencer, is presumed to have considered an aggravating circumstance that, as a matter of law, did not apply here. Espinosa v. Florida, 112 S. Ct. 2926, 2928 (1992). The sentencing court was in turn required to give weight to the jury's recommendation. Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975); Walton v. Arizona, 497 U.S. 639, 653 (1990). Thus, an extra thumb was placed on the death side of the scale. Stringer v. Black, 112 S. Ct. 1130 (1992). As a result, Mr. Stephens' sentence of death must be vacated. See Espinosa v. Florida; Sochor v. Florida, 112 S. Ct. 2114 (1992).

Appellate counsel was ineffective and appellate counsel was ineffective for failing to raise this issue as fundamental error.

CLAIM VII

THE AGGRAVATOR AND INSTRUCTION FOR A VICTIM UNDER 12 VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN THAT THEY ARE UNCONSTITUTIONALLY OVERINCLUSIVE, ARBITRARY AND AUTOMATICALLY APPLICABLE TO HOMICIDES COMMITTED AGAINST A HUGE PORTION OF THE POPULATION REGARDLESS

OF THE CIRCUMSTANCES, UNLIKE ANY OTHER AGGRAVATOR. APPELLATE COUNSEL WAS INEFFECTIVE FOR NOT RAISING THIS ISSUE AS FUNDAMENTAL ERROR.

At Jason Stephens= trial, the jury was instructed on the following aggravator: AThe victim of a capital felony was a person less than 12 years of age.@ (Vol V, R. 787).

Only a few aggravators are based on the victim=s status. Section 921.141(5)(j), Florida Statutes (1997), applies only to law enforcement officers killed while engaged in their official duties. Section 921.141(5)(k), Florida Statutes (1997) applies only to elected or appointed officials killed while engaged in their official duties and killed because of their official capacity. Contrary to those narrow provisions, section 921.141(5)(l), Florida Statutes (1997), making the killing of a person under the age of 12 an automatic aggravating circumstance, is vast, overinclusive and undiscriminating.

The statute and its instruction do not require the defendant to know the victim=s age or youth, to intend to kill because of the victim=s age, or to know the victim is present. They do not require a showing that the victim had an age-based vulnerability that played a role in the homicide.[6] They

[6] This is unlike section 921.141(5)(m), Florida Statutes (1997), which applies if the victim of the capital felony was

arbitrarily cut off at 12. The jury is given no discretion in finding this aggravator. Any unintended accidental killing of a child under any circumstance during a felony qualifies (as is the case here). This is a strict liability determinant of life or death, contrary to the common law tradition requiring some knowledge or intent and disfavoring strict liability in imposing severe punishments.

This overbroad, overinclusive, automatically applicable factor, on its face, fails to Agenuinely narrow the class of persons eligible for the death penalty,@ or Areasonably justify the imposition of a more severe sentence compared to others found guilty of murder,@ Zant v. Stephens, 462 U.S. 862, 877 (1983), thereby violating due process, equal protection,and appellant=s protection against cruel and/or unusual punishment. See U.S. Const. Amends. VIII, XIV; art. I ''9, 16, 17, Fla. Const,; Shriners Hospitals for Crippled Children v. Zrillic, 563 So. 2d 64, 70 (Fla. 1990)(overinclusive legislative classification violates Florida=s equal protection clause).

Even without objection below, the facial unconstitutionality of this factor and the instruction render the error fundamental.

›particularly vulnerable= due to advanced age or disability.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, postage prepaid, to Charmaine Millsaps, Office of the Attorney General, 400 South Monroe Street, PL-01, Tallahassee, FL 32399-6536 this 29th day of August, 2006.

CERTIFICATION OF TYPE SIZE AND STYLE

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