IN THE SUPREME COURT OF FLORIDA

ROBIN ARCHER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 83,258

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The Appellee, the State of Florida, will be referred to as the State. The Appellant, Robin Archer, will be referred to by his name. Citations to the transcript of the Record on Appeal (Volume I, pp. 1-169) will be denoted by the letter "R". Citations to the transcript of the penalty hearing (Volumes I, II and III, pp. 1-509) will be denoted by the letter "T".

STATEMENT OF THE CASE

The State accepts Archer's statement of the case.

STATEMENT OF THE FACTS

The state considers Archer's statement of facts to be misleading and incomplete. The State therefore offers the following statement of facts.

Daniel Ray Wells - the intended victim - worked at the Trout Auto Parts store on W. Street in Pensacola, Florida (T 237). Archer also worked at this store for a time, until he was fired in March of 1990 (R 138, T 238-40, 416). Wells testified that while, as a temporary manager, he was not "solely responsible" for the firing, he had "something to do with it" (T 243, 253-54). According to Wells, when he later asked Archer "something about being fired", Archer replied that he wasn't worried about it; Archer opened his jacket, displayed a gun and holster, and stated: "This is how I take care of my problems." (T 386-87).

Archer attended motorcycle school in Daytona, but returned sometime before the end of January 1991 (T 417-18). According to Archer's codefendant Patrick Bonifay, although Archer was not working during this period of time, he had another source of income which "generated significant amounts of cash" (T 376-77).

Bonifay testified[1] that on Thursday, January 24, 1991, Archer showed him "a briefcase full of money" and told him he wanted him to "murder someone" who would be working at the Trout Auto Parts store Friday night (T 331). Archer told him to take

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[1] At the resentencing proceeding, Bonifay refused to testify (T 304). His trial testimony was read into evidence. See Stano v. State, 473 So.2d 1282 (Fla. 1985).

the store's money to make it look like a robbery (T 332). According to Bonifay, Archer told him to go to the store just before midnight, when no one else would be there and only a window would be open for business (T 333). Archer, who owned a 1985 Nissan, told Bonifay to ask for a clutch for that vehicle; he wrote "85 Nissan Clutch" on a piece of paper so Bonifay would remember (T 333, 377-78). Archer said the clerk would have to go to the back room to get that part. Bonifay could enter the store through the window and shoot the clerk when he returned (T 333).

On cross-examination, Bonifay was asked how much money was in the briefcase. Bonifay did not know. Archer told him it was $500,000, but Bonifay knew there was "no way" it was that much (T 346).

George Wynne testified that Bonifay contacted him Friday and told him "they were going to rob Trout and . . . it might involve killing someone." Wynne tried to talk him out of it. He asked why it might involve a killing. Bonifay replied that "Archer had asked him to do it. . . He wanted this one particular person killed and he wanted it to look like a robbery" (T 259-60). Bonifay wanted Wynne to be the driver. Wynne refused (T 260).

Bonifay then recruited Clifford Barth and Larry Fordharm. Barth denied that Bonifay told him anything about a "killing" (T 296), but he was present when Bonifay obtained the gun from Archer (T 280, 302, 334). *Besides the gun, they also got* bolt cutters and ski masks, because Bonifay knew from Archer about the store security camera and the locks on the money boxes (T 280-81).

Daniel Wells testified that he was working at Trout that Friday evening. Five minutes before midnight, a "customer" whom Wells later identified as Patrick Bonifay (T 253), walked up to the window. This "spooked" Wells, because he had not heard a vehicle drive up or a car door slam (T 244). The "customer" asked for a clutch assembly for a 1985 Nissan pickup truck. Wells noticed that the "customer" was wearing gloves even though it was not cold outside, and decided not to turn his back on him (T 244-45). The parts were located in the back of the store. Wells pretended to look at the catalog for a minute. When he heard a sound like a gun cocking, Wells told the customer he did not have the part. The customer told him he would return, and walked off, carrying, instead of wearing, his right glove (T 245). Wells, who had kept a hand on the door that shuts the night window "the whole time", immediately shut the door and turned the lights out (T 245-46).

Bonifay testified that he walked away because he "could not shoot the man" (T 335). The next day Archer was furious because Bonifay had not done the job. He told Bonifay that "you don't back out on something like that" and that if Bonifay did not finish the job, Archer would hurt Bonifay's mother and girlfriend (T 336). So, Bonifay called Barth and Fordham and told them they had to try again that night (T 336-37).

However, Daniel Wells, the intended victim, was sick Saturday, and Billy Wayne Coker took his place (T 249). Coker and Wells were approximately the same height and weight (5'9" and 180 lbs. vs. 5'8" and 170 lbs.), and both had dark hair and a dark mustache (T 252-53, 325, 466).

Bonifay, Barth and Fordham returned to the store late Saturday evening. According to Barth, he waited in the vehicle while Bonifay went to the window and shot the clerk. After Bonifay shot the clerk a second time, Barth joined him (T 283-84). According to Bonifay, he had the gun out and was aiming it at the victim when Barth told him to "hurry up", got out of the vehicle, and grabbed Bonifay's arm just as he pulled the trigger. Then Barth took the gun and shot the victim a second time (T 338, 351).

Both witnesses agreed that Bonifay used the bolt cutters to cut the locks off the money boxes (because Barth was not strong enough), and that after removing the money from the boxes, Bonifay shot the victim two more times (T 284-86, 339-40). According to Barth, before the final two shots, the victim told them he had a son and daughter and asked them not to shoot him again (T 286). All Bonifay heard was "kids" (T 355). (The victim's wife confirmed that she and the victim did have one son and one daughter (T 396).)

The next day, Archer was at Daniel Webber's house asleep on the couch when the news came on about the robbery at Trout Auto Parts (T 271). Archer woke up and asked Webber what they had said about it. Webber told him it was a robbery. Archer then wanted to know if anyone had been killed. Webber told him he didn't know. Then, according to Webber, Archer told him he knew who had done it and that he had told them how they could do it (T 271). Archer told Webber that he had told them it would take two people; they would need ski masks for the security camera; they would go to the window to order a part, and when the clerk went

to the back to get the part, the two could help each other through the window. When the clerk returned, they could shoot him in the head (T 271-72).

Archer saw Bonifay that day or the day after and - according to Bonifay - Archer told him that he was not going to pay him because he had killed the wrong man (T 342-43).

By a vote of 7 to 5, the jury recommended a death sentence for Archer. After conducting the appropriate hearings, the trial court sentenced Archer to death. The trial court found two aggravating circumstances, explaining its findings as follows:

> The capital felony was committed while the Defendant was engaged, or was an accomplice, in the commission of the crime of robbery. [Section 921.141(5)(d), Florida Statutes].
>
> The guilt-phase jury by its verdict found the Defendant guilty of the robbery based upon the evidence that the Defendant conceived and procured the commission of the robbery, produced the plan, provided inside information and directions for carrying it out, secured the gun that used to kill, and directed the killing of the clerk. The new penalty phase jury heard substantially the same evidence regarding the robbery. As did Judge Collier, this Court agrees with the juries' determination and finds that this aggravating circumstance was proved beyond a reasonable doubt.
>
> The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification. [Section 921.141(5)(i), Florida Statutes].
>
> The Supreme Court of Florida uses the phrase 'heightened premeditation' to distinguish this aggravating circumstances from the premeditation element of first-degree murder. The evidence must show that the Defendant planned to kill or arranged to commit the murder before the crime began. This aggravating circumstance is reserved primarily for execution or contract murders,

or witness-elimination killings, but it is also applicable to homicides evincing a careful plan or prearranged design. Rutherford v. State, 545 So.2d 853 (Fla. 1989).

The merciless killing of Billy Wayne Coker is the classic case of 'murder for hire' - a contract murder, an execution. Archer sought out Patrick Bonifay for the purpose of avenging some perceived wrong by killing the one that he felt responsible. Whether payment was to be the money taken in the robbery or a satchel of money as claimed by Bonifay, Archer procured his cousin to kill the store clerk. Archer planted the seed in Bonifay's fertile mind, he concocted the plan to gain entry to the store, he urged the use of ski masks to thwart the video and gloves to thwart identification, he disclosed the location of the cash box and suggested the need for bolt cutters to open it, and he designed the getaway through the emergency exit. He aided in securing a gun and in ensuring its delivery to Bonifay.

This plan proceeded over a period of several days - ample time for reflection. When the first attempt failed, Archer directed and insisted that Bonifay try again and go through with the murder. It was carried out just as he directed except that the wrong man was on duty. Bonifay shot to death Billy Wayne Coker, believing him to be the clerk Archer had commissioned him to kill. By his actions, Archer had procured, aimed, cocked, and fired the gun just the same as though he had been present. It was Archer's motive, his intent, his purpose, his plan, his vengeance, and his procurement of the murder weapon which energized and enabled the others to carry out the robbery and murder. The crime was the product of a cold, calculated plan, ruthlessly and mercilessly devised, to kill the clerk on whom Archer desired to wreak vengeance. The degree of cunning and planning over time revealed in the facts of his case clearly illustrates the "heightened premeditation" sufficient to establish beyond any reasonable doubt this aggravating circumstance.

(R 140-142).

The trial court also found one statutory mitigator - no significant history of prior criminal activity - which the court gave "significant weight", and one nonstatutory mitigator - that Archer had been a good family member to his grandmother - which the court felt was entitled to "some weight" (R 142, 144).

SUMMARY OF ARGUMENT

There are seven issues on appeal: (1) No Jackson issue concerning the CCP instruction was preserved for review, because Archer did not request a Jackson-type expanded instruction or anything resembling a Jackson-type instruction at trial. The expanded instruction he did request was properly refused as an inaccurate statement of the law. Moreover, any possible error is harmless because this contract-murder case is CCP by any standard. (2) The trial court delivered the standard penalty-phase instruction that aggravators must be proved beyond a reasonable doubt. Archer did not object to this instruction, or ask that reasonable doubt be defined. Therefore, he has not preserved for appeal any issue of the necessity to define reasonable doubt on request. Because it is not constitutionally necessary to define reasonable doubt, the failure to do so is not fundamental error that can be raised for the first time on appeal. (3) Archer likewise did not preserve for appeal any issue of the necessity to deliver on request numerous other non-standard penalty phase instructions he now contends should have been given. (4) Even if Archer preserved any issue of the per se admissibility of victim-impact evidence, his claim is without merit. The United States Supreme Court has foreclosed any Eighth Amendment issue of the admissibility of victim-impact evidence,

and Archer cannot demonstrate that §921.141(7) violates any State constitutional provision. By definition §921.141(7) - a statute - cannot create a nonstatutory aggravator. While the legislature, consistently with the federal and State Constitutions, could have defined victim-impact as a selection stage (rather than an eligibility stage) aggravating circumstance, it did not do so. Instead, victim impact is admissible as counter to mitigation, rather than as evidence which is independently aggravating. The testimony in this case is the kind contemplated by §921.141(7). Because the statute is procedural, it is not ex post facto as applied to Archer. (5) Especially where the trial court actually instructed the jurors before they were sworn that their advisory sentence would be given "great weight", there was no error in refusing Archer's request for supplementation of the standard instructions concerning the jury's sentencing responsibilities. (6) A 26-year-old defendant is not entitled to the age-mitigator instruction. (7) Archer may not now be heard to complain of excusals of jurors for cause that he agreed to at trial.

ARGUMENT

ISSUE I

ARCHER DID NOT REQUEST A JACKSON-TYPE INSTRUCTION ON THE CCP AGGRAVATOR AND THE INSTRUCTION HE DID REQUEST WAS PROPERLY REFUSED; IN ANY EVENT, ANY ERROR IN NOT DELIVERING AN EXPANDED INSTRUCTION ON THE CCP AGGRAVATOR IS HARMLESS ON THE FACTS OF THIS CASE.

At the penalty phase charge conference, Archer's attorney objected "to the standard instruction" concerning the cold, calculated and premeditated aggravating factor. He requested this expanded instruction:

> In order to prove the existence of the cold, calculated and premeditated aggravator, the State must show a heightened level of premeditation establishing that the Defendant had a careful plan or prearranged design to kill and that the victim was killed by an accomplice with the intent of implementing that careful plan or prearranged design (R 80-81) (Emphasis supplied).

The trial court refused to deliver this expanded instruction and instead delivered the standard pre-Jackson CCP instruction. Jackson v. State, 648 So.2d 85 (Fla. 1994). Archer contends that because his trial judge delivered the same standard CCP instruction delivered by the trial judge in Jackson, the "result" should be "the same." Appellant's brief at 12-13. But Jackson had properly preserved the issue of the adequacy of the standard CCP instruction by not only objecting to the form of the instruction at trial, but also by asking for an expanded instruction "which essentially mirrors this Court's caselaw explanation of the terms" of the CCP aggravator. Id. at 90. Archer's requested instruction, by contrast, not only fails to address most of the elements of the CCP aggravator (and,

therefore, fails to "mirror this Court's case-law explanations of these elements), but, as addressed below, includes a proposed limitation which is neither addressed in Jackson nor supported by any case law.

(A) Archer's Requested Instruction Misstated the Law

It has long been a general rule of law that "persons who unlawfully set the means of death in motion are the guilty cause of the resulting death, whether they act personally or through an irresponsible instrument or agent." 40 Am. Jur. 2d, Homicide, §25. This Court has held that the key to the CCP factor is the defendant's level of preparation, i.e., his careful plan or prearranged design to kill. Sweet v. State, 624 So.2d 1138 (Fla. 1993). As this Court stated in the previous appeal in this very case: "Archer created the situation, and the victim's death was a natural and foreseeable result of Archer's actions. Bonifay's killing the victim was not an act for which Archer can deny responsibility." Archer v. State, 613 So.2d 446, 448 (Fla. 1993).

Archer's requested expanded instruction at the resentencing proceeding misstates the law because it makes Bonifay's intent an essential element of the CCP aggravator. But Bonifay's intent was not controlling.[2] The crime of murder for which Archer was convicted was cold, calculated and premeditated because Archer had a careful plan and a premeditated design to kill, and used

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[2] In fact, Archer's first death sentence was reversed on appeal because the State tried to apply the HAC aggravator vicariously to Archer. Archer v. State, 613 So.2d 446 (Fla. 1993). See Omelus v. State, 584 So.2d 563 (Fla. 1991) (where no evidence that defendant intended murder to be HAC, the intent of his hired killer could not be imputed vicariously to defendant).

Bonifay to implement that careful plan and prearranged design to kill. And this is so even if Bonifay killed the wrong person, had second thoughts or misgivings at any point about carrying out Archer's careful plan or prearranged design to kill (T 339), or developed a supplemental reason of his own to carry out Archer's careful plan and prearranged design to kill (i.e., the victim saw Bonifay's face and heard his name) (T 339). Spivey v. State, 529 So.2d 1088, 1094 (Fla. 1988).

A trial court does not err by refusing to deliver a jury instruction which misstates the law. Parker v. State, 641 So.2d 369, 376 (Fla. 1994). Therefore, the trial court did not err by refusing to deliver the expanded instruction requested here.

(B) Absent A Request For An Expanded Instruction That Was Correct As A Matter Of Law, Archer's Objection To The Standard Instruction Was Insufficient To Preserve The Issue For Review

It should be noted here that the issue Archer raised at trial was not the validity of the CCP aggravator itself (T 425-26). This Court has not allowed the CCP aggravator to be applied in an unconstitutionally overbroad manner. Jackson v. State, supra (and cases cited therein). Compare Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (death sentence reversed where Georgia Supreme Court failed to construe aggravator in sufficiently narrow manner). Rather, Archer raised at trial an issue concerning the standard CCP instruction.

The general rule is that a party who wishes the trial court to deliver additional instructions should request such instructions; a party on appeal cannot complain about a trial court's omission to deliver an instruction without a specific request for such instruction. Watson v. State, 533 So.2d 932

(Fla. 3d DCA 1988); Williams v. State, 346 So.2d 554 (Fla. 3d DCA 1977).

Andrea Hicks Jackson preserved for appeal her claims that the standard CCP instruction was inadequate and that the trial judge should have delivered an expanded instruction incorporating this Court's caselaw explanation of the terms of the CCP aggravator because she not only objected to the standard CCP instruction but also requested an expanded instruction that "essentially mirrored" this Court's cases defining the parameters of the CCP aggravator. Jackson v. State, supra, at 90. Likewise, the defendants in Fennie v. State, 648 So.2d 495 (Fla. 1994), Walls v. State, 641 So.2d 381, 387 (Fla. 1994), and Foster v. State, 20 Fla. L. Weekly S91 (Fla. February 23, 1995), also preserved the issue by requesting expanded instructions. Moreover, this Court's opinions in both Fennie and Jackson cite James v. State, 615 So.2d 668 (Fla. 1993), on the preservation issue, and James, too, had preserved the issue by requesting an expanded instruction on the aggravator at issue there (HAC). Id. at 669.

The State recognizes that there is language in both Jackson and in Walls implying that a specific objection (pursued on appeal) may be sufficient to preserve the issue. See Fla.R.Crim.P. 3.390(d). The State would argue, however, that such would be the case only if the objection is specific enough to properly apprise the trial court of precisely what needs to be charged. See, e.g., Buford v. Wainwright, 428 So.2d 1389, 1390 (Fla. 1983) (defendant's objection contained specific oral request that trial court include in its instruction the

"requirements that the state show that as a principal that Mr. Buford have the conscious intent that the crime (murder) be committed and that he say a word or do an act toward the commission or toward the incitement . . . (of the crime"). The State would note, moreover, that, in a case decided since Jackson and Walls, this Court held that, absent a request for a different instruction, a defendant's contemporaneous objection alone was insufficient to preserve any issue of the adequacy of the standard instruction on reasonable doubt. Esty v. State, 642 So.2d 1074 (Fla. 1994). Citing James v. State, supra (the same case cited in both Jackson and Fennie on the preservation issue), this Court held in Esty that "merely raising an objection to the standard instruction is not sufficient to preserve the issue for review." Id. at 1080.

Logically, it would seem that the same rule should apply to standard instructions on sentencing aggravators; and when this Court has by its decisions explained, construed and limited the meaning of a particular aggravator, a criminal defendant who desires supplemental instructions incorporating this Court's explanations of the meaning of that aggravator should be required to specifically request such explanatory instructions in order to preserve the issue for appeal.

In this case, of course, Archer did request an expanded instruction, but his requested instruction misstated the law for reasons argued earlier, and the requested instruction was properly refused. Parker v. State, supra. In any event, even if the requested instruction was not incorrect, it nevertheless was not a Jackson-type instruction, and therefore, no Jackson issue

was preserved. Street v. State, 636 So.2d 1297, 1303 (Fla. 1994).

The state recognizes that because Jackson v. State had not been decided when Archer's resentencing proceeding took place, Archer could not have cited the Jackson opinion to the trial court. Nor is it likely that Archer could have anticipated verbatim the instruction the court proposed in footnote (8) of its Jackson opinion. But there is no reason why Archer, like Jackson, could not have asked for expanded instructions which essentially - and accurately - mirrored this Court's case-law explanations of the CCP aggravator. After all, every one of the cases cited in Jackson concerning the meaning of CCP had been decided before Archer's resentencing proceeding took place.[3]

The state would therefore contend that Archer has not preserved a claim that the trial court's CCP instruction failed to provide the guidance required by Jackson because Archer did not request an expanded instruction mirroring or even closely resembling either the instruction set out in Jackson or this Court's prior case law explaining the meaning of the various terms of the CCP aggravator. Bertolotti v. Dugger, 565 So.2d 1343, 1345(2) (Fla. 1990). Street v. State, supra.

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[3] These cases include Porter v. State, 564 So.2d 1060 (Fla. 1990) (decided three years prior to Archer's resentencing); Richardson v. State, 604 So.2d 1107 (Fla. 1992) (decided a year before Archer's resentencing); Rogers v. State, 511 So.2d 526 (Fla. 1987) (decided six years earlier); and Banda v. State, 536 so.2d 221 (Fla. 1988) (decided 5 years earlier).

(C) In Any Event, Any Error Is Harmless Because This Contract Murder Case Is Cold, Calculated and Premeditated By Any Standard

Should this Court disagree with the foregoing analysis and conclude that Archer's Jackson issue is preserved, the state would contend that any error is harmless because "The record supports a finding that the murder was, beyond a reasonable doubt, cold, calculated, and premeditated without any pretense of moral or legal justification under any definition of those terms." Fennie v. State, supra, 19 Fla. L. Weekly at S371.

As the trial court noted in its order, the murder of Billy Wayne Coker "is the classic case of 'murder for hire' - a contract murder, an execution" (R 141). The CCP aggravator is "frequently and appropriately applied in cases of contract murder or execution-style killings and 'emphasizes cold calculation before the murder itself.'" Perry v. State, 522 So.2d 817 (Fla. 1988). In fact, this Court has often stated that CCP is not only "appropriate" in contract-murder cases, but that CCP is reserved "primarily" for contract or execution-style murders (although not limited to such). See, e.g., Herring v. State, 446 So.2d 1049 (Fla. 1984); Bates v. State, 465 So.2d 490 (Fla. 1985); Hansbrough v. State, 509 So.2d 1081 (Fla. 1987); Stokes v. State, 548 So.2d 188 (Fla. 1989); Pardo v. State, 563 So.2d 77 (Fla. 1990); Green v. State, 583 So.2d 647 (Fla. 1991). Thus, this case fits squarely within the "hard core" of the CCP aggravator, not at its periphery.

The CCP aggravator is well-established in this case by Bonifay's testimony. The state would note, moreover, that Bonifay's testimony is amply corroborated by other evidence,

including the testimony of Daniel Wells (who played a part in Archer's firing and whom Archer subsequently threatened with a gun), George Wynne (whom Bonifay tried unsuccessfully to recruit into Archer's plan to commit robbery and murder), Clifford Barth (who was with Bonifay when he got the murder weapon from Archer), and Daniel Webster (who was told by Archer the next day how the crime had been committed - including shooting the clerk in the head - even though neither of them had heard on the news how the crime had been committed or whether any one had been killed at all, much less shot in the head).

None of this evidence was "disregarded by the jury." (Brief of Appellant at p.15). As for the half-million dollars, the State never contended that Archer actually had that much (T 464-65). Even Bonifay knew there was not that much in the briefcase (T 346). Archer did have money, however (T 376-77), and was willing to use it to "take care of his problems" by violent means (T 386-87).[4]

Moreover, the jury could not reasonably have concluded that it could find CCP if Archer had only planned a robbery. At the outset of the sentencing charge, the trial court told the jury:

> Ladies and gentlemen of the jury, it is now your duty to advise the court as to what punishment should be imposed upon the defendant for his crime of First Degree Murder (R 84) (Emphasis supplied).

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[4] The record does not support the assertions in Archer's brief that his job at Trout only paid a "minimum-wage salary" or that he waited "18 months" to seek revenge. Appellant's brief at p.15.

This resentencing jury knew only that Archer had been convicted of, and was to be sentenced for, first-degree murder. The state did not argue any theory of felony murder. The state's theory of the case, expressed to the jury in its closing argument, was that this was a "murder for hire" (T 456) (emphasis supplied), that Archer had recruited a "17 year-old kid" who was "mean enough and dumb enough" to do Archer's "dirty work" for him (T 464), and that Bonifay went to Trout "to kill a man that Archer wanted him to kill" (T 466). The defense, too, argued that this was the state's "whole theory here for the death penalty" and that "they claim they have proven beyond and to the exclusion of every reasonable doubt that my client wanted Daniel Wells killed . . . That's why this really all occurred. . . That's their theory" (T 477) (emphasis supplied).

The trial court's instructions authorized the jury to find CCP only if it found that:

> The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (R 85) (emphasis supplied).

Since the crime for which the defendant was to be sentenced was first-degree murder, the jury rationally could have found CCP only if it found that Archer coldly, and with calculation and premeditation planned a murder, not just a robbery. Nothing in the court's instructions, the lawyer's arguments or the jury's common sense could have authorized a CCP finding on any other theory. Thus, Hardwick v. State, 461 So.2d 79, 81 (Fla. 1984) is inapposite here.

The four elements of CCP were established here. Wuornos v. State, 644 So.2d 1000, 1008 (Fla. 1994). The first element - cold - is obviously present. Archer coldly and calmly planned his crime; he did not act out of emotional frenzy, panic or fit of rage. The second element - careful plan or prearranged design to kill - is clearly established. As noted above, the state's "whole theory" of the case was that this was a murder for hire, and the evidence shows beyond a reasonable doubt a careful and well-detailed plan to commit that crime. Third, contract murders by their very nature involve heightened premeditation. Archer's plan proceeded over a period of several days and survived one aborted attempt. As the trial court noted, Archer had "ample time for reflection" (R 141). Finally, in this case, there is "absolutely no evidence, much less a colorable claim, establishing a pretense of moral or legal justification." Walls v. State, supra, 641 So.2d at 388.

Thus, any error in instructing the jury as to CCP is harmless beyond a reasonable doubt because all four elements of this aggravator would exist under any definition.[5]

Although Archer does not raise an issue concerning the proportionality of his death sentence, the State would note that this Court has consistently approved death sentences imposed upon defendants who planned murder and enlisted others to carry out their plans. See e.g., Antone v. State, 382 So.2d 1205, 1216

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[5] Sullivan v. Louisiana, 508 U.S. ___, 113 S.Ct. ___, 124 L.Ed.2d 182 (1993) has nothing to do with the proper harmless error analysis for any "jury instruction" issues except the "reasonable doubt" jury instruction, and will be further discussed in the State's argument on Issue II.

(1980) ("Antone was the mastermind of this operation. He supplied the gun, paid the money from his pocket, and pressured Haskens to complete the task. . . . The death penalty was clearly an appropriate punishment in this case."); Williams v. State, 622 So.2d 456, 464 (Fla. 1993) ("Williams' sentence at death is not disparate with the death sentences received by the actual triggerman since he specifically directed them to kill the victims."); Heath v. State, 648 So.2d 660 (Fla. 1994) (Where defendant ordered his brother to kill the victim, the defendant's death sentence was not disproportionate to life sentence imposed upon his brother, who was the triggerman.); Craig v. State, 510 So.2d 857, 870 (Fla. 1987) (Trial court's override of life sentence recommended by jury proper even though codefendant who actually killed two victims received life sentence, because defendant "was the planner and instigator of both murders.")

The death penalty was the appropriate punishment in this contract murder and robbery case even though Archer himself did not pull the trigger, because, as the trial court stated: "It was Archer's motive, his intent, his purpose, his plan, his vengeance, and his procurement of the murder weapon which energized and enabled the others to carry out the robbery and the murder." (R 142).

ISSUE II

ARCHER FAILED TO PRESERVE ANY ISSUE OF THE NECESSITY FOR EXPANDED INSTRUCTIONS ON REASONABLE DOUBT, AND THE TRIAL COURT'S OMISSION TO DELIVER SUCH INSTRUCTIONS SUA SPONTE IS NOT FUNDAMENTAL ERROR.

Archer acknowledges that the trial judge delivered the standard penalty phase instructions, including an instruction

that the jury could consider only such aggravating circumstances as were "established beyond a reasonable doubt" (T 86). Archer's "fundamental error" argument is an implicit concession that - as the record shows - his attorney failed to request any additional instruction on this issue or to object to the reasonable doubt charge as given.

The United States Supreme Court recently held that instructions which misstate the reasonable-doubt standard cannot be harmless error. Sullivan v. Louisiana, 508 U.S. ___, 113 S.Ct. ___, 124 L.Ed.2d 182 (1993). Archer reasons that the failure to define reasonable doubt must be more erroneous than misdefining reasonable doubt, and that if such error cannot be harmless, it must be fundamental. There are several flaws in his reasoning.

First, Archer overlooks Davis v. United States, 411 U.S. 233, 36 L.Ed.2d 216, 93 S.Ct. 1577 (1973), in which the U.S. Supreme Court found that the defendant had procedurally defaulted an issue which would have been presumptively harmful if preserved for review. The Court stated:

> [The cases relied upon by petitioner] all indicated a focus on the existence of the Constitutional right, rather than its possible loss through delay in asserting it. The presumption of prejudice which supports the existence of the right is not inconsistent with a holding that actual prejudice must be shown in order to obtain relief from a statutorily provided waiver for failure to assert it in a timely manner. [411 U.S. at 245].

In other words, presumptively harmful error is not necessarily fundamental error, and the mere fact that an erroneous reasonable doubt instruction cannot be harmless error

does not necessarily mean that a criminal defendant can raise the issue at any time, in complete disregard of the usual rules for preserving issues on appeal. See Harris v. State, 438 So.2d 787, 796 (Fla. 1983) (harmless error rule does not apply to failure to instruct jury as to necessarily lesser included offenses, if properly preserved for appeal by timely objection) and McKinney v. State, 579 So.2d 80, 83-84 (Fla. 1991) (failure to instruct on lesser included offense not preserved for review because no objection to omission). Moreover, even if "fundamental", such error would not necessarily be equally fundamental at both the guilt and penalty phases of the trial. See Schlup v. Delo, 130 L.Ed.2d 808 (1995) (less exacting standard of actual prejudice to overcome procedural bar where defendant is "innocent" only of death penalty than where the defendant is actually "innocent" of the crime).

Second, and more important here, Sullivan v. Louisiana involves a reasonable-doubt instruction that was not merely incomplete, but affirmatively misstated the law. Archer's contention that the failure to define reasonable doubt is more prejudicial than a misstatement of the reasonable-doubt standard is contradicted by Henderson v. Kibbe, 431 U.S. 145, 155, 52 L.Ed.2d 203, 97 S.Ct. 1730 (1977), in which the Court noted that an "omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." Thus, even if it ever became the rule that reasonable doubt must be defined as a matter of federal constitutional law, it does not necessarily follow that a failure to define reasonable doubt would be presumptively prejudicial.

Finally, and what decisively blows Archer's define-reasonable-doubt boat out of the water is this: he does not cite a single case which says that it is constitutionally necessary to define reasonable doubt. On the contrary:

> At least two Federal Courts of Appeals have admonished their District Judges not to attempt a definition.*
>
> *See, e.g., United States v. Adkins, 937 F.2d 947, 950 (CA4 1991) ("This circuit has repeatedly warned against giving the jury definitions of reasonable doubt, because definitions tend to impermissibly lessen the burden of proof. . . . The only exception to our categorical disdain for definition is when the jury specifically requests it."); United States v. Hall, 854 F.2d 1036, 1039 (CA7 1988) (upholding district court's refusal to provide definition, despite jury's request, because "at best, definitions of reasonable doubt are unhelpful to the jury. . . . An attempt to define reasonable doubt presents a risk without any real benefit.").

Victor v. Nebraska, ___ U.S. ___, ___ S.Ct. ___, 127 L.Ed.2d 583, 602 (1994) (Ginsburg, J., concurring). See also Whiteside v. Park, 705 F.2d 869, 871 (6th Cir. 1983); Dunn v. Perrin, 570 F.2d 21, 23 (1st Cir. 1978).

Whether or not this Court agrees with the notion that it is imprudent to attempt a definition of reasonable doubt (Justice Ginsburg herself does not, Victor v. Nebraska, supra at 603), nevertheless it is clear that "the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course." Victor v. Nebraska, supra, at 590 (opinion of the Court). Since there is no Constitutional requirement that reasonable doubt be defined, it follows that the failure to define reasonable doubt cannot possibly be fundamental error as a matter of federal Constitutional law.

Nor do the opinions of this Court support Archer's fundamental-error claim as a matter of State law. See, Esty v. State, 642 So.2d 1074, 1079-80 (Fla. 1994) (defendant's complaints about the trial court's reasonable doubt instruction not preserved for appellate review); Armstrong v. State, 642 So.2d 730, 737 (Fla. 1994) (absent objection, claim that reasonable doubt instruction invalid, procedurally barred); Parker v. State, 641 So.2d 369, 375 (Fla. 1994) (complaint about wording of reasonable doubt instruction not preserved for review); Kight v. State, 53 So. 541 (Fla. 1910) (failure to define reasonable doubt not error where there is no request for such instruction).

The foregoing leads ineluctably to the conclusion that the trial court's failure to define reasonable doubt sua sponte is not fundamental error as matter of federal constitutional or state law, and whether or not reasonable doubt must be defined on request at the penalty phase is an issue that Archer has procedurally defaulted.

The trial court did not err by delivering the standard penalty phase instructions, including an instruction that the two aggravators alleged by the State could only be considered if proved beyond a reasonable doubt.

ISSUE III

ARCHER FAILED TO PRESERVE ANY ISSUE OF THE NEED FOR ANY OF THE ADDITIONAL INSTRUCTIONS AT ISSUE HERE, AND THE TRIAL COURT'S OMISSION TO DELIVER SUCH ADDITIONAL INSTRUCTIONS SUA SPONTE IS NOT FUNDAMENTAL ERROR.

As Archer concedes in his brief, he neither requested any of the additional instructions at issue here,[6] nor objected to the instructions delivered by the court. As the cases cited by the state in its argument as to Issue I demonstrate, absent an objection to the charge delivered or a request for additional instructions, this issue is not preserved for appeal. Rule 3.390 of the Rules of Criminal Procedure.

Naturally, Archer now contends that the omission to deliver additional, unrequested instructions was such fundamental error that his procedural default should be overlooked. He cites three cases in support of his fundamental error claim.

In Wike v. State, 19 Fla. L. Weekly S617 (Fla. November 23, 1994), this Court held that a trial court's erroneous denial of final closing argument for the defense at the penalty phase could not be harmless. Not only was there no jury instruction issue in Wike, but Wike timely objected at trial, and this Court's acknowledgment that the final-closing-argument issue can be procedurally defaulted, id. at S618, offers no support for Archer's claim that his jury-instruction issue cannot be procedurally defaulted.

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[6] His requested CCP instruction is discussed in the state's argument as to Issue I, and his age-mitigator and great-weight requests are discussed in the state's argument as to Issues V and VI.

Sullivan v. Louisiana, supra, is discussed ante, and obviously involves a rule of harmless error specific to instructions misstating the reasonable doubt standard. Besides being irrelevant to other jury instruction errors, the case simply does not address any procedural default issue.

Finally, Rojas v. State, 552 So.2d 914 (Fla. 1989), is also inapposite. Cases involving jury instructions relating to necessarily included lesser offenses comprise a unique sub-species of jury instruction cases. See Harris v. State, 438 So.2d 787 (Fla. 1983). Moreover, Rojas, like the other two cases cited by Archer, does not involve any procedural default issue. Compare McKinney v. State, 579 So.2d 80 (Fla. 1991) (issue of court's failure to instruct on lesser included offense procedurally barred).

The State has already set forth in its argument as to Issue II why the trial court's omission to define reasonable doubt sua sponte is not fundamental error. Archer implicitly concedes that the omissions at issue here are less "fundamental" than the omission to define reasonable doubt. (See Appellant's Brief at p. 24: "Issue II involves merely the most obviously and easily egregious error the court made regarding the instructions it gave in this case."). The state would note that many of the guilt-phase type charges he belatedly contends for would not even have been appropriate at this resentencing proceeding, much less required.

For example, instruction 2.02 tells the jury that the defendant in this case "has been accused of" the crime charged.

This instruction obviously is inapt; Archer had not only been accused, he had been found guilty of first-degree murder, as the court correctly instructed the jury at the outset of the case (T 222).

Instruction 2.03 tells the jury that the defendant has entered a plea of not guilty and must be presumed innocent. Obviously, Archer previously had been found guilty and no longer enjoyed a presumption of innocence. Instruction 2.04(d) (concerning a defendant not testifying) includes a warning that it should be given only if the defendant requests it (and Archer did not). Instruction 2.04(e) appears to be directed towards in-custody statements by the defendant and no such statements were introduced at Archer's sentencing proceeding. In any event, there is no evidence in this record that any of Archer's out-of-court statements were obtained by threats or promises.

Instruction 2.05 tells the jury, among other things, that its duty is to determine if the defendant is guilty or not guilty, and that its verdict must be unanimous. These portions, at least, would have been clearly inappropriate to charge this resentencing jury. Instruction 2.09 also includes a jury unanimity requirement. Instruction 2.07 tells the jury that deciding a verdict is "exclusively" the jury's job. This, too, would be incorrect at the penalty phase. Fla. Stat. §921.141(3). Instruction 3.01 is a dubious instruction at either phase; the State would note that there is a pending proposal to amend 3.01 on the ground that it is "both insufficient and erroneous." Fla. Bar News, Vol. 22, No. 6 (March 15, 1995), Official Notice of Proposed Amendments to Jury Instructions, p.4.

Moreover, it is difficult to see what benefit Archer could have derived from some of the other instructions he now contends should have been delivered.

For example, Instruction 2.04(a), concerning expert testimony, would have provided no conceivable benefit to Archer because the only expert testimony concerned the autopsy and the ballistics comparison, and there was no issue about the cause of death or who killed the victim.

But whether or not any of these charges might have been appropriate at the penalty phase, or could have been appropriate if edited and modified, or could possibly have been of any benefit at all to Archer, none of them reaches down to the "very legality of the trial itself", and nothing here justifies a finding of fundamental error. Smith v. State, 240 So.2d 807 (Fla. 1970); Ray v. State, 403 So.2d 956 (Fla. 1981). Whether or not any of these instructions should be delivered on request at a resentencing proceeding is an issue that Archer has not preserved for review. Wyatt v. State, 641 So.2d 355, 360 (Fla. 1994). Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

ISSUE IV

TO THE EXTENT THAT THE ISSUE IS PRESERVED FOR REVIEW, THE TRIAL COURT DID NOT ERR BY ALLOWING THE VICTIM'S WIFE TO GIVE VICTIM-IMPACT TESTIMONY.

Sandra Coker (the victim's wife) gave testimony that in its entirety fills three pages of the trial transcript (T 396-99). Much of her testimony was admissible aside from any victim-impact relevance. For example, she confirmed that the Trout Auto Parts store where Coker was working the night he was killed was not his

regular store; he was merely filling in for Daniel Wells (T 397-98). She also testified that she and the victim had two children - a son and a daughter - which, as the prosecutor argued (T 464), corroborated Barth's testimony that the victim had pleaded for his life on behalf of his son and daughter (T 286). (The prosecutor argued: "And the thing significant about that, there is no way Barth could have known that Billy Wayne Coker had two children, a boy and a girl" (T 464).)

The strictly victim-impact testimony consists of the following four paragraphs:

> Wayne was a - he was a good man. I lived with him for 12 years. I know the good side and the bad side. I will tell you the good side outweighed the bad. He loved our children and we had a good relationship, and we miss him terribly. It's - it's hard to express your whole heart and how you totally feel, but Wayne I feel like was an asset to the community and he wasn't a troublemaker and he didn't go out drinking. He was working on a Saturday and he was not out doing other things that he could have been doing. He was working for his family and trying to buy us the things that we needed, you know, to stay alive and to - for us to have a few things to enjoy.
>
> And he was - I have missed him greatly and if he had not been that type of person and with the Lord's help, I tell you I couldn't have went on. His character of the example that he set with me has carried me and the children. . . . (T 396-97).
>
> It's had a hard impact on us. The - like I was saying, I have never taken so much medicine in my life. It traumatizes what other conditions that you might have. And my son, he's had extremely bad nightmares and he sees a psychiatrist. And Shelley has seen a psychiatrist. She has seen a counselor and she has got - she got the shingles, and they said it was very unusual for a small child to get them like that. First it was carrying stress worrying about his dad. . . .

> Her speech impediment had gotten real low after seeing some things on TV which had worried her, and she kept to herself. And so they - and I didn't know what the future holds for them because sometimes we don't know everything with kids, you know. They say what happens in your childhood has a - has an effect on your adulthood. I still got all of that to go through with two, you know. . . . (T 398-99).

At trial, Archer moved to exclude victim-impact evidence on the grounds (1) that Section 921.141(7) is unconstitutional, (2) that the proffered testimony was not admissible under the statute, and (3) that as applied in this case, the statute is an ex post facto law (R 68-79).

On appeal, Archer again raises grounds (2) and (3) above, but his constitutional argument on appeal is entirely different than his constitutional argument at trial. At trial, Archer contended that Section 921.141(7) is unconstitutional because it is too vague, because it provides no guidance as to how victim-impact evidence should be used and because it is inherently emotional and prejudicial in violation of due process. Archer did not attack the admissibility of victim-impact evidence "per se" under the Eighth Amendment to the United States Constitution or under the Florida Constitution (R 198). The Eighth Amendment issue, of course, has been decisively foreclosed by Payne v. Tennessee, ___ U.S. ___, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), which holds that "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar." 115 L.Ed.2d at 736. On appeal, however, Archer apparently contends that this

Court should find victim impact evidence inadmissible per se as a matter of State constitutional law, following the reasoning of the United States Supreme Court's pre-Payne decisions of Booth v. Maryland, 482 U.S. 496, 96 L.Ed.2d 440, 107 S.Ct. 2529 (1987) and South Carolina v. Gathers, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989), both of which were overruled in Payne. Since this argument was not made below, the State would contend that it has not been preserved for review. See Peterka v. State, 640 So.2d 59 (Fla. 1994); Bertolotti v. State, 565 So.2d 1343 (Fla. 1990); Jackson v. State, 451 So.2d 458 (Fla. 1984); Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

Alternatively, the State would contend that Archer's inadmissible-per-se argument is without merit, as are his other grounds for attacking the admission of Sandra Coker's testimony, for reasons discussed below.

THE CONSTITUTIONALITY OF SECTION 921.141(7)

The Payne decision does not entirely overrule Booth v. Maryland, supra. That portion of Booth which holds that "the admission of a victim's family member's characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment" was left undisturbed in Payne v. Tennessee. 115 L.Ed.2d at 739 (fn. 2). See also id. at 740 (O'Connor, J., concurring); id. at 742 (fn. 1) (Souter, J., concurring). No such evidence is authorized by §921.141(7), and no such evidence was introduced in this case.

Nor does Payne require the admission of victim impact evidence.[7] Rather, Payne merely reaffirms the general rule that once the decision-maker's judgment has been sufficiently narrowed by rational threshold criteria, "the Court has deferred to the State's choice of substantive factors relevant to the penalty determination." Id. at 734-35 (quoting California v. Ramos, 463 U.S. 992, 1001, 77 L.Ed.2d 1171, 103 S.Ct. 3446 (1983)). Payne explicitly recognizes the State's "legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as a murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." Payne v. Tennessee, supra, 115 L.Ed.2d at 735.

Contrary to Archer's contention on appeal, §921.141(7) does not "significantly differ[] from what the nation's high court permitted in Payne." (Brief of Appellant at p.33). The reach of Section 921.141(7) will be more fully discussed later, but the State would point out here that Payne specifically authorizes consideration of the "unique loss to society" caused by the

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[7] See Id. at 739 (O'Connor, J., concurring). There is language, however, in the majority and concurring opinions indicating that the exclusion of victim-impact evidence is inconsistent with the Eighth Amendment. See id. at 733 (the exclusion of victim-impact evidence "unfairly weigh[s] the scales in a capital trial"); id. at 735 (the exclusion of victim impact evidence may prevent the jury from having before it "all the information necessary to determine the proper punishment for a first-degree murder:); id. at 744-45 (Souter, J., concurring) ("given a defendant's option to introduce relevant evidence in mitigation, [cits.], sentencing without such evidence of victim impact may be seen as a significantly imbalanced process.")

defendant's crime as well as consideration of the particular loss to the victim's family. Thus, even if Section 921.141(7) were interpreted to require the consideration of the "generalized loss" to the community as a whole, as Archer contends (Brief of Appellant at p.34), rather than the loss to the "community's members" (which would, of course, include the victim's family) as the statute specifically states, the statute would not run afoul of Payne.

Nor can the State agree that anything about §921.141(7) would "undermine the very foundation on which this Court's decisions in death penalty cases have been built." (Brief of Appellant at p.34). On the contrary, §921.141(7) readily may be applied in a manner that is perfectly consistent with the philosophical underpinnings supporting this Court's cases over the years.

As Archer contends, this Court has consistently applied the rule that aggravating factors are limited to those specifically enumerated as such in §921.141(5). See, e.g., Miller v. State, 373 So.2d 882, 885-86 (Fla. 1979). The State agrees with Archer's contention that §921.141(7) does not create a new aggravating factor, because, as he correctly observes, "the legislature did not list it as one under §921.141(5)" (Brief of Appellant at p.37), and by the explicit terms of paragraph (5), "Aggravating circumstances shall be limited" to those specifically enumerated in that paragraph.

However, because this Court might disagree with this analysis, the State will first address the constitutionality of

allowing victim-impact evidence in aggravation, and then return to the question of what the State thinks §921.141(7) does.

The State would note, first, that no matter how §921.141(7) is perceived, it clearly does not create a "nonstatutory aggravator", as Archer contends, for the very simple reason that it is included in the statute. Therefore, Grossman v. State, 525 So.2d 833, 842 (Fla. 1988), on which Archer relies, is inapplicable, because at the time Grossman was decided, victim impact was not in §921.141. Now it is. Clearly, the legislature may add to the exclusive list of statutory aggravators, and has done so before. See, e.g., Laws 1987, c. 87-368, adding subsection (5)(j); Laws 1988, c. 88-381, adding subsection (5)(k).

Second, §921.141(7) clearly does not create a new "threshold" aggravator that could by itself justify a death sentence. By its terms, §921.141(7) authorizes the introduction of victim impact evidence only after the prosecution has first produced evidence establishing one or more of the paragraph (5) aggravators. Therefore, even if §921.141(7) is interpreted to allow the consideration of victim impact evidence as additional evidence in aggravation, the statute would not suffer the constitutional infirmity that Archer contends - i.e., that it fails to "genuinely narrow" the class of persons eligible for a death sentence (Appellant's Brief at p.38).

Archer's argument here fails to take into consideration the "two different aspects of the capital decision making process: the eligibility decision and the selection decision." Tuilaepa

v. California, ____ U.S. ____, ____ S.Ct. ____, 129 L.Ed.2d 750, 759 (1994). At the eligibility stage, "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 877, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). However, once the state has established that a defendant is eligible for a death sentence, "the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death." Id. at 878. "Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty . . . , the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment." California v. Ramos, 463 U.S. 992, 1008, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983).

It is not written in stone that a "statutory" aggravating factor is necessarily an eligibility factor. The California system approved in Tuilaepa v. California, supra, includes both statutory eligibility factors and statutory selection factors. Selection factors may be weighed in the sentencing decision; however, because they need not be independently capable of justifying a death sentence, they need not meet the strict requirements for eligibility factors, and may encompass open-ended subject matter. Id., 129 L.Ed.2d at 763.

Therefore, the Florida Legislature, consistent with the United States Constitution and with the long-standing policy of this State to limit aggravating circumstances to those

specifically enumerated in the statute, could have statutorily authorized the consideration of victim impact evidence as additional evidence in aggravation that the jury could consider at the selection stage. Payne v. Tennessee, supra.

Nevertheless, it does not appear from the manner in which §921.141 was amended that the legislature meant for such evidence to be considered as an aggravating circumstance, for reasons discussed earlier. The State would agree with Archer on this. However, the State cannot agree that victim impact is therefore irrelevant. State v. Maxwell, 19 Fla. L. Weekly D1706 (Fla. 4th DCA August 10, 1994).

It is true that Justice Scalia's concurring opinion in Payne refers to victim impact as "aggravating evidence," Id. at 741, but the opinion of the Court discusses victim impact in terms of its relevance as a species of rebuttal to mitigation, rather than as evidence which is independently aggravating, viz: " . . . [T]here is nothing unfair about allowing the jury to bear in mind [the] harm [caused by the defendant] at the same time as it considers the mitigating evidence introduced by the defendant," Id. at 736; "[The State has a] legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in . . ." Id. at 735.

Victim impact evidence, which is "simply another form or method of informing the sentencing authority about the specific harm caused" by the defendant, Payne, supra at 735, is logically relevant to counter whatever the sentencer might otherwise consider mitigating about the defendant or his crime. And this

is so whether or not a capital defendant presents evidence in mitigation at the penalty phase; whether or not he does so, he is, unlike the victim, present at trial, and is an observably unique human being entitled to an individualized sentencing in which the jury must consider anything that might be mitigating about the defendant, his character or record, or any of the circumstances of the offense. Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); Castro v. State, 547 So.2d 111, 116 (Fla. 1989).

There is nothing the least bit unfair or illogical about authorizing the jury to bear in mind victim impact while it considers whether or not "sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist," Fla. Stat. 921.141(2)(b), and the Florida legislature cannot be faulted for enacting Section 921.141(7).

In short, §921.141(7) clearly is not unconstitutional under the United States Constitution; victim impact evidence is admissible as a counter to mitigation; and Archer offers no real reason for declaring §921.141(7) unconstitutional under the State Constitution.[8]

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[8] The State would note that a large number of states have addressed the admissibility of victim-impact evidence since Payne, and have concluded that such evidence is admissible: E.g., McMillan v. State, 594 So.2d 1253, 1274 (Ala. Crim. App. 1991); People v. Edwards, 54 Cal. 3d 787, 819 p.2d 436, 465-67 (1991); Livingston v. State, 264 Ga. 402, 444 S.E.2d 748 (Ga. 1994); State v. Card, 121 Idaho 425, 825 P.2d 1081, 1088-89 (1991); State v. Howard, 147 Ill. 2d 103, 588 N.E.2d 1044, 1066-67 (1991); Benirschke v. State, 577 N.E. 2d 576, 578 (Ind. 1991); Evans v. State, 333 Md. 660, 637 A.2d 117, 129-32 (1994); State v. Williams, 239 Neb. 985, 480 N.W. 2d 390, 401 (1992); Hamick v. State, 108 Nev. 127, 825 P.2d 600, 605-07 (1992); State v. Lorraine, 66 Ohio St. 3d. 414, 613 N.E.2d 212, 219

APPLYING §921.141(7) TO THIS CASE

Section 921.141(7) provides that the victim impact evidence which the prosecutor may introduce "shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death."

The State does not follow Archer's reasoning when he declares that the "legislature must have meant . . . that the victim was sufficiently distinguished from the rest of humanity that he or she was distinct or unusual," or that "there must be some objective standard by which victims can be measured in which some will emerge as sufficiently unusual to be considered further and others will remain with the great unwashed." (Brief of Appellant at p. 41).

As has been observed, as a "general matter, . . . victim impact evidence is not offered to encourage comparative judgements of this kind - for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murdered of a reprobate does not." Payne, supra at 734. Whether or not Wayne Coker was a "significant contributor to society, . . . [he is] nonetheless a murdered human being," id., and is morally entitled to be considered as the unique individual that he was, not as a "faceless stranger." Id. at 735.

(1993); State v. Johnson, 306 S.C. 119, 410 S.E.2d 547, 555 (1991); State v. Smith, 857 S.W.2d 1, 14 (Tenn. 1993); State v. Young, 853 P.2d 327, 353 (Utah 1993); State v. Gentry, 125 Wash. 570, ___ P.2d ___ (1995).

Nor can the State understand why it should matter that the "loss to the community's members" is not readily susceptible to objective measurement. (See Appellant's Brief at p.43). Victim impact is of necessity an open-ended subject matter, but "open-ended factors" have "obvious utility . . . as part of a neutral sentencing process." Tuilaepa v. California, supra, 129 L.Ed.2d at 763.

Whatever issues might arise in the future concerning what is the relevant "community" (Appellant's Brief at 44-45), in this case Wayne Coker's wife and two children were clearly three community members who suffered a loss as a result of the victim's death. The testimony given in this case was of the kind contemplated by the statute. The trial court did not err by admitting it pursuant to §921.141(7).

APPLICATION OF THE EX POST FACTO CLAUSE

"Even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto." Dobbert v. Florida, 432 U.S. 282, 293, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977). Accord, Glendening v. State, 536 So.2d 212 (Fla. 1988). Of course, "the distinction between substance and procedure might sometimes prove elusive." Miller v. Florida, 482 U.S. 423, 433, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987). However, it is difficult to see how the effect of §921.141(7) could be *anything* other than procedural: It does "not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt." Miller v. Florida, supra at 433 (quoting Hopt v. Utah, 110 U.S. 574, 590, 4 S.Ct. 202, 28 L.Ed.262 (1884)). As in

Dobbert v. Florida, supra, the "new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime." 432 U.S. at 293-94. See also State v. Maxwell, 19 Fla. L. Weekly D1706 (Fla. 4th DCA August 10, 1994). Therefore, §921.141(7) is not an ex post facto law as applied to Archer.

Should this Court disagree with any of the foregoing, however, the State would point out that Sandra Coker's testimony in its entirety fills only three pages of the trial transcript, and the victim impact portion less than that, out of almost 200 pages of trial testimony. In light of the evidence presented showing how this murder for hire was planned and committed and how the victim was shot to death as he pleaded for his life on behalf of his two children, and the limited mitigation presented, Sandra Coker's testimony had an inconsequential impact on the jury's evaluation of the proper sentence. State v. DiGuilo, 491 So.2d 1129 (Fla. 1986). Stein v. State, 632 So.2d 1361, 1367 (Fla. 1994).

For all of the above reasons, there was no reversible error in the admission of victim impact testimony in this case.

ISSUE V

THE COURT DID NOT ERR BY GIVING THE STANDARD PENALTY PHASE JURY INSTRUCTIONS CONCERNING THEIR SENTENCING RESPONSIBILITIES, PARTICULARLY WHERE THE COURT INSTRUCTED THE ENTIRE JURY PANEL AT VOIR DIRE THAT THE JURY'S ADVISORY SENTENCE WOULD BE GIVEN GREAT WEIGHT

Early in the jury voir dire, defense counsel objected to a prosecutor's voir dire question concerning the role of the court as the ultimate sentencer (T 24). In response to the objection, the court delivered this clarifying instruction to the entire jury venire:

> Ladies and gentlemen, please listen carefully. Your advisory sentence as to what sentence should be imposed on this defendant is entitled by law and will be given great weight by this Court in determining what sentence to impose in this case. It's only under rare circumstances that this Court could impose a sentence other than what you recommend. (T 25-26).

After the jury was selected, but before it was sworn, the court told the jury, "you are co-judges in this case." (T 166). Then, after swearing in the jury, prior to the presentation of evidence, the Court delivered, inter alia, the standard jury instruction (as amended July 2, 1992, 603 So.2d 1175) that:

> Final decision as to what punishment shall be imposed rests solely with the judge of this court. However, the law requires that you, the jury, render to the court an advisory sentence as to what punishment should be imposed on the defendant. (T 222).

Finally, after the close of the evidence and the arguments, the Court delivered the standard instruction that:

> As you have been told, the final decision as to what punishment shall be imposed is the

> responsibility of the judge; however, it is your duty to follow the law that will now be given to you by the court and render to the court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist. (T 494-95).

Because the "standard jury instructions fully advise the jury of the importance of its role," Sochor v. State, 619 So.2d 285 (Fla. 1994), the trial judge had no obligation to go "beyond the approved standard jury instructions." Wournos v. State, 19 Fla.L.Weekly S455, 459 (1994). Archer's complaint especially lacks merit because here the trial court did, in fact, go beyond the standard instructions and (albeit, before the jury was sworn) actually delivered the very instruction he now contends the court erred by not giving.

There is no reasonable possibility that Archer's jury failed to understand the importance of its advisory sentence. Harich v. Dugger, 844 F.2d 1464, 1475 n.16 (11th Cir. 1988).

ISSUE VI

THE TRIAL COURT DID NOT ERR BY REFUSING TO INSTRUCT THE JURY THAT THE AGE OF THE DEFENDANT WAS A POSSIBLE STATUTORY MITIGATOR.

This Court has held that an age of 24 is "iffy" as a mitigating circumstance, King v. Dugger, 555 So.2d 355, 358 (Fla. 1990), and that an age of 24 alone "will not establish a mitigating factor." Scull v. State, 533 So.2d 1137, 1143 (Fla. 1988). Archer was older than 24 - he was 26 at the time of his crime. The trial court properly refused to instruct the jury on the age mitigator. Cave v. State, 476 So.2d 180, 187 (Fla. 1985); Lara v. State, 464 So.2d 1173, 1179 (Fla. 1985).

Nor is it necessary for this Court to re-examine these cases, as Archer contends, in light of Espinosa v. Florida, ____ U.S. ____, 112 S.Ct. 2928, 120 L.Ed.2d 854 (1992). A more recent case decided by the United States Supreme Court fully supports the results of these cases.

At issue in Tuilaepa v. California, ____ U.S ____, ____ S.Ct. ____, 129 L.Ed.2d 750 (1994), were several sentencing-phase jury instructions, including an instruction to consider the age of the defendant. Unlike our Florida age-mitigator instruction, however, the California instruction does not characterize a defendant's age as mitigating; in fact, California prosecutors typically argue that a defendant's age is aggravating, "no matter how old or young he was at the time of the crime." Id. at 763. Tuilaepa argued that the age instruction was unconstitutionally vague because it was equivocal - age could be considered mitigating or aggravating. The Supreme Court responded:

> It is neither surprising nor remarkable that the relevance of the defendant's age can pose a dilemma for the sentencer. But difficulty in application is not equivalent to vagueness. Both the prosecution and the defense may present valid arguments as to the significance of the defendant's age in a particular case. (Ibid).

(See also, Id. at 767, Souter, J., concurring: "[R]efusing to characterize ambiguous evidence as mitigating or aggravating is . . . constitutionally permissible.")

In our case, Archer was entitled to argue and the jury was authorized to consider his age in mitigation under the general mitigation instruction. Echols v. State, 484 So.2d 568 (Fla. 1985). The prosecutor, on the other hand, was not authorized

under Florida law to argue that Archer's age was aggravating. Miller v. State, 373 So.2d 882 (Fla. 1979). Archer's situation concerning the use of his age was more favorable to him than that approved in Tuilaepa v. California, and there was no error here.

ISSUE VII

THE TRIAL COURT DID NOT ERR BY GRANTING MOTIONS TO STRIKE JURORS FOR CAUSE THAT WERE AGREED TO BY THE DEFENSE

As the outset of the voir dire examination, the State asked the venire if "anyone here . . . could not recommend the death penalty for someone convicted of first-degree murder who did not actually do the killing?" (T 17). Archer's attorney objected:

> Your Honor, that is a legitimate mitigating factor. I mean, it's just that they shouldn't be serving on the jury because they would vote for a life -
>
> [M]y point is though it seems to me that he's in essence to commit on their vote on this factor from the inception. (T 18).

The trial court, noting that the prosecutor was merely "ask[ing] the question right now," overruled the objection (T 18).

Later, near the end of the voir dire process, the prosecutor moved:

> to strike the following jurors for cause based upon their representation they don't believe in the death penalty or could not recommend it for the non-triggerman: Carolyn Shuler, juror no. 1; Lance Zachary, juror no. 2; Emma Pineda, juror no. 3; Willie Longmire, juror no. 4; and Lillian Lee, juror no. 6. And that's all. (T 71).

Contrary to what Archer now contends (Appellant's Brief at p. 54)., Emma Pineda was juror number 3, not juror number 2.

Archer's attorney agreed with State's motion to strike Emma Pineda for cause (T 72), along with all of the others in this group except the real juror number 2, Lance Zachary, as to whom the State withdrew its motion to strike (T 72).[9] Lance Zachary, in fact, was selected as a juror in this case (T 155, 162).

Having agreed at trial to excusing jurors for cause on the basis of their inability to impose a death sentence for a non-triggerman, and not one such juror having been excused over his objection, Archer has failed to preserve for appeal any issue of the appropriateness of excusing any such juror. Peterka v. State, 640 So.2d 59, 65 (Fla. 1994); White v. State, 446 So.2d 1031, 1035 (Fla. 1984).

Although we do not know if any of these jurors would have been excused if Archer had not agreed to their excusals, it would not have been an abuse of discretion if the trial court had, over Archer's objection, excused jurors who could not "faithfully and impartially apply the law" allowing a death sentence for a non-triggerman who hires someone to kill for him. Hannon v. State, 19 FLW S447 (Fla. 1994); Castro v. State, 644 So.2d 987, 989 (Fla. 1994); Peterka v. State, supra at 66.

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[9] Archer's attorney stated: "I will agree as to No. 1. I believe the State is correct as to No. 3. And the State is correct as to No. 4 and to No. 6, but I thought while Mr. Zachary was on the undecided column, I think we rehabilitated him" (T 72). The prosecutor responded: "I agree as to Mr. Zachary. He did come back and agree." (T 72).

The Court then asked Archer's attorney, "You agree as [to] 1, 3, 4 and 6?" The attorney answered: 'I do. I think it's a fair summary by the prosecutor." (T 72).

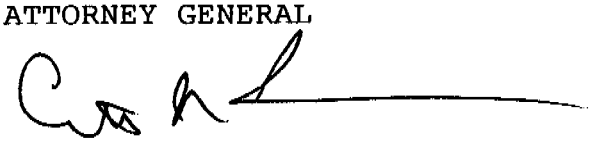
Thus, no error occurred here.

CONCLUSION

Based on the foregoing arguments and authorities, the State would urge this Court to affirm the judgment of the court below.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to , Mr. David A. Davis, Assistant Public Defender, Second Judicial Circuit, Leon County Courthouse, Fourth Floor, 301 South Monroe Street, Tallahassee, Florida 32301, this 13th day of April, 1995.

CURTIS M. FRENCH
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