IN THE SUPREME COURT OF FLORIDA

JASON DEMETRIUS STEPHENS

Petitioner,

v. CASE NO. SC06-1729

JAMES R. McDONOUGH,
Secretary, Fla. Dept of Corrections

Respondent.

RESPONSE TO PETITION FOR HABEAS CORPUS AND MEMORANDUM OF LAW

COMES NOW, Respondent, the State of Florida, by and through the undersigned Assistant Attorney General and hereby responds to Stephens' Petition for Writ of Habeas Corpus filed in the above-styled case. The State respectfully submits the petition should be denied.

PRELIMINARY STATEMENT

Petitioner, Jason Demetrius Stephens, raises seven claims in this petition for writ of habeas corpus. References to petitioner will be to "Stephens" or "Petitioner," and references to respondent will be to "the State" or "Respondent." The record on direct appeal, Case Number SC92987, will be referenced as "TR" followed by the appropriate volume number and page number.

Citations to the two-volume record in Stephens' pending post-conviction appeal, Case Number SC05-1301, will be referred to as "PCR" followed by the appropriate volume and page number. Citations to the one-volume supplemental record in Stephens' pending post-conviction appeal, Case Number SC05-1301 will be referred to as "PCR-Supp" followed by the appropriate page number. References to the Initial Brief in that appeal will be referred to as "IB" followed by the appropriate page number. Citations to the record of testimony presented at the evidentiary hearing held on Stephens' amended and supplemented motion for post-conviction relief will be referred to as "PCR-T" followed by the appropriate page number. References to Stephens' instant habeas petition will be referred to as (Pet.) followed by the appropriate page number.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Jason Stephens, born on March 8, 1974, was 23 years old at the time he murdered three-year-old Robert Sparrow III. The relevant facts surrounding the murder were cited by the Florida Supreme Court on direct appeal:

> ... The overwhelming evidence of guilt in this case shows Stephens broke into Robert Sparrow, Jr.'s house on June 2, 1997, at approximately 2 p.m., while a number of people were present. He robbed the people there and kidnapped a child. There were three or four other people with Stephens at the time he committed these crimes. However, Stephens refused to cooperate with the authorities in their efforts to identify the

other individuals. One of the individuals, Horace Cummings (Cummings), turned himself into the police and was tried with Stephens. The other two individuals were never apprehended. Stephens testified at trial that Cummings and the other unidentified individuals went to the house to buy drugs and were unaware of his plan to rob the occupants.

There were eight eyewitnesses in the house who testified at trial. Seven people were at the house when Stephens first entered including: (1) Robert Sparrow, III; (2) Robert Sparrow, Jr., the owner of the house and Robert Sparrow, III's father; (3) Consuelo Brown, Robert Sparrow, III's mother; (4) Kahari Graham, Robert Sparrow, III's six-year-old half-brother and Consuelo Brown's other son; (5) Tracey Williams; (6) Derrick Hosea Dixon; and (7) Tammy Cobb. Two other victims entered the house after Stephens: (1) David Cobb; and (2) Roderick Gardner.

While some of the details of the eyewitness' accounts varied, they all substantially agreed with the following summary of events. Stephens entered the house first, carrying a nine millimeter automatic gun. He was standing next to Robert Sparrow, III (Sparrow III), who was three years and four months old. Upon seeing the gun, the child's mother, Consuelo Brown, physically confronted Stephens. Stephens hit her with the gun on the bridge of her nose. Ms. Brown fell to the ground and her nose began to bleed. Stephens ejected a bullet onto the floor and informed the occupants that the gun was loaded. He told them that he wanted "money and weed." He demanded from Robert Sparrow, Jr. (Sparrow Jr.) the keys to a blue car located outside the house. Sparrow Jr. told Stephens the keys were with someone who was not present at the house.

Thereafter, two other individuals entered the house. One of the individuals was Cummings, but the other individual was never identified. Stephens made all the occupants lie down on the floor as he searched their pockets for valuables. The unidentified individual, referred to as Plats or Dreds because of the way he wore his hair, held the occupants of the house on the floor at gunpoint while Stephens located a secured

room where he could put them. There was some testimony that Sparrow III said he was being choked, but it was unclear from the record who was choking him. After inspecting the house, Stephens determined the bathroom was the most secure location to put his hostages, and he ordered six of them, including six-year-old Kahari Graham, to crawl to the bathroom. Sparrow III was kept separate from the others.

Many of the eyewitnesses testified that Stephens showed his ID and said he was taking Sparrow III with him as insurance. Sparrow Jr. testified Stephens agreed he would leave the child at the corner if he was not followed. Stephens also testified he agreed to leave the child somewhere, but he did not know what location the child's father had referred to in his testimony.

After the occupants had been secured in the bathroom, Sparrow Jr.'s half-brother, David Cobb (Cobb), and his friend, Roderick Gardner (Gardner), arrived at the house. Upon entry, they too were robbed and forced to crawl to the bathroom. One of the items Stephens took from Gardner was his car keys. Gardner was driving his mother's dark green Kia, which had roll-down windows and pull-up locks. There was testimony that Sparrow III had ridden in the Kia the day before he was killed. On that day, he had been scolded for rolling down the windows and trying to open the car door while it was moving. The record did not reflect that Stephens had any way of knowing whether the child was capable of rolling down the windows or opening the car door.

When Stephens exited the house with the child, the other individuals who Stephens testified had only gone to the house to buy drugs, were seated in the black car they had driven to the scene. Stephens testified the other individuals waved him away from the black car because he had the child. Stephens then ordered the boy to get into the Kia. Both cars pulled away from the house, with the Kia following the black car. After driving eight tenths of a mile, both cars pulled over in a residential neighborhood. It was approximately 2:30 p.m. The Kia was parked on the side of the street without the benefit of any shade. The

outside temperature was approximately 82 degrees and sunny. The windows in the car were rolled up and all of the doors were closed. At 9:25 p.m., the dark green Kia was found. Sparrow III was dead, his body lying face down in the passenger's seat with his feet angled toward the steering wheel. The State argued Stephens suffocated Sparrow III before leaving the car. Stephens testified the boy was alive when he left him in the car.

The medical examiner, Bonifacio Floro, M.D., testified that in his expert medical opinion Robert Sparrow, III had probably died of asphyxiation. However, he could not conclusively rule out hyperthermia as the cause of death. He primarily relied upon multiple "petechiae" in the face and eye lining as an indication of asphyxiation. He also noted there was a small four-millimeter scratch on the back of the child's neck. Dr. Floro concluded this scratch was probably caused by a fingernail. Dr. Floro testified the child's lower lip was bruised, indicating he had been suffocated. Dr. Floro also relied upon the lack of fingerprints or other evidence showing the child tried to roll down the window or open the door in concluding it was more likely that Sparrow III died from asphyxiation than hyperthermia.

Steven Frank Dunton, M.D., testified on the defendant's behalf. After reviewing Dr. Floro's report, he concluded Sparrow III died from hyperthermia. Dr. Dunton relied upon the fact that there were very few signs of asphyxiation. However, he did admit asphyxiation can never be conclusively ruled out because it can leave no signs at autopsy. Dr. Dunton admitted hyperthermia by itself should not cause petechiae, whereas asphyxiation could. However, he went on to explain that gravity will pull the blood down to the lowest point of the body when the heart stops pumping, causing the blood to pool to such a degree that venules rupture resulting in petechiae. He attributed the discoloration of the child's lips to the tissues drying out after death. Therefore, he concluded Dr. Floro erred in relying on the petechiae to diagnose the child's death as being caused by asphyxiation.

Stephens v. State, 787 So.2d 747 (Fla. 2001).

Prior to trial on the merits, Stephens entered a plea to eight counts of the same indictment that charged Stephens with the murder of Robert Sparrow III. (TR Vol I, 8-11). Stephens entered a plea to the armed kidnapping of Robert Sparrow III, three counts of the armed robbery of Robert Sparrow, Jr., Roderic Garner, and Derrick Dixon, two counts of attempted armed robbery of Tammy and David Cobb, one count of armed burglary and one count of aggravated battery on little Rob's mother, Consuelo Brown. The trial judge conducted a plea colloquy and Stephens' pleas were accepted as freely and voluntarily made.

Stephens pled not guilty and went to trial on three counts of armed robbery (of Consuelo Brown, Tracey Williams, and Kahari Graham) and one count of first degree murder. Stephens was represented at trial by Mr. Richard Nichols and Mr. Refik Eler. Mr. Nichols had primary responsibility for the guilt phase. Mr. Eler had primary responsibility for the penalty phase. Mr. Nichols is now deceased.

On December 18, 1997, the jury convicted Stephens of first degree murder on a general verdict form. (TR. Vol II 296). The jury also convicted Stephens of the armed robbery of Kahari Graham. The jury acquitted Stephens of the armed robbery of Consuelo Brown and Tracey Williams. (TR. Vol II 297-299).

The penalty phase was conducted on January 15, 1998. In aggravation, the State offered evidence of a 1992 burglary conviction and evidence of Stephens' contemporaneous convictions against the other victims in the Sparrow home. Trial counsel, Eler, objected to the use of the 1992 burglary conviction. (TR. Vol IV. 587-588).

In order to demonstrate the 1992 burglary conviction qualified as a prior violent felony, the State presented the testimony of the then 16-year-old victim, LaTonya Jackson. Ms. Jackson testified she awoke to hear three men walking around her father's house. One of the group, Sammie Washington, was the father of her one-year-old child. According to Ms. Jackson, two of the men, including Stephens, had a gun. Ms. Jackson testified Stephens had a sawed off shotgun and Sammie had a handgun.

She told the jury she saw Stephens jiggling the sliding glass door to her home. All of the three eventually got inside. None had been invited to enter. Ms. Jackson testified that as she tried to get out of the house, the men who had entered her home chased her outside. Ms. Jackson testified Stephens threw her up against a car and held her there. Stephens held a gun to her head and said he wanted to kill her. Ms. Jackson testified she did not know Stephens prior to this incident. (TR. Vol IV

591-596). The Court overruled the defense's objection to the use of this conviction as a prior violent felony aggravator. (TR Vol. IV 589-590).

The State also offered victim impact evidence through the live testimony of Consuelo Brown, who was allowed to read a statement to the jury, and a letter written by the victim's grandparents. Trial counsel objected to this evidence as improper victim impact evidence. (TR Vol. IV 580-584). The trial court overruled the objection but instructed the jury it could not consider the victim impact evidence in aggravation, nor could it weigh it as an aggravating circumstance when determining whether to recommend life or death. (TR Vol. IV 581, 584, and 598).

In mitigation, Stephens presented ten witnesses and testified on his own behalf. The jury recommended death by a nine to three vote. Stephens v. State, 787 So.2d 747, 752 (Fla. 2001). The trial court found three aggravating circumstances; prior violent felonies; murder during the commission of a felony; and the age of the victim, all of which were given great weight. (TR Vol. II 389). The trial court found no statutory mitigating circumstances had been established but found and gave weight to eleven nonstatutory factors including: (1) Stephens came to the aid of a child being punished at a mall (little

weight), (2) Stephens volunteered at church related functions (some weight), (3) Stephens was from a religious and supportive family and was distraught over the loss of his father (little weight), (4) Stephens was capable of rehabilitation in prison (little weight), (5) Stephens genuinely likes children and has often done things for children (little weight), (6) Stephens was a good student (little weight), (7) Stephens has adjusted well to incarceration (little weight), (8) Stephens did not intend to kill the child (Significant Weight), (9) Co-defendant, Horace Cummings, received a life sentence (some weight), (10) Stephens faces up to life in prison on the other offenses (little weight), and (11) Stephens pled guilty to numerous offenses acknowledging his guilt (little weight). (TR Vol II 391).

The trial judge followed the recommendation of the jury and sentenced Stephens to death for the first degree murder of Robert Sparrow III. Stephens was also sentenced to life imprisonment for armed kidnapping with the sentence to run consecutive to the murder sentence. The trial judge sentenced Stephens to concurrent life terms for the six armed and attempted robberies to be served consecutive to the murder and armed kidnapping sentences. Stephens was also sentenced to fifteen years each for the armed burglary and aggravated battery convictions.

Stephens raised eleven issues on direct appeal: (1) the trial court erred in denying a motion for judgment of acquittal; (2) the trial court erred in denying motion for new trial; (3) the trial court erred in denying a motion to withdraw the robbery plea involving the robbery of Derrick Dixon or erred in failing to reduce the charge to attempted armed robbery; (4) the trial court erred in denying the defendant's special instruction on his theory of defense; (5) the trial court erred in denying the defendant's motion for a change of venue; (6) the trial court erred in failing to conduct a Nelson inquiry; (7) the trial court erred in allowing the prosecutor to question the defendant concerning a statement about the electric chair; (8) the defendant's sentence is unlawful under Tison v. Arizona, 481 U.S. 137, 95 L.Ed.2d 127, 107 S.Ct. 1676 (1987); (9) the trial court erred in its assessment of aggravating and mitigating factors; (10) the trial court erred in failing to declare section 922.10, Florida Statutes (1997), unconstitutional; and (11) the trial court erred in failing to declare section 921.141, Florida Statutes (1997), unconstitutional. The Florida Supreme Court rejected his arguments and affirmed Stephens' convictions and sentence to death. Stephens v. State, 787 So.2d 747, 762 (Fla. 2001).

On October 23, 2002, Stephens filed a motion for post-conviction relief raising eighteen claims and the State filed a response. After a Huff hearing, the collateral court granted Stephens an evidentiary hearing on seven claims.[1]

On August 4, 2004, Stephens filed an amended and supplemented motion to vacate judgment of conviction and sentence with special request for leave to amend. Stephens re-pled the claims initially presented in his initial motion for post-conviction relief. Additionally, Stephens raised a nineteenth claim attacking the reading of certain testimony, specifically, the reading of a letter written by Robert Sparrow's grandparents purporting to express their feelings and that of Robert's seven-year-old brother. The letter was read into evidence by the prosecutor. (PCR Vol. I. 73-74). Citing to Crawford v. Washington, Stephens alleged his right to confrontation was violated when this victim impact evidence was admitted without a showing that the witnesses were unavailable to testify at trial or that Stephens had a prior opportunity to cross-examine these witnesses. Stephens claimed this type of

[1] The Court granted Stephens an evidentiary hearing on Claims II, III, IV, V, VI, VIII, and IX of his amended and Supplemented Motion for post-conviction relief. (PCR Vol. I 105).

victim impact testimony constituted a "testimonial statement" within the meaning of Crawford. (PCR Vol. I 73-74).

On August 25 and 26, 2004, the collateral court held an evidentiary hearing on the seven claims upon which the court granted a hearing. On April 29, 2005, the collateral court denied all of Stephens' claims. (PCR Vol. II 252-284).

Stephens appealed. Contemporaneously with the filing of his initial brief in that case, Stephens filed the instant habeas petition.

PRELIMINARY DISCUSSION OF APPLICABLE LAW

Like claims of ineffective assistance of trial counsel, the standard of review for claims of ineffective assistance of appellate counsel is *de novo*. Porter v. Crosby, 840 So.2d 981 (Fla. 2003) (standard of review applicable to claims of ineffective assistance of counsel raised in a habeas petition mirrors the Strickland v. Washington, 466 U.S. 668 (1984), standard for trial counsel ineffectiveness).

When evaluating an ineffective assistance of appellate counsel claim raised in a petition for writ of habeas corpus, this Court must determine, (1) whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance, and (2) whether the

performance deficiency compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. Johnson v. Moore, 837 So.2d 343 (Fla. 2002). The petitioner bears the burden of alleging a specific and serious omission or overt act upon which the claim of ineffective assistance of counsel can be based. Freeman v. State, 761 So.2d 1055, 1069 (Fla. 2000). It is not enough to show an omission or act by counsel constituted error. Rather, the "deficiency must concern an issue which is error affecting the outcome, not simply harmless error." Knight v. State, 394 So.2d 997, 1001 (Fla. 1981).

Absent fundamental error, a petitioner cannot prevail on a claim of ineffective assistance of appellate counsel when the issue was not preserved for appeal. *See* Medina v. Dugger, 586 So.2d 317 (Fla. 1991). Further, when appellate counsel chooses not to argue an issue as a matter of strategy, this Court will generally not find that appellate counsel was ineffective. This is so because effective appellate counsel need not raise *every conceivable* non-frivolous issue. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) (appellate counsel not required to argue all non-frivolous issues, even at request of client); Atkins v. Dugger, 541 So.2d 1165, 1167 (Fla. 1989)("Most successful appellate counsel agree that from a

tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points."). An appellate counsel is equally not ineffective for failing to raise a claim that would have been rejected on appeal. Downs v. State, 740 So.2d 506, 517 n. 18. *Accord,* Freeman v. State, 761 So.2d 1055, 1069-1070 (Fla. 2000) (appellate counsel not ineffective for failing to raise non-meritorious issues); Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000)(same).

This Court has also ruled that appellate counsel cannot be deemed ineffective if the habeas claim, or a variant thereof, was, in fact, "raised on direct appeal." Atkins v. Dugger, supra, 541 So.2d at 1166-67. So long as appellate counsel raised the issue on appeal, mere quibbling with, or criticism of, the manner in which appellate counsel raised such issue on appeal is insufficient to state a habeas-cognizable issue. Thompson v. State, 759 So.2d 650, 657, n. 6 (Fla. 2000). Finally, a claim that has been resolved in a previous review of the case is barred as "the law of the case." See Mills v. State, 603 So.2d 482, 486 (Fla. 1992). Thus, claims properly raised and rejected in a previous rule 3.850 motion for post-conviction

relief cannot be raised again on habeas. Scott v. Dugger, 604 So.2d 465, 469-470 (Fla. 1992).

RESPONSE TO SPECIFIC CLAIMS

CLAIM I

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

In his first claim, Stephens alleges the trial court erred in failing to conduct a Nelson inquiry when Stephens became dissatisfied with his defense counsel, wanted to discharge them, and wanted another lawyer. Stephens raises this claim as a substantive claim and, alternatively, "to the extent this Court believes this issue was not adequately presented on appeal, appellate counsel's performance was deficient and Mr. Stephens was prejudiced." (Pet. at page 7).

Stephens acknowledges this claim was raised and rejected on direct appeal. However, Stephens contends a note that surfaced after the direct appeal was decided demonstrates this Court "relied on erroneous facts in deciding Mr. Stephens direct appeal claim." (Pet. at page 6).[2]

[2] Stephens also raised this same claim in his motion for post-conviction relief. (PCR Vol. I 32). The collateral court rejected the claim. (PCR Vol. II 266-268). Stephens did not, however, raise this as a claim on appeal from the denial of his motion for post-conviction relief.

At the evidentiary hearing, Stephens was allowed to introduce a note he wrote to the trial judge sometime before October 20, 1997.[3] The note alleged, without any specific detail, that trial counsel, Nichols, had demonstrated unpreparedness. Stephens expressed concern that Mr. Nichols would be ineffective. The note also alleged that Mr. Nichols had shown a lack of concern for his case and that Stephens felt like he was not receiving adequate counseling from him. Stephens stated he wanted a new lawyer. (D-Ex. 3).

In the instant petition, Stephens alleges the full text of this note sheds new light on the issue and entitles him to re-litigate this claim in these habeas proceedings. The State respectfully disagrees.

On direct appeal, the Florida Supreme Court outlined his claim and its findings as follows:

> ... Stephens argues the trial court erred in denying him a Nelson inquiry, after he raised the issue of counsel's competency. The record does not contain the handwritten note 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

[3] The note was discovered in another case file in which Stephens was a defendant. A hearing was held on October 20, 1997, during which the trial judge had the note and queried Stephens about its contents. (TR Vol. III 444-448).

> 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.
>
> Under the circumstances of this case, the trial court made an adequate inquiry into the complaint and properly remedied the problem by telling counsel to visit Stephens more frequently and provide him with the proper records. Moreover, the record reflects Stephens subsequently expressed satisfaction with counsel. For example, on December 5, 1997, Stephens swore that he discussed all aspects of this case with his attorneys, did not want any delay, and wanted the trial to go forward as scheduled on December 8, 1997. Stephens did not tell the court that he was still dissatisfied with his counsel or that the lack of communication had not been remedied.
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> On December 8, 1997, Stephens also signed a "Plea of Guilty" form that concerned charges integrally intertwined with those ultimately tried. In the plea form he agreed he had fully discussed all aspects of this case with his attorney. He also indicated to the court that he was satisfied with the services of his attorney in the case. In the plea colloquy, Stephens told the trial court that he had had enough time to discuss his case with his attorneys and that he was satisfied with the representation that they had given him in this case.
>
> Thus it is clear that the trial court sufficiently responded to Stephens' complaints about his appointed counsel. Additionally, Stephens demonstrated a subsequent satisfaction with his counsel which shows any possible error was harmless. See Scull v. State, 533 So.2d 1137, 1141 (Fla.1988) (stating any failings of the inquiry were mooted by defendant's expressions of satisfaction with counsel's representation).

State v. Stephens, 787 So.2d 747, 758 (Fla. 2001)(most internal citations omitted).

Nothing about the discovery of the note alters the findings of fact reached by the trial judge prior to trial nor the findings of the Florida Supreme Court on direct appeal. Stephens' penning of this note was explored at a hearing held on October 20, 1997. The trial court had the note for consideration. (TR Vol. III 444).

During the hearing, the trial court summarized his view of Stephens' complaints about trial counsel. The trial court stated "Mr. Stephens complains of Mr. Nichols' contact with Mr. Stephens as well as his contact with his priest and his mother. The court next asked, "Is there anyone else, Mr. Stephens?" In response, Stephens shook his head. (TR Vol. III 444). The trial judge informed Stephens of his rights to counsel and specifically observed that Stephens had not raised the issue of competence. (TR Vol. III 445). Stephens did not dispute the trial court's conclusion. (TR Vol. III 445).

The court then encouraged trial counsel to visit with Stephens and communicate with his family more often. When given the opportunity to elaborate on the matters he raised in his note and asked whether there was anything else, Stephens told the trial court that "[i]t ain't much as the visits, it's the paperwork." Stephens explained he did not have copies of the police reports, depositions, medical records, pictures, and

autopsy reports. (TR Vol. III 447). The trial court then instructed Mr. Nichols to provide the paperwork. When asked once again, whether there was anything further, Stephens replied “Still ain't going to be satisfied." Stephens voiced no specific complaint directed at Mr. Nichols' competency. (TR Vol. III 448).

This Court found specifically, based on the hearing, that Stephens voiced dissatisfaction with counsel but did not actually question counsel's competency. The Court found that under such circumstances a full Nelson inquiry was not necessary. State v. Stephens, 787 So.2d 747, 758 (Fla. 2001).

Even if this were not the case, this Court found that any error in failing to conduct a full Nelson inquiry was harmless because Stephens, subsequent to October 20, 1997, expressed satisfaction with trial counsel. Id. This conclusion is unaffected by the discovery of the note and remains the law of the case. This claim should be denied.

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

Stephens claims he is brain damaged, mentally impaired and has an emotional age of less than 18 years of age. Stephens

alleges these conditions render him ineligible for the death penalty. Stephens points to the opinion testimony of Dr. Jethrow Toomer in support of his claim. Dr. Toomer testified at the evidentiary hearing held on Stephens' motion for post-conviction relief.

Contrary to Stephens' allegations, Dr. Toomer's testimony did not establish Stephens is mentally impaired. At the evidentiary hearing, Dr. Toomer testified that Stephens has an IQ of 105 which, according to Dr. Toomer, puts him in the slightly above average to average range. (PCR-T Vol. I 34).

Additionally, Dr. Toomer's testimony did not establish Stephens was brain damaged. While Dr. Toomer concluded there is a likelihood of brain damage based on unexplained "substantial data," he could not opine Stephens was actually brain damaged.[4] (PCR-T Vol. I 61). Dr. Toomer suggested that further neurological or neuropsychological evaluations be done to "pinpoint the nature and extent of any possible underlying or organic impairment." (PCR-T, Vol I 32). However, as found by the collateral court judge in his order denying Stephens' motion

[4] For instance, Dr. Toomer testified that the gap between Stephens's verbal and performance IQ may be a result of not applying himself or being in a bad mood, a personality disorder, or brain damage. (PCR-T Vol. I 81). He also testified that one of the tests he administered showed soft signs of underlying

for post-conviction relief, Stephens presented no evidence at the evidentiary hearing demonstrating that Stephens was actually brain damaged.[5] (PCR Vol. II 276).

Because of the dearth of evidence supporting his claim of actual brain damage and mental impairment, Stephens relies heavily, before this Court, on Dr. Toomer's testimony regarding Stephens' chronological age. Stephens alleges Dr. Toomer's testimony establishes Stephens lacks the requisite highly culpable mental state to warrant the death penalty. (Pet. at page 10). Stephens claims that under Roper v. Simmons, 543 U.S. 551 (2005), he may not be sentenced to death. (Pet. at page 8).

In support of his claim, Stephens points to Dr. Toomer's testimony about Stephens' emotional and mental age. Dr. Toomer opined that because Stephens grew up in an "environment that is not nurturing, that is not caring, that is unpredictable, and is not characterized by saneness... you have an individual who is like 18, 19, 20 years of age chronologically [but] emotionally they are six, seven, eight whatever ....". (Pet. at page 9). Stephens also points to Dr. Toomer's testimony this same lack of

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neurological involvement based on his responses. (PCR-T Vol. I 32).

[5] Dr. Toomer testified he provided his opinion regarding the likelihood of brain damage to Stephens' collateral counsel in

nurturing adversely influenced Stephens' ability to control his impulsivity, to reason at higher levels, or think out the consequences of leaving Little Rob in a car on a hot sunny day. (Pet. at pages 10 and 11).

As noted by the collateral court judge in his order denying Stephens' motion for post-conviction relief, Dr. Toomer's testimony completely ignored the testimony of the witnesses that Stephens presented at the penalty phase of his capital trial. This, according to the collateral court judge, "raises questions about the legitimacy of Dr. Toomer's opinions." (PCR Vol. II 276).[6]

At the penalty phase, family members and friends painted a picture of a happy home life which was both caring and nurturing; a family headed by two parents who worked and

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2002. (PCR-T Vol. I 93). The evidentiary hearing was held in August 2004.

[6] Similar to the case at bar, in Rose v. State, 787 So.2d 786 (Fla. 2001), this Court noted that Dr. Toomer's testimony had been undermined by the fact that Dr. Toomer failed to consider important information in arriving at his findings. For instance, Dr. Toomer conceded he never talked to any of the doctors who performed the earlier examinations of Rose. The State also established the doctor's failure to talk to individuals who were close to Rose to get insights on his personal relationships. As a result, the trial court rejected the mental mitigators about which Dr. Toomer testified and this Court upheld that decision.

provided for the family and a family in which Jason Stephens was happily ensconced. For instance, Stephens' mother testified she worked as the Director of the Office of Justice and Peace at St. Augustine Catholic Church. Stephens' father, when he was alive, worked for UPS. (TR Vol. IV 606).

Ms. Stephens described Stephens and his father's unique bond because both were so good with their hands. Stephens and his father built things together. Stephens even took up welding, modeling after his father. (TR Vol. IV 608). Ms. Stephens told the jury the whole family worked on making the dining room table and furniture for the house. (TR Vol. IV 608). The family played together and Stephens' father went to Stephens' ball games, went to church with him, took him camping, went to the movies, dinner, and the park, etc. They went on family vacations. (TR Vol. IV 607). Stephens did chores at home and had a good relationship with his siblings. (TR Vol. IV 606-607). Stephens played baseball as a child, was a Boy Scout, and played the guitar. (TR Vol. IV 610). Stephens went to church regularly and was not a major disciplinary problem at home. (TR Vol. IV 610-611). She told the jury they celebrated every Christmas, New Years, Memorial Day, and every family member's birthday. (TR Vol. IV 614-615). Likewise, Stephens' siblings

and acquaintances testified consistently that Stephens was funny, had good relationships with everyone, was never violent, did not drink or take drugs, was good with kids, held jobs, did volunteer work, had a good relationship with his dad, and was good with his hands. Stephens' priest, Father Parker, who had known Stephens since Stephens was in the fifth grade, testified the Stephens family attended church regularly and Stephens, himself, was very faithful in church attendance. (TR Vol. IV 625-673).

At the evidentiary hearing, Stephens' younger brother, Brian, who did not testify at trial, told the court that while his father was a strict disciplinarian who would "beat" the children when they misbehaved, their family for the most part was a "close and loving family." (PCR-T 152). Likewise, Michael Stephens testified he and his brother had a close relationship, the kids all loved their father, and Stephens took his father's death hard. Michael confirmed that Mr. Stephens punished his children by whipping them as well as by grounding them and making them pull weeds or go to bed early. Michael testified that Stephens was 22 or 23 years old when their father passed away. (PCR-T 156).

While both brothers testified their father used corporal punishment, neither provided any evidence that their father

whipped them in anger or caused any lasting physical or emotional scars. Likewise, neither provided any testimony to support Dr. Toomer's assumption that Stephens grew up in an environment devoid of saneness, nurturing or caring.

In short, the evidence admitted at both the penalty phase of Stephens' capital trial and at the evidentiary hearing completely undermined Dr. Toomer's assumptions that provided the basis for his conclusion Stephens was, at the time of the murder, emotionally, some twelve years younger than his actual age of 23.

Even if Dr. Toomer's opinion was grounded in reality, this Court has rejected any notion that a person with an emotional age or developmental age is ineligible for the death penalty. In Hill v. State, 921 So.2d 579 (Fla. 2006), this Court rejected Hill's claim he was ineligible for the death penalty because his mental and emotional age places him in the category of persons for whom it is unconstitutional to impose the death penalty under Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). This Court ruled that "Roper does not apply to Hill. Hill was twenty-three years old when he committed the crimes at issue. Roper only prohibits the execution of those defendants whose chronological age is below eighteen." Hill v. State, 921 So.2d at 584. *See also* Rogers v. State, 2006 Fla.

LEXIS 2542 (Fla. October 26, 2006) (Justice Anstead dissenting) (noting that Roper provided no immunity from the death penalty for those with a mental age of less than 18).

Like Clarence Hill, Stephens was twenty-three years old at the time he murdered Little Rob Sparrow. Like Clarence Hill, Stephens is, and was at the time of his capital trial, eligible for the death penalty. In accord with this Court's decision in Hill this Court should deny this claim.

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 PHASE AND PENALTY PHASES PRESENTED IMPERMISSIBLE CONSIDERATIONS TO THE JURY, MISSTATED THE LAW AND THE FACTS, AND WERE INFLAMMATORY AND IMPROPER. APPELLATE COUNSEL'S FAILURE TO RAISE THIS ISSUE ON APPEAL WAS DEFICIENT PERFORMANCE WHICH PREJUDICED MR. STEPHENS

Stephens alleges appellate counsel was ineffective when he failed to raise a claim of prosecutorial misconduct on direct appeal.[7] Stephens does not dispute the prosecutor's comments,

[7] Stephens raised this same claim as a claim of ineffective assistance of trial counsel in his amended and supplemented motion for post-conviction relief. Stephens alleged that trial counsel was ineffective for failing to object to the same comments he complains about here. (PCR Vol. I 13-17). The collateral court denied the claim. The court concluded that

about which he takes issue, were not objected to at trial and therefore were procedurally barred on direct appeal. Sliney v. State, 2006 Fla. LEXIS 2608 (Fla. Nov. 9, 2006) (noting that a prosecutor's alleged improper comments and misstatements of the law that were not objected to at trial could not have been raised on direct appeal because they were procedurally barred). Accordingly, in order to overcome the bar, Stephens claims these comments constitute fundamental error.[8]

In order for an error to be fundamental as to the guilt phase, the "error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Brown v. State, 124 So.2d 481, 484 (Fla. 1960); *see also* State v. Delva, 575 So.2d 643, 645 (Fla. 1991). In order for improper comments made in the closing arguments of a penalty phase to

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while some of the comments were objectionable, they were not so prejudicial as to deny Stephens a fair trial. (PCR Vol. II 258-261). Stephens raised this issue on appeal from the denial of his amended and supplemented motion for post-conviction relief. (IB 68, 81).

[8] As a general rule, trial counsel's failure to raise a contemporaneous objection to improper comments during argument waives any claim concerning such comments for appellate review. Walls v. State, 926 So.2d 1156 (Fla. 2006); Brooks v. State, 762 So.2d 879, 898 (Fla. 2000). The sole exception to this rule is when the comments rise to the level of fundamental error. Id. Accordingly, Stephens cannot establish appellate counsel was

constitute fundamental error, they must be so prejudicial as to taint the jury's recommended sentence. Walls v. State, 926 So.2d at 1176.

A. **Guilt phase comments**

Stephens first complains about the prosecutor's comments, during opening statements, in which he "repeatedly" stated that Little Rob has been "brutally and savagely murdered", adding that the victim's fate was to "slowly fry to death". (Pet. at page 17). Stephens cites to Volume X, pages 991 and 996). The comments challenged by Stephens were made during opening statement, the purpose of which is to permit counsel to outline what he, in good faith, expects to be established by the evidence presented at trial. Conahan v. State, 844 So.2d 629, 640 (Fla. 2003); Occhicone v. State, 570 So.2d 902, 904 (Fla. 1990).

The evidence presented at trial by the State demonstrates the prosecutor's comments, which by no means were made "repeatedly", were consistent with the evidence he ultimately presented at trial. The evidence at trial supported the prosecutor's comments that Little Rob was brutally and savagely murdered.

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ineffective for failing to raise this claim unless he can show the prosecutor's comments constituted fundamental error.

Dr. Floro, a forensic pathologist, testified that in his opinion, Little Rob was suffocated to death. (TR Vol. XII 1375). Dr. Floro testified his findings, during the autopsy, were consistent with Little Rob being suffocated by an individual forcing his face into the car seat. (TR Vol. XII 1378). Dr. Floro found swelling of the brain which he opined was consistent with oxygen deprivation. (TR Vol. XII 1379).

Dr. Floro observed as well that there were no signs that Little Rob tried to get out of the car. (TR Vol. XII 1380). This was especially relevant because Little Rob's mother, Conseulo Brown, testified Little Rob was able to open and close manual windows in the cars in which she and Little Rob had ridden and had never exhibited difficulty in opening car doors. (TR Vol. X 1041-1042). She also testified her son had been punished for opening the door of the Kia in which Little Rob died because he opened it when the car was moving. (TR Vol. X 1041). Ms. Brown's testimony supported Dr. Floro's opinion that Little Rob was dead at Stephens' hands before Stephens left the car. As the State's evidence supported the prosecutor's claim this three-year-old was brutally and savagely murdered, Stephens can show no fundamental error.

Additionally, Stephens can show no error in the prosecutor's comments about Little Rob frying to death. First,

Stephens misrepresents the prosecutor's comments. The record shows the prosecutor did not tell the jury that Little Rob's fate was to fry to death.

Instead, the comment came when the prosecutor told the jury he expected the defense to call an expert (Dr. Dunton) to refute Dr. Floro's testimony regarding the cause of death and who would testify that Little Rob died of hyperthermia. The prosecutor noted his testimony would be inconsistent with the fact that Little Rob was a "bright, intuitive, healthy child who would not have sat there in a car for hours in a fairly dense residential area and slowly fry to death." (TR Vol. X 995-996). Once again, because the prosecutor limited his comments to the evidence he expected to be admitted at trial, Stephens can show no fundamental error.

Stephens also complains that appellate counsel was ineffective for failing to raise a claim of fundamental error as to some of the prosecutor's comments during closing arguments. The purpose of closing argument is to help the jury understand the issues in a case by "applying the evidence to the law applicable to the case." Hill v. State, 515 So.2d 176, 178 (Fla. 1987). Attorneys are afforded great latitude in presenting closing argument, but must "confine their argument to the facts and evidence presented to the jury and all logical deductions

from the facts and evidence." Knoizen v. Bruegger, 713 So.2d 1071, 1072 (Fla. 5th DCA 1998).

Stephens' first complaint about the prosecutor's closing argument stems from the prosecutor's comment where he allegedly "first opined that Mr. Stephens' testimony came from a 'warped concern' for his co-defendant then went on to query the jury 'where was the concern that he showed for a 3 year old child? There's the concern,' while again flashing a photo of the victim to the jurors." (Pet. at page 17).

The record establishes the prosecutor's comments were fair comment based on Stephens' testimony at trial. During the guilt phase, Stephens took the stand on his own behalf. Stephens testified he went to the Sparrow home with three other men, including co-defendant Horace Cummings. (TR Vol. XIII 1509). Stephens refused to identify any of his accomplices at the time of his arrest. Likewise, Stephens refused, on the witness stand, to identify the two, still unidentified, men who accompanied him to the Sparrow home. (TR Vol. XIII 1536-1537).[9] Stephens also told the jury that co-defendant Horace Cummings had nothing to do with the robbery and that Cummings was a victim of the robbery too. (TR Vol. XIII 1531, 1537, 1539).

[9] Co-defendant Cummings turned himself in.

As to Little Rob, Stephens testified he tried to make it easy to find the car by leaving it in front of somebody's house. (TR Vol. 1529). Stephens told the jury he did not deliberately try to hurt the child. (TR Vol. XIII 1530). He also testified when he left Little Rob in the car, he figured someone from the Sparrow household would be coming right behind him. (TR Vol. XIII 1525).

In view of Stephens' testimony he took actions to facilitate Little Rob's immediate rescue, the prosecutor's contrast of Stephens' deliberate actions to protect the men who went with him to the Sparrow home with his actions leading to Little Rob's death was fair comment on the defendant's self-serving statements. Stephens failed to show error, let alone fundamental error, in this brief comment.

Stephens' argument regarding the photographs is equally without merit. His suggestion the prosecutor may not ask the jury to look at photographs introduced at trial and argue fair inferences from those photographs is without support. This is especially true as the jury was instructed on the HAC aggravator during the penalty phase and the means of Little Rob's death during the guilt phase was in dispute. *See e.g.* Mansfield v. State, 758 So.2d 636 (Fla. 2000) (ruling that autopsy was

probative in the determination of the heinous, atrocious, or cruel aggravator).

Stephens' second complaint about the prosecutor's closing argument stems from the prosecutor's comments that "My job is to represent the State of Florida and to seek justice" and "If the State has not proven the defendant's guilt beyond a reasonable doubt, then I'm not sure it can be done in any case." (Pet. at page 17). Stephens alleges these comments "bolster the credibility of the State's case." (Pet. at page 17).

During closing argument, trial counsel told the jury the prosecutor's job "is to persuade you that the evidence that's been presented proves his theory of the case beyond a reasonable doubt." (TR Vol. XIV 1756). Trial counsel went on, at length, to argue that the State had failed in their job to prove their case and instead was content to persuade the jury by providing them with a convenient legal theory to justify "this thing." (TR Vol. XIII 1757). A bit later, trial counsel told the jury that the State wants it to "want to convict these people so badly that you will distort and twist and stretch these definitions (referring to aspects of felony murder) to make it fit. (TR Vol. XIII 1765).

In response and in context, the prosecutor began his remarks by stating that Mr. Nichols "told you what my job is.

My job is to represent the State of Florida to seek justice." (TR Vol. XIV 1767). A prosecutor's comments are not improper where they fall into the category of an "invited response" by the preceding argument of defense counsel concerning the same subject. Walls v. State, 926 So.2d 1156, 1166 (Fla. 2006). Trial counsel's attempt to portray the prosecutor as one who would try to persuade the jury to distort and twist the facts simply to make them fit the prosecution's theory of the case invited the prosecutor's brief and accurate comment.[10]

Likewise, the prosecutor's assertion the State had met its burden of proof was not improper. The comment came after the defendant testified on his own behalf and admitted entering the Sparrow home with the intent to commit robbery, robbing its occupants, kidnapping Little Rob, and leaving him in the car in which he would die. Nothing precludes the State from advocating that the evidence supports a finding of guilt beyond a reasonable doubt.

The comment also followed trial counsel suggestion the prosecutor was acting outside the bounds of the law simply to

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[10] This Court has said on numerous occasions that a prosecutor's duty is to do justice. Fla. Bar v. Cox, 794 So.2d 1278 (Fla. 2001) (noting that a prosecutor has responsibilities beyond that of an advocate, and has a higher duty to assure that

get a conviction. Nothing should preclude the State from rebutting trial counsel's inference the State would willfully act unethically and unlawfully simply to win a conviction. Stephens provides no support for his claim that appellate counsel was ineffective for failing to raise this comment as a claim of error on direct appeal.

Lastly, Stephens complains the prosecutor improperly characterized Stephens' testimony as melodramatic and untruthful and implied that Stephens had been convicted of other crimes. (Pet. at page 18). When reading the prosecutor's comments in context, it is clear the other crimes to which the prosecutor referred were the crimes committed against the other people in the Sparrow home. The prosecutor noted that "you saw him, his theatrical testimony, melodramatic, lying, maybe he's bragged and lied so often about so many crimes--do you remember how proud he was where he said about Derrick Dixon, "he didn't even know I robbed him, but yeah, I robbed him." (TR Vol. XV 1819).

No reasonable juror would fail to understand the prosecutor's charge of untruthfulness was made solely in reference to the evidence presented at trial. Further, no

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justice is served); Garron v. State, 528 So.2d 353, 359 (Fla. 1988)(observing a prosecutor's duty is to seek justice).

reasonable juror could fail to understand the prosecutor was merely submitting to the jury a conclusion he believed could properly be drawn from the evidence. A review of Stephens' testimony, as it compares to other witnesses, makes clear the prosecutor's comments only sought to have the jury draw its own conclusions as to Stephens' credibility. Calling a defendant a braggart and a liar when the evidence points to a conclusion the defendant is a braggart and a liar is not reversible error. Lugo v. State, 845 So.2d 74, 107 (Fla. 2003).

Even if any of the prosecutor's arguments, alone or cumulatively, could be deemed improper, Stephens' claim of fundamental error must fail because, during the guilt phase of his capital trial, Stephens admitted his involvement to the armed burglary of the Sparrow home, the robbery of some of its occupants, and the kidnapping of Little Rob. He also admitted leaving Little Rob in the closed car where he was found dead some seven hours after the kidnapping. Given his admissions, Stephens cannot show that a verdict of guilty could not have been obtained without the assistance of the alleged improper arguments.[11] Walls v. State, 926 So.2d 1156, 1176 (Fla. 2006)(in

[11] Stephens testified on his own behalf at the guilt phase. Stephens told the jury that before he went to the Sparrow home he decided to "rob whoever [he] found in the house." (TR Vol.

order for improper comments made in the arguments to constitute fundamental error the error must reach down into validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error). This Court should deny this claim.

B. **Penalty Phase Comments**

Stephens complains about the prosecutor's comments that reviewed the victim impact evidence introduced during the penalty phase of Stephens' capital trial. (Pet. at page 15-16). Stephens claims these comments were intended to appeal to the sympathy to the jury. Stephens also complains about the use of photographs during the prosecutor's discussion of the victim impact evidence. (Pet. at page 15).

In support of his argument, Stephens points to a comment by the prosecutor where he noted that murder "turns 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." Stephens also complains

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XIII 1514). He also admitted taking Little Rob from his home to "make sure I got out of the house safe." (TR Vol. XIII 1518). Little Rob was Stephens' "insurance". (TR Vol. XIII 1518). Stephens also admitted driving Little Rob from his home, parking the stolen car, taking the CD player, shutting the car door and leaving Little Rob alone in the car. (TR. Vol. XIII 1525). During cross-examination, Stephens told the jury he parked the

the prosecutor unfairly compared Stephens' mitigation evidence, specifically the loss of his father, when he was an adult with the Sparrows' loss. Finally, Stephens points to a portion of the argument when the prosecutor showed photos of Little Rob and his mother and noted that "this (showing photo) is the Little Rob who existed that morning before Jason Stephens went in and terrorized these people and murdered Little Rob, and this is the Little Rob that Jason Stephens left (showing photo)."

Section 921.141(7), Florida Statutes (1997), permits the State to introduce victim impact evidence once the prosecution has provided evidence as to the existence of one or more aggravating factors. However, the statute limits the evidence to the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death.

In this case, the prosecutor's comments were permissible as a fair comment on the victim impact evidence properly admitted at trial. The prosecutor's comments stayed within the limitations outlined in Florida's capital sentencing statute. He made no attempt to argue that victim impact evidence should be considered or weighed in aggravation. Additionally, the trial court correctly instructed the jury that victim impact

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car and left because "you don't drive around town with a kidnapped child in a stolen car." (TR Vol. XIII 1547).

evidence could not be considered to be an aggravating circumstance and could not be weighed as an aggravating circumstance. (TR Vol. V 788).

As to the photographs, this Court has determined that the use of photographs is permissible in order to show the uniqueness of his life. In Branch v. State, 685 So.2d 1250, 1253 (Fla. 1996), this Court rejected Branch's claim it was improper for the prosecutor to publish a photo of the victim to the jury that depicted her taken several weeks before the crime, holding the sweater she wore when she was murdered. This Court noted that "[f]ew types of evidence can 'demonstrate the victim's uniqueness as an individual' more aptly than a photo of the victim taken in his or her life before the crime." Branch at 1253. *See also* Alston v. State, 723 So.2d 148, 160 (Fla. 1998) (finding nothing improper about the trial court's ruling permitting the State to exhibit a full-color, eleven-inch by fifteen-inch graduation photograph of the victim during its penalty phase closing argument). Additionally, use of admitted photos taken after death were relevant to support the prosecutions theory the murder occurred in the course of a felony and the murder was heinous, atrocious or cruel. Mansfield v. State, 758 So.2d 636 (Fla. 2000)(ruling that autopsy was probative in the determination of the heinous,

atrocious, or cruel aggravator). See also Willacy v. State, 696 So.2d 693, 695 (Fla. 1997) (finding photographic evidence relevant to show the circumstances of the crime and establish HAC aggravator admissible).

Stephens has failed to demonstrate that any of the comments or actions about which he complains, either alone or cumulatively, constituted fundamental error. Accordingly, appellate counsel cannot be deemed ineffective for failing to raise this unpreserved claim on direct appeal.

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 IN THE COURSE 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

In just three pages of argument on this issue, Stephens offers a variety of theories which he claims renders the "in the course of a felony aggravator" unconstitutional. Stephens' claims are contrary to long established Florida jurisprudence.

First, Stephens alleges that the "in the course of a felony" aggravator fails to guide the sentencer's discretion and

does not genuinely narrow the class of persons eligible for the death penalty. Stephens alleges that, as such, the underlying felonies for which Stephens was convicted cannot be used in aggravation. In Blanco v. State, 706 So.2d 7, 12 (Fla. 1997), this Court rejected a similar constitutional attack on the "in the course of a felony aggravator."

In Blanco, this Court determined that Florida's sentencing scheme does narrow the class of death-eligible defendants because a person can commit felony murder yet still be ineligible for this particular aggravating circumstance. This Court noted that because the list of enumerated felonies in the provision defining felony murder is larger than the list of enumerated felonies in the provision defining the aggravating circumstance of commission during the course of an enumerated felony, the "in the course of a felony" aggravator passes constitutional muster. Id. *See also* Miller v. State, 926 So.2d 1243, 1260 (Fla. 2006)(rejecting the argument that Florida's capital sentencing scheme is unconstitutional because it provides for an automatic aggravating circumstance and neither "narrows the class of persons eligible for the death penalty" nor "reasonably justifies the imposition of a more severe sentence on the defendant compared to others found guilty of murder."); Freeman v. State, 761 So.2d 1055, 1067 (Fla. 2000)

(finding no merit to the argument that an underlying felony cannot be used as an aggravating factor).

Next, Stephens alleges the "in the course of felony" aggravator is unconstitutional because this Court has held this aggravator to be insufficient, standing alone, to justify the death penalty. Stephens argues the jury is required to be given a limiting instruction that informs it this aggravating factor, standing alone, is insufficient to warrant imposition of the death penalty. Stephens also claims the jury was instructed on this aggravating factor and "told that it was sufficient for a recommendation of death" unless the mitigating circumstances outweighed the aggravating circumstances. (Pet. at page 21). Stephens' argument must fail for two reasons.

First, the "in the course of a felony" aggravator was not the only aggravating factor found to exist beyond a reasonable doubt. The jury was instructed on, and the trial judge found two additional aggravators, specifically that Stephens had previously been convicted of a violent felony and the murder victim was under the age of 12.

Second, Stephens' claim must fail because it is simply not true that Stephens' jury was told the "in the course of a felony" aggravator was sufficient for a recommendation of death. Instead, the trial judge properly instructed the jury, in accord

with the standard jury instructions, that "if you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without the possibility of parole." (TR. Vol. VI 787).

The jury was further instructed that "should (emphasis mine) you find sufficient aggravating factors do exist, it will be then your duty to determine whether mitigating factors outweigh the aggravating circumstances." (TR Vol. V 788). The jury was also instructed that aggravating factors must be found beyond a reasonable doubt and that "to justify a recommendation of a death sentence, the aggravating circumstances must be sufficient in nature to justify the death sentence. (TR Vol. V 789).

Finally, the jury was instructed that "proof of one or more aggravating circumstances does not by itself dictate a death recommendation even in the absence of mitigation evidence". (TR Vol. V 789). Stephens' claim the jury was instructed the "in the course of a felony aggravator" was sufficient to warrant a death sentence is refuted by the record.

Lastly, Stephens alleges the "in the course of a felony" aggravator is unconstitutionally vague. (Pet. at page 22). In making this claim, Stephens does not identify any particular

infirmity in the instruction. Rather, Stephens claims only that the instruction is vague. (Pet. at page 22).

This Court has already rejected the notion the "in the course of a felony" aggravator is unconstitutionally vague or that appellate counsel is ineffective for failing to challenge this aggravator on vagueness grounds. Thompson v. State, 759 So.2d 650, 656, 666 (Fla. 2000) (ruling that appellate counsel was not ineffective for failing to raise the meritless claim that the murder in the course of a sexual battery instruction was unconstitutionally vague).[12] As Stephens' underlying claims regarding the "in the course of a felony" aggravator are without merit, appellate counsel cannot be deemed ineffective. Freeman v. State, 761 So.2d 1055, 1070 (Fla. 2000) (ruling that appellate counsel cannot be ineffective for failing to raise an

[12] This claim is also without merit because trial counsel posed no objection to the "in the course of a felony" aggravator on the grounds it was vague. (TR Vol. IV 681). Appellate counsel is not ineffective for failing to raise a challenge to jury instructions that were not preserved. Marquard v. State, 850 So.2d 417, 432 (Fla. 2002) (rejecting Marquard's claim that appellate counsel should have raised the unpreserved claim that the cold, calculated, and premeditated jury instruction was unconstitutionally vague because the claim was not properly objected to at trial); Thompson v. State, 759 So.2d 650, 667 (Fla. 2000)(ruling that because Thompson did not object to the instruction as vague or offer a legally sufficient alternative, appellate counsel is not ineffective for failing to raise an issue on appeal that was not properly preserved).

issue which is without merit). This Court should deny this claim.

CLAIM V

THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY INSTRUCTING THE JURY REGARDING THE AGGRAVATING FACTOR OF HEINOUS, ATROCIOUS, OR 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 AND APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE AS FUNDAMENTAL ERROR

Stephens claims that appellate counsel was ineffective for failing to raise a claim of fundamental error on direct appeal. Stephens alleges the trial court committed fundamental error by instructing the jury on the HAC aggravating factor, when as a matter of law, this factor did not apply. (Pet. at page 23).

Stephens argues the HAC aggravator did not apply, as a matter of law, because the trial judge did not find, beyond a reasonable doubt, the murder was especially heinous, atrocious, or cruel. (Pet. at page 24). Though not entirely clear, it appears the gravamen of Stephens' argument is that fundamental error occurs if, based on the evidence presented at trial, the trial judge instructs the jury on an aggravator but later

rejects it in his sentencing order. Stephens' claim is without support in law or logic.[13]

This Court has held a finding of HAC is proper in murders that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another. Brown v. State, 721 So.2d 274, 277 (Fla. 1998). The HAC aggravator focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding the death. Card v. State, 803 So.2d 613,624 (Fla. 2001). Accordingly, contrary to Stephen's suggestion he did not have the requisite intent to permit the trial judge to instruct the jury on the HAC aggravator, the focus on the HAC aggravator is not on the intent of the assailant, but on the actual suffering caused to the victim. Schoenwetter v. State, 931 So.2d 857, 874 (Fla. 2006). *See also* Barnhill v. State, 834 So.2d 836, 850 (Fla. 2002) (concluding that if a victim is killed in a torturous manner, a defendant need not have the intent or desire to inflict torture, because the very torturous manner of the victim's death is evidence of a defendant's indifference).

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[13] Stephens raises this claim as a substantive claim of fundamental error in his appeal from the denial of his motion for post-conviction relief.

Competent substantial evidence supported the trial judge's decision to instruct Stephens' jury on the HAC aggravator. The evidence adduced at trial showed that Robert Sparrow III died an extremely torturous death brought on by Jason Stephens' utter indifference for the life of a child he kidnapped from the safety of his home. Accordingly, Stephens can demonstrate neither error nor prejudice in the trial judge's instruction on the HAC aggravator. Floyd v. State, 850 So.2d 383, 405 (Fla. 2002) (where competent, substantial evidence supports the trial judge's decision to do so, it is not error to instruct the jury on the HAC aggravator). The fact the trial judge later concluded the aggravator had not been proven beyond a reasonable doubt, because he did not believe Stephens intended to kill Robert Sparrow, does nothing to undermine the propriety of instructing the jury on an aggravator supported by evidence adduced at trial.

In the case at bar, as found by this Court on direct appeal, the evidence demonstrated that Stephens kidnapped Robert Sparrow from his home and his parents' care on June 2, 1997, at about 2:30 p.m., drove him away in a stolen dark colored Kia, and parked the car on the side of the street, without the benefit of any shade, on a hot and sunny day. The windows in the car were rolled up and all of the doors were closed. Some

seven hours later, Little Rob was found dead in the car. Stephens v. State, 787 So.2d 747, 751 (Fla. 2001).

Even accepting Stephens' claim he left the child alive in the car, Stephens' own defense expert laid the foundation for the trial judge to properly instruct the jury on the HAC aggravator. Dr. Steve Dunton testified he was the medical examiner in Atlanta. (TR Vol. XIV 1616).

Dr. Dunton opined that Little Rob died of hyperthermia and his death "took some time to occur." (TR Vol. XIV 1630). He testified that on the day of the murder, June 2, 1997, there were 13 hours of sunshine which was the longest duration of daylight hours in the entire month of June. (TR Vol. XIV 1625-1626).

According to Dr. Dunton, there was nothing to provide shade to the area where Stephens parked the Kia. Dr. Dunton testified the temperature in the car, under the circumstances would have reached the low hundreds if not higher. (TR Vol. VIX 1639). Dr. Dunton told the jury he would expect that Little Rob would have suffered periods of panic and increased anxiety prior to his death. (TR Vol. XIV 1652). Dr. Dunton opined that it would have taken Little Rob anywhere from 30 minutes to several hours to die. (TR Vol. XIV 1651-1652). Dr. Dunton found brain swelling which contraindicated a speedy death.

Stephens can show no error, let alone fundamental error, because the trial judge instructed the jury on the HAC aggravator. There was competent substantial evidence to support a conclusion that Robert Sparrow died a prolonged tortuous death at the hands of the defendant. Duest v. State, 855 So.2d 33, 47 (Fla. 2003) (evidence of prolonged suffering is sufficient to support HAC). Even this Court, on direct appeal, concluded the trial record demonstrated that Stephens was indifferent to the fate of this helpless child. Stephens v. State, 787 So.2d 747, 751 (Fla. 2001).

As Stephens can make no showing the trial judge's instruction to the jury on the HAC aggravator constituted fundamental error, appellate counsel cannot be deemed ineffective for failing to challenge the HAC instruction on direct appeal. Freeman v. State, 761 So.2d 1055, 1070 (Fla. 2000) (ruling that appellate counsel cannot be ineffective for failing to raise an issue which is without merit). This Court should deny this claim.

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 SENTENCINGF 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[14]

Stephens claims that appellate counsel was ineffective for failing to raise a claim of fundamental error. Stephens alleges the trial court committed fundamental error by instructing the jury on the pecuniary gain aggravator when, as a matter of law, this factor did not apply. (Pet. at page 25).[15]

Stephens argues the pecuniary gain aggravator did not apply, as a matter of law, because pecuniary gain was not the

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[14] Stephens raises this claim as a substantive claim of error in his appeal from the denial of his motion for post-conviction relief.

[15] The trial judge did not find this aggravating factor to exist beyond a reasonable doubt. In rejecting this aggravator, the trial judge noted that this aggravating factor only applies when the murder is an integral step in obtaining some sought after specific gain. The trial court found that if the theft of money or other property is over and the murder is not committed to facilitate it, the pecuniary gain aggravator does not apply. The court noted that while a CD player was taken out of the stolen KIA, the death of Robert Sparrow was not committed to facilitate this theft. (TR Vol. II 390).

primary motive for the killing. In support of his argument, Stephens points to this Court's 1988 decision in Scull v. State, 533 So.2d 1137 (Fla. 1988). Stephens also points to evidence adduced at trial that the robbery and burglary of Little Rob's home had already been completed by the time the murder occurred. (Pet. at page 26).[16]

Initially, Stephens is mistaken when he claims that in order to establish the existence of the pecuniary gain aggravator, the State must prove that pecuniary gain was the primary motive for the killing. To establish a murder was committed for pecuniary gain, the State is required only to show beyond a reasonable doubt the murder was motivated, at least in part, by a desire to obtain money, property, or other financial gain. Harris v. State, 843 So.2d 856 (Fla. 2003) (ruling that in order to establish the aggravating factor of pecuniary gain, the State must prove beyond a reasonable doubt that the murder

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[16] Stephens also claims the instruction was unconstitutionally vague because it did not require the jury to find that pecuniary gain was the primary motive for the killing. This Court has rejected claims that the standard pecuniary gain jury instruction is overbroad, vague, and fails to narrow the class of persons eligible for the death penalty. Card v. State, 803 So.2d 613 (Fla. 2001) (rejecting Card's claim the CCP, HAC, avoiding arrest, pecuniary gain, and murder committed during the course of a felony aggravating circumstances are overbroad, vague, and fail to narrow the class of persons eligible for the death penalty).

was motivated, at least in part, by a desire to obtain money, property, or other financial gain); Card v. State, 803 So.2d 613, 625 (Fla. 2002) (rejecting Card's argument that pecuniary gain aggravator is only applicable where the State proves that pecuniary gain was the sole or dominant motive in the murder.

Stephens is also mistaken when he claims there was no competent substantial evidence to support the pecuniary gain instruction. Stephens does not deny he entered Little Rob's home on June 2, 1997, for pecuniary gain. Prior to trial, Stephens pled guilty to armed burglary of Little Rob's home and to the robbery of some of the home's occupants.[17] Additionally, Stephens testified during the guilt phase of his capital trial that he entered the Sparrow home with the intent to rob anyone in the house. (TR Vol. XIII 1514).

Stephens' argument turns, instead, on the notion that, because the burglary of Little Rob's home and the robbery of its occupants were over by the time Stephens committed the murder,

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[17] Stephens testified at the guilt phase that he entered the Sparrow home with the intent to rob whoever was in the house. He also admitted committing the aggravated battery upon Consuelo Brown and that he jacked a round into the chamber of his 9 millimeter pistol and ordered everyone to the ground when Robert Sparrow reacted to Stephens' attack on Consuelo by getting off of the couch. He testified he robbed at least two occupants of the house, Derrick Dixon and Robert Sparrow Jr., by taking the cash they had on them. (TR Vol XIII 1513-1514, 1526-1528).

pecuniary gain could not be proven as a matter of law. The contrary is true.

This Court has upheld the pecuniary gain aggravator when the murder was the culmination of events that began when the defendants went into the store to commit the robbery and abducted the cashier at gunpoint. Parker v. State, 873 So.2d 270 (Fla. 2004). In Parker, Parker and three co-defendants (Bush, Cave, and Johnson) robbed a convenience store. They took $134. Once the money had been obtained, the defendants abducted the 18-year-old female clerk and took her to an isolated location some 20 minutes away from store. Parker shot the victim and another co-defendant stabbed her.

The appellant and the co-defendants then drove back to Fort Pierce and split the money four ways, the appellant receiving twenty to thirty dollars. This Court upheld the pecuniary gain aggravator noting that “murder was the culmination of a course of events that began when appellant went into a store, robbed the clerk at gunpoint, and abducted her from the store." Parker v. State, 873 So.2d at 290 (Fla. 2004).

Likewise, in Copeland v. State, 457 So.2d 1012 (Fla. 1984), this Court upheld the pecuniary gain aggravator when Copeland and three co-defendants robbed the Junior Food Store in Wakulla County, Florida, and abducted the cashier at knifepoint. The

men took the cashier to a hotel, raped her, and then took her to the woods and shot her three times in the head. Based on a finding the cashier's murder was a culmination of the armed robbery, this Court upheld the pecuniary gain aggravator. Copeland v. State, 457 So.2d at 1019.

The evidence adduced at trial demonstrated the murder of Little Rob was the last in an unbroken series of events that began with Stephens' armed entry into Little Rob's home, the robbery of its occupants, and the kidnapping of Little Rob for the purpose of effecting an escape.[18] When competent substantial evidence supports the trial judge's decision to instruct the juror on a statutory aggravator, there is no error. Floyd v. State, 850 So.2d 383, 405 (Fla. 2002) (where competent, substantial evidence supports the trial judge's decision to do so, it is not error to instruct the jury on a statutory

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[18] During the guilt phase, Stephens testified he took Robert Sparrow III out of his home as "insurance to make sure I got out of the house safe." (TR Vol. XIII 1518). As there was no definitive break in circumstances, the robbery and burglary Stephens committed at the Sparrow home continued to the time of Little Rob's murder. Stephens v. State, 787 So.2d 747 (Fla. 2001).

During the charge conference on the issue of whether the pecuniary gain instruction was appropriate, the State argued, *inter alia*, the instruction was appropriate because the defendant took the child from his home in furtherance of the

aggravator). Likewise, because the trial judge committed no error in instructing the jury on the pecuniary gain aggravator, appellate counsel cannot be ineffective for failing to challenge the instruction on appeal. Freeman v. State, 761 So.2d 1055, 1070 (Fla. 2000) (ruling that appellate counsel cannot be ineffective for failing to raise an issue which is without merit).

CLAIM VII

THE AGGRAVATOR AND INSTRUCTION FOR A VICTIM UNDER 12 VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN THAT THEY ARE OVERINCLUSIVE, ARBITRARY, AND AUTOMATICALLY APPLICABLE TO HOMICIDES COMMITTED AGAINST A HUGE PORTION OF THE POPULATION REGARDLESS OF THE CIRCUMSTANCES, UNLIKE ANY AGGRAVATOR. APPELLATE COUNSEL WAS INEFFECTIVE FOR NOT RAISING THIS ISSUE AS FUNDAMENTAL ERROR.

Stephens claims appellate counsel was ineffective for failing to challenge the constitutionality of the "victim under 12" aggravator on direct appeal. Stephens alleges the "victim under 12" aggravator is unconstitutional because it is overinclusive, arbitrary, and automatically applicable to a "huge" portion of the population. Stephens argues this "status" aggravator is much broader than Florida's narrow "law enforcement" and "elected or appointed officials" aggravators,

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robbery and in the course of that taking, the child died. (TR Vol. IV 685).

and, as such, fails to genuinely narrow the class of persons eligible for the death penalty." (Pet at page 29). Stephens also claims the jury is given no discretion in finding this aggravator and that, as is the case here, "[a]ny unintended accidental killing of a child under any circumstances during a felony qualifies". (Pet. at page 29).

This claim may be denied for two reasons. First, attacks on the constitutionality of the "victim under 12" aggravator must be specifically raised at trial to be pursued on appeal. Hutchinson v. State, 882 So.2d 943 (Fla. 2004) (ruling that an argument attacking the constitutionality of the victim under 12 aggravator must be specifically raised at trial to be pursued on appeal). *See also* Morrison v. State, 818 So.2d 432, 455 (Fla. 2002); Lukehart v. State, 776 So.2d 906, 925 (Fla. 2000) (refusing to address a claim that the "victim under 12" aggravator was unconstitutional because the issue was not preserved for review).

In the case at bar, trial counsel raised no objection to the constitutionality of the "victim under 12" aggravator nor did he propose an alternative "constitutional" instruction. To the contrary, trial counsel specifically informed the trial court during the charge conference that the State was entitled to the "victim under 12" instruction. (TR. Vol. IV 690).

Appellate counsel cannot be ineffective for failing to raise this claim on direct appeal because even if he had done so, this Court, consistent with its decision in Morrison and Lukehart, would have declined to address the merits of the claim. Floyd v. State, 808 So.2d 175,186 (Fla. 2002) (concluding that appellate counsel cannot be ineffective for failing to challenge the adequacy of the murder in the course of a felony or the financial gain jury instruction because trial counsel posed no objection at trial to these two instructions). *See also* Johnson v. Singletary, 695 So.2d 263, 266-67 (Fla. 1996) (ruling that appellate counsel cannot be ineffective for failing to raise issues not properly preserved for appeal).

Second, this Court may reject this claim because, even assuming, *arguendo*, the instruction was inadequate, Stephens can show no error in instructing the jury on this aggravator because Little Rob was, at age three years and four months, undisputedly, less than 12 years old at the time of the murder. As the facts of this case were sufficient for the jury to conclude the victim was under the age of 12 at the time of the murder, Stephens is unable to show prejudice under Strickland. *See* Sweet v. Moore, 822 So.2d 1269 (Fla. 2002) (rejecting claims of ineffective assistance of appellate counsel for failing to challenge the constitutionality of the avoid arrest aggravator

on appeal when the evidence at trial clearly established the existence of the aggravtor); Arbelaez v. State, 775 So.2d 909, 915 (Fla. 2000) (explaining that even if counsel were deficient for failing to object to aggravator instructions, there would be no prejudice because evidence established that circumstance existed).[19] This claim should be denied.

[19] Other states have specifically rejected the substance of the claim Stephens raises here in recognition that protecting society's most vulnerable citizens is a legitimate state interest. *See* Blackmon v. State, 2005 Ala. Crim. App. LEXIS 137 (Ala. Crim. App. 2005)(rejecting Blackmon's varied constitutional attacks on Alabama's capital murder statute that defines a capital offense as murder when the victim is less than fourteen years of age"); State v. Bolton, 182 Ariz. 290 (AZ 1995) (rejecting Bolton's claim Arizona's "under the age of 15" aggravator is unconstitutional because it amounts to an automatic death sentence and is unconstitutional); Black v. State, 26 S.W.3d 895, 896-898 (Tex. Crim. App. 2000)(rejecting constitutional attack on Texas' child capital murder provision).

CONCLUSION

Stephens has failed to demonstrate appellate counsel was ineffective and presents no issues that are cognizable in these proceedings. The Petition for Writ of Habeas Corpus should be denied.

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, P.O. Box 3006, Lake City, FL 32506-3006, this 4th day of December 2006.

Meredith Charbula
Assistant Attorney General

CERTIFICATE OF FONT AND TYPE SIZE

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

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Meredith Charbula