IN THE SUPREME COURT OF FLORIDA

ROBIN ARCHER,

Appellant,

v. CASE NO. 83,258

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

This is a capital resentencing appeal. Robin Archer was one of four defendants involved in the 1991 murder of an Auto Parts Store clerk. One of the other defendants, Patrick Bonifay, the actual killer, was convicted of the murder and sentenced to death. His conviction was affirmed, but like Archer's death sentence, his was also reversed and his case remanded. Bonifay v. State, 626 So. 2d 1310 (Fla. 1993). The most troubling issues deal with the court's instructions to the jury, and several issues focus on what guidance the court did or did not give the jury.

STATEMENT OF THE CASE

An indictment filed in the circuit court for Escambia County on February 26, 1991 charged Robin Archer, Larry Fordham, Clifford Barth, and Patrick Bonifay with one count of first degree murder, one count of armed robbery, and one count of grand theft (R 1-2). Archer proceeded to trial and was found guilty as charged on all of the counts and sentenced to death. On appeal, this court affirmed the convictions, but reversed the death sentence and remanded for a new sentencing hearing before a jury. Archer v. State, 613 So. 2d 446 (Fla. 1993).

On remand, the defendant filed several motions relevant to this appeal:

> 1. Motion for Determination that Section 921.141(7), F.S. is Unconstitutional and to Preclude Evidence or Argument on Victim Impact.
>
> 2. Motion to exclude Victim Impact Evidence and any Argument by the Prosecutor Related Thereto.
>
> 3. Motion to Prohibit Application of Florida Statute 921.141(7).

(R 68-79). The court denied all of them (T 192-93).

Archer proceeded to the resentencing before Judge T. Michael Jones. After selecting a jury, they heard evidence, argument and instructions regarding the sentence they should recommend. They returned a death recommendation by a vote of 7-5 (R 89). The court followed that advice and sentenced Archer to death. In aggravation, it found,

> 1. The murder was committed during the

course of a robbery.

2. It was committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification (R 140-42).

In mitigation, the court found that Archer had no significant history of prior criminal activity (R 142). It also held that the defendant had been a loving son to his parents and a good family member to other relatives (R 144).

This appeal follows.

STATEMENT OF THE FACTS

Most of the facts presented here come from the state's star witness, Patrick Bonifay, who was also a co-defendant with Archer. His version of what happened was seriously challenged by other witnesses, and where his story varies with what others claimed happened, the differences will be indicated either in a footnote or at the end of the facts.

Robin Archer, the defendant in this case, had worked at one of the several Trout Auto Parts stores in Pensacola but had been fired (T 243). One of the employees, Daniel Wells, may have had something to do with the lay off (T 243). It is not known what the defendant did for the next several months, but later he attended a motorcycle school in Daytona Beach (T 417). He eventually returned, but apparently because he did not have any money or a job he stayed with friends, relatives, and acquaintances (T 345-46, 270). Even his girlfriend had to loan him money (T 348).

On Thursday January 24, 1991 Bonifay claimed Archer, who was his stepcousin (T 330), asked him to kill Wells because he had been instrumental in getting him fired from Trout Auto Parts (T 335). He showed Bonifay a briefcase full of money, estimated at $500,000, which the defendant said would be his if he did what he asked (T 331, 346). Archer told his cousin to make the murder look like a robbery by taking the money from the cash till and the drop boxes used by the employees from the other stores to deposit receipts at the end of the day (T

333-34). He also warned him about the security camera at the store.

The next night Bonifay got a gun,[1] and two other men, Clifford Barth and Eddie Fordham, drove to the W Street branch of Trout Auto Parts. While the two other men waited in the car, Bonifay walked up to the night counter and asked Wells, who was the clerk, for a car part. Wells turned his back to Bonifay and heard him cock the gun (T 245).[2] Bonifay did not shoot Wells but returned to the car instead, and the trio drove away.

On Saturday, Bonifay told Archer that he did not want to kill anyone, but the defendant threatened to hurt the co-defendant's mother and girlfriend if he did not go through with the murder (T 336).[3] Bonifay relented and he, Barth, and Fordham returned to the parts store that night. Wells, however, was not the clerk. Instead, Wayne Coker was filling in for him because Wells was sick (T 248-49).

Bonifay and Barth went to the night window, and the latter grabbed Bonifay by the arm causing him to shoot Coker in the

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[1]Bonifay went to a Kelly Bland to get a weapon, but Bland said he had given his gun to Archer (T 334). Bonifay then went to Archer who gave him the pistol (T 334).

[2]Bonifay denied cocking the gun (T 362) even though Barth testified that Bonifay did not kill Wells on Friday because he had heard the gun being cocked (T 205).

[3]Bonifay never revealed the threat Archer allegedly made until he testified at the defendant's trial (T 162).

back (T 338). Noticing that the clerk was still alive, Barth took the gun and shot him again (T 339-40).

The two boys climbed through the window, and Bonifay heard Coker say "something about some kids or something." Bonifay told him to be quiet (T 339).[4] The pair cut the locks off the night box and took the receipts and other money they could find. Then, according to Bonifay, Barth told him that Coker was still alive, and he should kill him (T 339). So, Bonifay, because the victim had heard his name and had seen him (T 339), shot him two more times in the head (T 340), killing him.

The two young men got back into Fordham's car and sped away. They eventually stopped, threw away the checks, and divided the money three ways (T 341).

When Bonifay saw Archer the next day, the latter was giggling, and he refused to pay him because he had shot the wrong person (T 343). Bonifay did nothing because he was afraid of Archer (T 343). The previous night, however, he had been giddy with excitement, joking and laughing about what had happened (T 298).

The next night Archer heard about the robbery/murder, and he told Daniel Webber, an acquaintance he was staying with. that he knew who might have committed the crimes (T 271).

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[4]According to Barth, Coker asked Bonifay not to "shoot him no more because he had kids and a wife, and he wouldn't say nothing to the police." Bonifay told him to "shut the fuck up and fuck your kids." (T 286)

Webber subsequently called the police (T 272). Some time later, Bonifay told Jennifer Tatum, Kelly Bland's girlfriend, that he had killed Coker, but he made not mention of either Archer's threats or the $500,000 (T 409).

SUMMARY OF THE ARGUMENT

Robin Archer presents four arguments for this court to consider. The first three deal with the court's jury instructions. Specifically, the court never instructed the jury on the definition of reasonable doubt. Nor did it give them any of the general instructions contained in the standard jury instructions. The failure to provide any definition of reasonable doubt is particularly egregious, and the failure to object to this deficiency does not preclude this court from reviewing the lower court's error. Reasonable doubt, after all, is one of the hallmarks of the American criminal justice system. If the jury was told it could find particular aggravating factors only if the state had proven them beyond a reasonable doubt, it makes sense that they needed to be told what it is. They were, however, never given any definition of it.

The reasonable doubt instruction, however, was just one of several general instructions the court should have but did not provide the jury. Of the several omissions made by the court, the most egregious involved never providing them with any guidance regarding the weighing of the evidence, the inherent unreliability of accomplice testimony, or the warning about not holding Archer's not testifying against him. Not giving these instructions plus several other of them provide ample justification for this court to review the court's failure in this case without any consideration of the contemporaneous objection and harmless error rules.

Counsel did strongly object to the court's willingness to instruct the jury on the cold, calculated, and premeditated aggravating factor. He was correct because in Jackson v. State, 19 Fla. L. Weekly S215 (Fla. April 21, 1994) this court declared the standard jury instruction on that aggravator unconstitutional. Unlike the other cases this court has considered since Jackson that error was harmful. The state relied heavily on the CCP aggravator, and the jury's vote of 7-5 only emphasizes that the defective instruction may have improperly influenced at least one juror to recommend death.

Moreover, a harmless error analysis is inappropriate in this case because with a defective instruction this court can only speculate what the jury would have found had they been correctly guided.

Again over defense objection the court allowed the state to introduce evidence from the victim's wife about the effect Coker's death had on her, and the type of person her husband had been. Such a ruling was error because Section 921.141(7) Fla. Stats. (1992) does not allow victim impact evidence of this sort. Moreover, and more fundamentally, admitting such evidence, particularly when the jury is given no guidance on how to use it, undermines the confidence we have that the jury's recommendation will be channeled and its sentencing discretion adequately guided. Finally, applying this section to this crime violated federal and state prohibitions against ex post facto application of the law.

The court, despite Archer's request, refused to instruct the jury that its recommendation was entitled to great weight, as this court on numerous occasions has said. In light of the United States Supreme Court's opinion in Espinosa v. Florida, 505 U.S. ___, 112 S.Ct. 2928, 120 L.Ed.2d 854 (1992) that was error because the jury was not as substantially informed on the law regarding its verdict as the trial judge.

Archer asked the court to instruct the jury that they could consider his age of 26 as mitigation. While this court has ruled in other cases that that age was not a factor the trial court had to consider in weighing whether the defendant should live or die, in light of Espinosa, it was error for the court here to in effect direct a verdict against the defendant on this mitigator.

Finally, during voir dire the prosecutor asked which members of the panel could not recommend death for a defendant convicted of murder who was not the triggerman. The court then excused several members of the venire who could not recommend death under that situation. That was error because the state's question was an incorrect statement of the law. That is, under Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) a defendant who is not the triggerman and who never intended for a murder to occur may not be sentenced to death. Here that situation was part of Archer's defense because he contended that at most all he ever told Bonifay was how to commit the robbery of Trout Auto Parts. He never contracted with him to kill Wells. Thus, the court excused prospective

jurors for an impermissible reason, and such error was not harmless.

ARGUMENT

ISSUE I

THE COURT ERRED IN INSTRUCTING THE JURY ON THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR BECAUSE THAT GUIDANCE, AS THIS COURT HAS DECLARED, WAS UNCONSTITUTIONALLY VAGUE, A VIOLATION OF ARCHER'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

At the penalty phase charge conference Archer objected to the standard instruction on the cold, calculated, and premeditated aggravating factor (T 425-30). He even had a proposed jury instruction that he believed passed constitutional muster (R 426, R 80-81). The court, however, refused to recognize the validity of his complaint or give the suggested guidance (T 436). That was error.

In Jackson v. State, 19 Fla. L. Weekly S215 (Fla. April 21, 1994), this court found that the standard jury instruction on the cold, calculated, and premeditated aggravating factor was unconstitutionally vague.

> Florida's standard CCP jury instruction suffers the same constitutional infirmity as the HAC-type instructions which the United States Supreme Court found lacking in Espinosa, Maynard, and Godfrey-the description of the CCP aggravator is "so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." Espinosa, 112 S.Ct. at 2928.

Jackson, at 19 Fla. L. Weekly S217.

In this case the court gave the jury the same instruction on the CCP aggravator as the court in Jackson had read. The

result should, therefore, be the same. The court erred, and this case should be remanded for a new sentencing hearing.

Ah, but what about finding the error harmless? This court refused to do so in Jackson, noting that the trial court found only two aggravators and several nonstatutory mitigators in sentencing the defendant to death. "[W]e cannot say beyond a reasonable doubt that the invalid CCP instruction did not affect the jury's consideration or that its recommendation would have been the same if the requested expanded instruction had been given." Id. The jury had also recommended death by only the slimmest of margins: 7-5.

This court has had no similar qualms in affirming death sentences in three other cases that have raised the same issue. In Fennie v. State, 19 Fla. L. Weekly S370 (Fla. July 7, 1994); Walls v. State, 641 So. 2d 381 (Fla. 1994); and Wuornos v. State, 19 Fla. L. Weekly S455 (Fla. September 22, 1994) this court recognized that the trial courts had given the unconstitutional instruction to the juries, and the various defendants had properly preserved the issue. Nevertheless, in each case the courts' errors were harmless. The reasons for these conclusions are obvious. In each case, unlike Jackson, the court found several other aggravators besides CCP. In Fennie, for example, the sentencer concluded that 1) the murder was committed while engaged in the commission of a kidnapping; 2) the crime was committed to avoid arrest; 3) the crime was committed for financial gain; 4) the crime was heinous, atrocious, or cruel, and 5) the crime was cold, calculated and

premeditated. Fennie, 19 Fla. L. Weekly at S370. The court also found some minor, nonstatutory mitigation. Finally, the jury in that case, as in Walls and Wuornos, unanimously recommended death.

Archer's case, using the analysis presented, has more similarities with Andrea Jackson's case than those of Wuornos, Fennie, and Walls. First, the court found only that the murder had been committed during the course of the robbery, and that it was cold, calculated, and premeditated. Second it recognized that Archer had no significant prior criminal record, a statutory mitigator. It also found that he had a loving relationship with his grandmother. Finally, the jury recommended death by a 7-5 vote. Thus, the error in reading the truncated instruction cannot be harmless beyond all reasonable doubts.

This court in Fennie, Walls, and Wuornos, also analyzed the evidence in those cases and concluded that had the jury been properly instructed it would have found the CCP aggravator applicable. While Archer argues below that is the wrong analytical approach, using it only fortifies the conclusion that the evidence does not prove beyond all reasonable doubt that Archer plotted the murder in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

The evidence connecting Archer to the murder came from Patrick Bonifay, the person who actually shot Coker. He claimed Archer offered to pay him a half million dollars to

kill Daniel Wells because the latter had had something to do with getting him fired from his job at Trout Auto Parts (T 335). Then when Bonifay tried to back out of the deal, Archer supposedly threatened to kill his girlfriend and mother if he did not murder Wells. Finally, he claimed Archer refused to pay him when he found out Bonifay had killed the wrong person. All the while Bonifay had a gun.

This evidence, while arguably showing a coldly premeditated desire to murder on Archer's part, could and probably was disregarded by the jury. First, that Archer had a half million dollars defies belief. No one other than Bonifay saw it. What is more, Archer's lifestyle of near poverty makes Bonifay's story ludicrous. We have, for example, Robin Archer with so little money that he has to live with friends (T 270), and borrow money to go to a trade school (T 417-18). His girl friend gave him money (T 348). Everyone who testified about Archer's status, except Bonifay, added to the picture that this young man never had two nickels to rub together.

Moreover, Bonifay's cold hearted murder of Coker as he told his victim to "shut the fuck up" and "fuck his family" exhibits this co-defendant's contempt for life (T 287).

The logic of Bonifay's story also defies credibility. Why would Archer, who had $500,000 want to kill Wells for ostensibly getting him fired from a job that must have paid only a minimum wage salary. Why would he wait 18 months to have it done? Why would he have some one else do it? For a

man who had a lifetime's wages in a suitcase and who was willing to blow it on a murder, his story makes little sense.

What the evidence does show is that Archer told Bonifay how one could rob the Trout Auto Parts store. He never told Bonifay to do it, only how it could be done.

The jury nevertheless could have believed that Archer coldly, with calculation and premeditation planned the robbery. Then using the CCP definition given by the court (R 85), it could have concluded that because the robbery was cold, calculated, and premeditated, the murder was also. Such logic, while perhaps sufficient to support a conviction for guilt under a felony murder theory cannot carry the day with the CCP aggravator. As this court held in Hardwick v. State, 461 So. 2d 79, 81 (Fla. 1984), a planned robbery does not mean the resulting murder was also sufficiently premeditated for the CCP aggravator to apply. Thus, had the jury been properly instructed, it may not have concluded this factor applied, and with only one other aggravator applicable and some strong mitigation present, this court cannot say beyond a reasonable doubt that none of the seven jurors who voted for death would have remained steadfast in their opinion.

Such an analysis, however, goes against what the United States Supreme Court has determined the proper harmless error analysis should be for jury instruction issues. Sullivan v. Louisiana, 508 U.S. ___, 113 S.Ct. ___, 124 L.Ed.2d 182 (1993). In Sullivan, the trial court gave the jury an unconstitutional reasonable doubt instruction. The issue facing the nation's

high court was whether that error was harmless. A unanimous court not only said that it was reversible error, it also concluded that the mistake was not amenable to a harmless error analysis.

The court's rationale focussed on two constitutional guarantees: 1) The defendant has the right to have his guilt determined beyond a reasonable doubt, and 2) the jury is the one to make that decision. If the trial court instructed them on reasonable doubt using an unconstitutional instruction, "there has been no jury verdict within the meaning of the Sixth Amendment." Id. at 189. If the jury has not validly determined the defendant's guilt, a reviewing court cannot substitute its judgment for the body that has the constitutional obligation to do so under the guise of a harmless error analysis.

> There is no object, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt-not that the jury's actual finding of guilty beyond a reasonable doubt would surely not have been absent the constitutional error. That is not enough. . . . The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual finding of guilty.

Id. at 190 (cites omitted. emphasis in opinion.)

Sullivan, because it dealt with a reasonable doubt instruction, has obvious limitations when applied to this case. The fundamental rationale of that opinion, however, is directly

relevant and pertinent. That is, any defendant facing a death sentence has 1) the right to have a jury (in Florida) recommend whether he should live or die, and 2) each aggravating factor must be proven beyond a reasonable doubt.

In this case, as with the defendant's guilt in Sullivan, the jury could not determine if Archer had committed the murder in a cold, calculated, and premeditated manner because of the defective instruction on that point. There was, therefore, no valid death recommendation, and this court can only speculate about the jury's action had it been given proper guidance. As the nation's high court in Sullivan noted, however, appellate courts cannot do such crystal ball gazing. Here, as in Sullivan, the error remains harmful, and this court must remand for a new sentencing hearing.

ISSUE II

THE COURT COMMITTED FUNDAMENTAL ERROR WHEN IT FAILED TO INSTRUCT THE SENTENCING JURY ON THE DEFINITION OF REASONABLE DOUBT, IN VIOLATION OF ARCHER'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

This a very strange issue, and the error here is one that is virtually inconceivable to imagine a trial court committing. In light of the unusual nature of death penalty resentencings it is, however, understandable. The trial court in instructing the jury after it had heard all the evidence and arguments gave the jury the standard instructions this court has approved. That was perfectly correct. In particular, it told the jury, after telling them what aggravating and mitigating circumstances it could consider:

> Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision.

(T 86).

That guidance was, of course, correct. The court's error arises from its failure to define "reasonable doubt." The penalty phase instructions do not have that definition, and the court here failed to provide the definition provided in Instruction 2.03 of the General Instructions to the Standard Jury Instructions in Criminal Cases.[5] In fact, the court gave

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[5]In pertinent part, it reads, "A reasonable doubt is not a possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to return a verdict of not
(Footnote Continued)

none of the general instructions normally given when there is a guilt phase portion of the trial.

In Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), the United States Supreme Court held that Louisiana's reasonable doubt instruction violated the Fourteenth Amendment's due process clause guarantees. In Sullivan v. Louisiana, 508 U.S. ___, 113 S.Ct. ___, 124 L.Ed.2d 182 (1993), the court ruled that a harmless error analysis was inappropriate to measure the effect the unconstitutional jury instruction in Cage might have on the jury. It grounded its decision on the Fifth Amendment's requirement of proof beyond a reasonable doubt and the Sixth Amendment's right that a jury determine the defendant's guilt. When it has received a defective instruction on reasonable doubt, there can be "no jury verdict within the meaning of the Sixth Amendment." Id. at 189. Without a valid jury determination of guilt, an appellate court has "no object, so to speak, upon which harmless-error scrutiny can operate." Id. at 190. In short, as Justice Rehnquist noted in his concurring opinion, "I agree that harmless-error analysis cannot be applied in the case of a

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(Footnote Continued)
guilty if you have an abiding conviction of guilt. On the other hand, if, after carefully considering, comparing, and weighing all the evidence, there is not an abiding conviction of guilt, or, if, having a conviction, it is one which is not stable but one which wavers and vacillates, the the charge is not proved beyond every reasonable doubt and you must find the defendant not guilty because the doubt is reasonable."

defective reasonable-doubt instruction consistent with the Sixth Amendment's jury-trial guarantee. Id. at 193.

Sullivan does not open a gate allowing appellate counsel to now challenge all unobjected to errors in jury instructions. Clearly, as the United States Supreme itself has ruled in other cases, such a conclusion about the holding in Sullivan would be unwarranted. Indeed, that court has repeatedly applied a harmless error analysis to various errors in jury instructions. Carella v. California, 491 U.S. 263, 109 S.Ct. 2419, 105 L.Ed. 2d 218 (1989) (jury instruction containing an erroneous conclusive presumption); Pope v. Illinois, 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987) (jury instruction misstating an element of the offense); Rose v. Clark, 478 U.S. 570, 106 S. Ct. 3101, 92 L.Ed.2d 460 (1986) (jury instruction containing an erroneous rebuttable presumption).

It refused to apply this analysis to the reasonable doubt instruction because, again as Justice Rehnquist said, "a constitutionally deficient reasonable-doubt instruction is a breed apart from the many other instructional errors that we have held are amenable to harmless-error analysis." Sullivan, at 193.

In this case we have no constitutionally infirm definition of reasonable doubt. We have something worse: no guidance at all on this crucial and fundamental issue. The jury, instead of being properly reigned in regarding reasonable doubt, was left to roam unchecked among the fields of its own creation and inventiveness. The sentencing discretion this court has

steadfastly worked to curtail in capital sentencing proceedings, see State v. Dixon, 283 So. 2d 1 (Fla. 1972) was completely absent here. There can be no error more fundamental than to tell the jury they can find a particular aggravating factor if the state has proven it beyond a reasonable doubt but then fail to define what is reasonable doubt.

Thus, counsel's lack of objection to the court's failure to instruct the jury on reasonable doubt provides no impediment to this court's review of this issue. Unlike other instructions, the reasonable doubt guidance is fundamental to a fair trial. Failure to define the term amounts to the structural defect the court in Sullivan found unamenable to a harmless error analysis, and by implication one for which a contemporaneous objection is unnecessary to preserve. Sullivan, at 190-91.

This court, while not squarely faced with the issue, would also conclude it could consider it without the necessity of a contemporaneous object. In Gerds v. State, 64 So. 2d 915, 916 (Fla. 1953), this court said "it is an inherent and indispensable requisite of a fair and impartial trial . . . that a defendant be accorded the right to have a Court correctly and intelligently instruct the jury on the essential and material elements of the crime charged and required to be proven by competent evidence." But, when the defendant failed to object, this court will review the purported error only if it was fundamental. "To justify not imposing the contemporaneous objection rule, 'the error must reach down into

the validity of the trial itself to the extent that a verdict of guilty could not have been challenged without the assistance of the alleged error.' . . . In other words, 'fundamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict.'" State v. Delva, 575 So. 2d 643, 644-45 (Fla. 1991). If proof beyond a reasonable doubt permeates the jury's deliberations then they must consider the definition of that term in order to find an aggravating factor. The court's failure to instruct the jury was fundamental error which this court can review without any contemporaneous objection.

When examined, this court can only conclude that the court erred in failing to instruct the jury on reasonable doubt, and such error requires this court to reverse the trial court's sentence and remand for a new sentencing hearing.

ISSUE III

THE TRIAL COURT FUNDAMENTALLY ERRED IN FAILING TO GIVE THE JURY ANY OF THE GENERAL INSTRUCTIONS AND MISCELLANEOUS INSTRUCTIONS ON PRINCIPALS, AND THAT MISTAKE VIOLATED ARCHER'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

Issue II involves merely the most obviously and easily egregious error the court made regarding the instructions it gave in this case. It was not the only one as Issue I focussing on the cold, calculated, and premeditated aggravating factor attests. The court's failure to instruct on reasonable doubt exhibits the equally basic flaw in its jury instructions: it failed to read any of the general instructions that a trial judge should give the jury before it deliberates. It also did not give them Instructions 3.01 and 3.01(a) of the miscellaneous instructions that provided necessary guidance on principals. Regarding the general instructions, it never provided the following guidance[6]:

1. 2.02 Statement of Charge.
2. 2.03 Pleas of not guilty, Reasonable doubt; and burden of Proof.
3. 2.04 Weighing the evidence
4. 2.04(a) Expert Witnesses
5. 2.04(b) Accomplice
6. 2.04(d) Defendant not testifying
7. 2.04(e) Defendant's statements
8. 2.05 Rules for Deliberation
9. 2.07 Cautionary Instruction
10. 2.09 Submitting case to jury

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[6]The instructions are included as Appendix 1 to this brief.

The court's error arose easily enough. After the state and Archer had presented their cases, the court adjourned to consider the instructions it would give the jury:

> THE COURT" Okay. So we're in a position now which the Court needs to determine what I'm going to be instructing the jury on and what you will be able to argue tomorrow. And are we going to be able to conclude this or how do you want to handle it? I know you have a bit longer to be with us, Mr. Rimmer.
>
> MR. RIMMER: Yes, sir.
>
> THE COURT: What are you requesting?
>
> MR. RIMMER: What am I requesting? The standard instructions that I just handed the Court are the ones that I'm instructing.
>
> THE COURT: What do they include on aggravators?
>
> MR. RIMMER: Robbery and cold, calculated and premeditated.
>
> THE COURT: Any others?
>
> MR. RIMMER: No sir. And I have a verdict form that is prepared.

(T 424-25).

The court then noted that defense counsel had previously objected to the cold, calculated, and premeditated aggravating factor. Archer's lawyer, at that point, reiterated his objection and submitted a proposed instruction on that aggravator (T 425-30). After recessing for the night and allowing further argument on the issue, the court refused the defendant's request to modify the jury guidance provided in the standard instruction (T 436). The argument focussing on that error has been presented in Issue I.

The court then briefly discussed the mitigators, some stipulations regarding Archer's lack of prior significant history, and the sentences the co-defendants had received (T 437-45). Before the jury, the court gave a brief introduction that the state and Archer had presented all their evidence. It then allowed the state to present its concluding argument. Archer followed with his summation, after which the court gave the penalty phase instructions, omitting the general instructions and the miscellaneous instruction on principals as mentioned above (T 494-98). Neither Archer's lawyer or the state raised any objection to the instructions read to the jury (T 498-99).

Thus, neither the court, the state, or the defense counsel realized that the jury had received none of the general guidance it probably would have gotten as a matter of course had it determined Archer's guilt. But this was a resentencing proceeding, and the jury instructions dealing with penalty phase proceedings make only a brief, ambiguous remark concerning the instructions the court should give in resentencings:

> Penalty Proceedings-Capital Cases F.S. 921.141
>
> Note to Judge: Give 1a at the beginning of penalty proceedings before a jury that did not try the issue of guilt. In addition, give the jury other appropriate general instructions.
>
> 1. a. Ladies and gentlemen of the jury, the defendant has been found guilty of (crime charged). Consequently, you will not concern yourselves with the question of his/her guilt. (Emphasis supplied.)

The court gave no "other appropriate general instructions" at the beginning of the penalty phase, nor did it do so after the evidence and arguments had been presented. That was error.

Black letter law merely confirms what we learned somewhere in law school or the first years of practice: jury instructions furnish guidance to the jury in their deliberations, and aid them in arriving at a proper verdict. 15 Fla. Jur. 2d Criminal Law §1900. As a necessary corollary to this general principle, they must also receive proper instructions, and failure to provide them is fundamental error. See, Rojas v. State, 552 So. 2d 914 (Fla. 1989) (Failure to instruct on justifiable and excusable homicide as part of the manslaughter instruction is fundamental error.) It is fundamental error because the jury, as the United States Supreme Court noted in Sullivan v. Louisiana, 508 U.S. ___, 113 S.Ct. ___, 124 L.Ed.2d 182 (1993) never had the correct law to determine the defendant's guilt, so in a real sense they never reached a legitimate verdict.

While they must, as a matter of fundamental law, receive the proper guidance in the guilt phase of any trial, in the penalty phase of a capital case it is absolutely imperative that they be properly instructed. The stakes are simply too high to tolerate sloppiness at any stage of the proceeding however inconsequential an error may appear. Wike v. State, 19 Fla. L. Weekly S617 (Fla. November 23, 1994). Thus, when the court fails to give a jury, whose sole purpose is to render a crucial sentencing recommendation, the general instructions

necessary that it would, as a matter of routine, have provided in a petit theft trial, fundamental error has occurred. It becomes error of the first magnitude when the omitted guidance was crucial, as it was in this case.

The court never told the jury that "It is to the evidence introduced upon this trial and to it alone, that you are to look for that proof." Instruction 2.03. This limitation was particularly important here because the local newspaper published periodic accounts of Archer's resentencing trial, and a "vast majority" of the venire had heard about it (T 69, 106). The court, at counsel's request had to ensure no one had been contaminated by those accounts (e.g. T 211-12).

Bonifay's testimony provided the only significant evidence linking Archer to this murder. He claimed the defendant either offered him an incredible amount of money to murder Wells or threatened to kill his mother and girl friend if he did not (T 332, 336, 346). Yet, until trial, he had never said anything about Archer's alleged threat (T 373). In light of Bonifay's obvious credibility problems, an instruction on how to evaluate his testimony was essential. Yet, the court also never told the jury that a "reasonable doubt. . . may arise from the evidence, conflict in the evidence, or the lack of evidence." Instruction 2.03.

Bonifay, the person who killed Coker, obviously presented the most damaging testimony against Archer. Yet, he never mentioned the defendant's role to Barth, another co-defendant, or that the real reason for the robbery was murder (T 297).

Bonifay also was more conniving. Immediately before Barth testified at Bonifay's first trial, Bonifay told Barth that he wanted him to lie for him (T 300). He wanted Barth to say that Archer had threatened him (Barth). Bonifay tried to strengthen his own case by claiming for the first time at trial that Archer threatened to kill Bonifay's mother and girlfriend if he did not kill Wells (T 373). With Bonifay's credibility at issue and in doubt, the court should have, but never did, told the jury "You should use great caution in relying on the testimony of a witness who claims to have helped the defendant commit a crime. This is particularly true when there is no other evidence tending to agree with what the witness says about the defendant." Instruction 2.04(b) Accomplice.

Because Archer did not kill Coker he could be guilty of the murder only if he was a principal to either the murder or the robbery. Yet the jury never was guided on the law regarding principals. Instructions 3.01, 3.01(a).

Likewise, the jury in weighing the evidence presented never was told that Bonifay's criminal conviction could affect his credibility. Instruction 2.04(10). It was likewise never informed that they "may believe or disbelieve all or any part of the evidence or the testimony of any witness." Instruction 2.04. The court never instructed them to consider whether "the witness' testimony agree[s] with the other testimony and other evidence in the case." Instruction 2.04(5).

Archer never testified at the penalty phase trial, yet the court never gave the jury the guidance "The defendant exercised

a fundamental right by choosing not to be a witness in this case. You must not view this as an admission of guilt or be influence in any way by his decision. No juror should ever be concerned that the defendant did or did not take the witness stand to give testimony in the case." Instruction 2.04(d). Without this controlling advice, some or all of the seven members of the jury who voted for death may very well have done so because Archer never took the stand.

The court never gave it any of the rules for deliberation contained in Instruction 2.05. The jury may have followed the law it wanted, not liking what the court gave it, or it may have considered evidence outside of that presented at trial. The jury, having heard the victim impact evidence, may have recommended death because some of the jurors felt sorry for the victim or angry at Archer. Some of them may not have liked Archer's lawyer, or they may have believed he should not have talked to any of the witnesses outside of trial. In short, the death recommendation may very well have been based on factors outside the evidence and law. Without the guidance provided by Instruction 2.05, the subsequent recommendation is suspect.

Finally, some of the jurors may have believed the judge wanted them to return a death sentence. It, however, never gave them the instruction that they should disregard "anything I may have said or done that made you think I preferred one verdict over another." Instruction 2.07.

Thus, we have a series of nagging omissions by the trial court that by themselves may not create reversible error, but

when considered in the aggregate, this court cannot say with easy confidence that the failure to give the general instructions had no impact on the jury's death recommendation. Because this court cannot say that, it should reverse the trial court's judgment and sentence and remand for a new sentencing hearing.

ISSUE IV

THE COURT ERRED IN ADMITTING EVIDENCE OF THE IMPACT THE VICTIM'S MURDER HAD ON HIS FAMILY, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 17 OF THE FLORIDA CONSTITUTION.

Before trial, Archer filed three motions concerning the victim impact evidence the state intended to introduce at Archer's resentencing:

> 1. Motion for Determination that Section 921.141(7), F.S. is Unconstitutional and to Preclude Evidence or Argument on Victim Impact.
>
> 2. Motion to exclude Victim Impact Evidence and any Argument by the Prosecutor Related Thereto.
>
> 3. Motion to Prohibit Application of Florida Statute 921.141(7).

(R 68-79). Specifically, he contended that the United States Supreme Court's recent case of Payne v. Tennessee, ___ U.S. ___, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (1991) did not permit the jury to consider "Victim Impact" evidence. Similarly, Section 921.141(7) Fla. Stat. (1992) did not authorize such proof. He also asked that victim impact evidence be excluded on ex post facto grounds (R 75-77). The court denied those requests (T 193, 197).

Accordingly, the victim's wife told the jury that the couple had two children, a son 10, and a daughter 9. Wayne Coker was a good man who loved children who "miss[ed] him terribly." (T 396) He was not a troublemaker, but one who worked to provide for his family. His death had a great impact

on them. His wife had never "taken so much medication in her life." (T 398) Her children have seen psychiatrists and have suffered (T 398).

This evidence was admitted under Section 921.141(7) Fla. Stats. (1992), but that section did not authorize what the court did in this case, and it is, in any event, unconstitutional for several reasons.

THE CONSTITUTIONAL PROBLEMS WITH SECTION 921.141(7)

In Payne v. Tennessee, ___ U.S. ___, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (1991), the United States Supreme Court modified its recent opinion in Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987) that prohibited Victim Impact Statements from being considered in capital sentencing. The Payne court, rather than erecting a per se Eighth Amendment ban on such evidence, left the matter to the states:

> 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. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

Payne, at 111 S.Ct. 2609.

The Florida legislature responded to that invitation by enacting section 921.141(7) Fla. Stat. (1992). That addition to the laws of Florida significantly differed from what the nation's high court permitted in Payne. Rather than allowing members of the victim's family to testify about the effect the

murder had on them, that section permits evidence of only a generalized loss to the community:

> (7) VICTIM IMPACT EVIDENCE.- Once the prosecutor has provided evidence of the existence of one or more aggravating circumstances as describe in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence 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. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as part of victim impact evidence.

(Emphasis supplied.)

This court, when presented with the issue of the admissibility of victim impact evidence, has noted that Payne at least partially overruled Booth. Further, the evidence in the cases raising this issue was appropriately considered by the jury under Payne. Hodges v. State, 595 So. 2d 929 (Fla. 1992); Burns v. State, 609 So. 2d 600 (Fla. 1992). Notably absent from this court's reasoning was any consideration of its earlier decisions explicitly excluding victim impact evidence or any discussion of the effect section 921.141(7) has on the relevance of state proffers of victim's losses.

Moreover, beyond the confines of this case, section (7) has serious state law flaws that undermine the very foundation on which this court's decisions in death penalty cases have been built.

If we go back to the very first cases of this court and the United States Supreme Court that approved this state's

death penalty sentencing scheme, there emerges the central, controlling idea that capital sentencing discretion must be somehow controlled or "channelized" to be legitimate. For example, in Proffitt v. Florida, 432 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), the court found

> The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner.

Id. at 252-53.

This court had reached a similar conclusion in State v. Dixon, 283 So. 2d 1, 7 (Fla. 1972):

> Thus, if the judicial discretion possible and necessary under Fla. Stat. Section 921.141, F.S.A., can be shown to be reasonable and controlled, rather than capricious and discriminatory, the test of Furman v. Georgia, [408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)] has been met.

Later cases that the U.S. Supreme Court examined moved beyond the broad examination of Florida's (and other state's) capital sentencing schemes, and focussed instead on the mechanisms devised to separate those who were eligible for execution from those who were not. Although the nation's high court occasionally disagreed with how this court or a trial court may have applied our death sentencing statute, See, Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), it has steadfastly accepted Florida law that the aggravating factors, as defined in Section 921.141(5),

were vitally important in selecting the few who should die from the many who should not.

This court's long experience with death sentencing has left the unmistakable message that this court takes its obligation seriously to ensure that death sentences are imposed in a rational and controlled way. While required to follow the law as declared by the United States Supreme Court in many instances, this court has occasionally refused to follow it when its rulings have failed to comport with what this court believes is just. That is, state law, whether it is found in our constitution or in statute, has frequently mandated more selective application of the death penalty than approved by the fundamental law of the United States. The best, most relevant example of this independence, comes from this court's ruling that the list of aggravating factors articulated in section 921.141(5) is the exclusive list of what the state can prove to justify a death sentence. Miller v. State, 373 So. 2d 882 (Fla. 1979). In Barclay v. Florida, 463 U.S. 939, 966, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), it was mentioned that the list of what could aggravate a first degree murder conviction was not exclusive. Zant v. Stephens, 462 U.S. 103, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).

This court has, however, refused to follow that decision, and instead continued to adhere to follow Miller. Grossman v. State, 525 So. 2d 833, 842 (Fla. 1988). In fact, in Grossman, this court explicitly held that "victim impact is a non-statutory aggravating circumstance which would not be an

appropriate circumstance on which to base a death sentence." Id. Thus, trial courts have erred when they admitted evidence at sentencing hearings demonstrating that the victim was a decent person. For example, in Jackson v. State, 498 So. 2d 906, 909 (Fla. 1986), this court rejected a trial court's findings that a murder was especially heinous, atrocious, or cruel because the victim had been married, ran a store by himself, had led a good and honest life, and would be missed by the community. These factors were, as this court said, "patently improper." Id. They were so because the only issues relevant at sentencing trials focus exclusively on the aggravating and mitigating factors relevant to a particular case. Victim impact evidence raised matters outside those concerns. Taylor v. State, 583 So. 2d 323 (Fla. 1991); Jackson v. State, 522 So. 2d 802 (Fla. 1988). Until Payne, this court consistently adhered to its strict policy of allowing only evidence relevant to the mitigating or statutory aggravating factors.

If this court intends to continue this policy how does section 921.141(7) fit into Florida's capital sentencing scheme? As Grossman, the two Jackson cases, and the Taylor case make clear, victim impact evidence and argument have no relevancy to the aggravators. Perhaps, however, victim impact evidence, as authorized by this section, amounts to a new aggravating factor.

That clearly is not so because the legislature did not list it as one under section 921.141(5). Moreover, that

section introduces what the legislature considers appropriate to justify a death sentence by saying "Aggravating circumstances shall be limited to the following." Certainly, if they had wanted to include victim impact as an aggravating factor they could have done so. That they did not, can only mean it was not intended to be considered as such.

More significantly, victim impact evidence never significantly limits the type of person eligible for a death sentence. As the Supreme Court held in Zant, supra, aggravating factors

> must genuinely narrow the class of person eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

Zant, supra. at 877.

In Godfrey v. Georgia, 446 U.S. 420, 428-29, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), the court struck Georgia's equivalent "Heinous, atrocious, or cruel" aggravating factor because it did not create any "`inherent restraint on the arbitrary and capricious infliction of the death sentence' sentence because a person of ordinary sensibility could find that almost every murder fit that stated criteria." Zant, supra. at 878. A death sentence runs the risk of becoming arbitrarily imposed when it could apply to any number of other persons who are not sentenced to death. Spaziano v. Florida, 468 U.S. 447, 460, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984).

Victim impact evidence has the same problem as that identified in Godfrey. "[A] person of ordinary sensibility

could find that almost every murder fit the stated criteria." Zant, supra. As argued below every individual is unique, and every death in some measure is a loss to the community. Victim impact evidence does nothing to genuinely narrow the class of death worthy defendants, nor does it reasonably justify a more severe sanction when compared to others found guilty of murder. Nothing in section 921.141(7) limits or narrows the class of those who are death eligible.

Until Payne, the U.S. Supreme Court carefully insured that state death sentencing statutes minimized the risk of arbitrary and capricious inflictions of death sentences. The cases cited above, Barclay, Zant, Spaziano, and others demanded that states imposed death rationally, that sentencing discretion was controlled. Significantly, the court in Payne simply ignored this long and rich history of judicial concern because nowhere in either the majority or the concurring opinions are the principles of those cases cited. Nowhere does the court consider, as Archer has, the effect Victim Impact Statements will have on the fragile balance reached in death penalty sentencing.

This court should, as it has done before on other issues, reject the Supreme Court's widening of the death penalty net. As you have said, our state constitution provides greater protections than those afforded by the United States Constitution, Traylor v. State, 596 So. 2d 957 (Fla. 1992), and this is one instance where it should be invoked. The nation's high court was politically correct in Payne, but this court has

worked too hard to perfect section 921.141 to allow popular expediency to wreck it.

So, unless this court is willing to reverse Miller and a host of other cases following it and to ignore the legislative mandate that aggravating factors "shall be limited to the following" this court must find victim impact evidence, under Florida Law, irrelevant in a capital sentencing proceeding.

THE UNIQUENESS OF THE INDIVIDUAL AND THE LOSS TO THE COMMUNITY

Section 921.141(7) has further difficulties in that what it seeks to allow the state to prove defies proof or more seriously, it violates Article 1, Section 2 of the Florida Constitution. If this section survives this court's scrutiny, victim impact evidence will have relevance if the state can prove two things:

> 1. The victim was unique as an individual human being.
>
> 2. Because of that distinctiveness, the members of the community suffered a loss.

The first "element" amounts to a truism of western society. Payne (Stevens, dissenting. "The fact that each of us is unique is a proposition so obvious that it surely requires no evidentiary support.") We believe everyone is unique. Like snowflakes, among the billions of people who are alive now, who have ever lived, and who will yet breath, there is none like any other. The combination of genetics, experience, and culture, combine in such bewildering variety that no one truly has an identical twin somewhere.

What the legislature must have meant was that the victim was sufficiently distinguished from the rest of humanity that he or she was distinct or unusual. But saying that we are all different of necessity forces us to consider in what way and to what extent our differences define us. Perhaps we should focus on the physical, moral, or mental aspects of a person's makeup, or some combination of them. Do victims then have to have been an Arnold Scwharzeneger, a Mother Theresa, or an Albert Einstein to be "unique?" If not Einstein, for example, maybe it would be sufficient if they had a Phi Beta Kappa key. If that was too strict, perhaps he or she had graduated from college. Or finally, maybe they were merely literate. If people are unique 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. Yet, if we distinguish them we violate the provisions of Article I, Section 2 of the Florida Constitution which provides "All natural person are equal before the law . . . " Clearly when we say Einstein's murder murder was a greater loss than appellate counsel's there is created a disparity anathema to our fundamental law.

Moreover, as Justice Stevens recognized in his dissenting opinion in Payne, there arises the ominous possibility that prosecutor's may seek death for some defendants based solely on unacceptable reasons such as the race of their victims. While the Supreme Court rejected the proof of that theory in McClesky v. Kemp, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987)

for capital cases, race is a proven factor in non-capital sentencing in Florida.[7] Some defendant's may face a death sentence simply because the victim was white and the defendant black.

The problem of distinctiveness is more complex. What of children, whose murders easily raise our greatest outrage. Few of them sufficiently standout to the degree that society can justify letting the jury hear about what their deaths meant.

Then what of the "second" element, the loss to the community? John Donne, the seventeenth century metaphysical poet expressed this sentiment best:

> No man is an island, entire of itself; every man is a piece of the continent, a part of the main; if a clod be washed away by the sea, Europe is the less, as well as if a promontory were, as well as if a manor of thy friends or if thine own were; any man's death diminishes me, because I am involved in mankind; and therefore never send to know for whom the bell tolls; it tolls for thee.

Devotions XVII

In the practical, legal world, there are, however, problems with this approach. If the death, or the murder, of any person diminishes us, the real question must be how much have we lost? Answering that question inevitably leads to another grading of human life, which means that some people are

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[7]See, An Empirical Examination of the Application of Florida's Habitual Offender Statute (Economic and Demographic Research Division, Joint Legislative Management Committee, The Florida Legislature, August 1992).

more important to the community than others. How do we objectively measure the loss to the community? For example, assuming that a six month old baby is recognizably distinct, the community will likely have suffered no specific loss by his or her death? Likewise, the homeless wino murdered while laying in the gutter will probably not be missed.

Perhaps this court has already solved this problem. In Coleman v. State, 610 So. 2d 1283 (Fla. 1992) and Williams v. State, 622 So. 2d 456 (Fla. 1993) this court refused to accept, as a reasonable basis for the jury's life recommendation, that the several victims in that case somehow "deserved" to be executed because they had stolen several thousand dollars worth of cocaine from the defendants who not only wanted it back but also intended to make an example of them. If the murders of these victims, whose character and value to the community in truth were perhaps only a shade less black than the defendants, remained reprehensible then whose death is not? We then must fall back to Donne's conclusion that every death diminishes us. If so, this court must then reconcile this loss with the United States Supreme Court's requirement that a capital sentencing scheme must "rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." Spaziano, supra, at 460.

On the other hand, perhaps the juries in Coleman and Williams acknowledged the community's loss but simply felt it was too slight to justify a death sentence. If so, then this

court has refused to let what the state can establish as aggravation be used to mitigate a death sentence.

There are, moreover, other legal problems that ooze from this quagmire. In Cannady v. State, 620 So. 2d 165 (Fla. 1993), the defendant murdered his wife and her alleged rapist. In sentencing him to death, the court found only two aggravating factors applied, but on appeal this court rejected both of them. What would have happened, though, if there had been evidence of either or both factors, but the jury had given them little or no weight. By current law, it should have returned a life recommendation. Nevertheless, it may have recommended death because the victim impact evidence (had it been introduced) convinced it to do otherwise. Clearly, to sustain this decision, this latter proof would amount to a nonstatutory aggravating factor.

If so, then the rules applicable to capital sentencing would bear on victim impact evidence. For instance, the state would have to prove beyond a reasonable doubt that the victim was unique and that there was an accompanying community loss. How does one do that without having a mini trial on what is essentially a collateral issue? Afterall, until Payne, sentencing hearings focussed exclusively on the defendant's character and the nature of the crime he committed. Spaziano at 352, fn. 7. Zant, supra, at 879.

Finally, there is the problem of what is the "community." Consider for example, the recent murders of tourists from Germany and England. Their communities were in those

countries, not in Miami or Jefferson County. Neither Florida location has objectively "lost" anything by their shocking deaths. Moreover, if these Florida locations are the relevant focus, what have they lost and for how long? How do we measure, in an objective manner, loss to the community occasioned by the murder of a transient?

In short, though the United States Supreme Court in Payne allowed victim impact evidence because it believed such proof somehow balanced the scales, the risk of imposing death in an arbitrary and capricious manner that was identified in Booth remains. Victim impact evidence, as shown above, creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner. Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989).

APPLYING 921.141(7) TO THIS CASE.

In this case, there was no evidence about the impact of Coker's death on the community. Nor was there any evidence of the victim's "uniqueness as an individual human being." Instead, what his wife told the jury was the loss the family, as real and poignant as it was, suffered. No one mentioned any loss the community felt, even that which we would expect when anyone dies.

But, as required by the statute, we must ask what evidence showed her "uniqueness as an individual human being." And the answer must be, none. Even that which the state introduced only shows a good husband and father, which even today is so typical of so many good men. He had demonstrated no special

intellectual talents, no outstanding athletic ability, nor any high level of compassion for others.

Of course, every wife sees her husband as a special, and he is, but to the community at large, we must very coldly ask, as the statute requires, how was he unique? And the answer again is that he was not.

We must also ask what substantial loss the community suffered by his death. The only evidence presented was the family's tragedy. The state presented nothing to show that the impact of Coker's death transcended the circle of his loved ones to involve the community. Thus for this reason as well, the court erred in letting Coker's wife testify.

EX POST FACTO APPLICATION HERE

Finally, applying Section 921.141(7) to this case violates the Ex Post Facto prohibitions found in the United States and Florida Constitutions.

Under the federal constitution, a legislative act will violate Article I, Section 9 if it is applied retroactively, and it adversely affects the defendant. Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981); Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987).

In this case section 921.141(7) became effective on July 1, 1992, and the crimes Archer was charged with occurred on January 26, 1991. The only question is whether the victim impact statute "disadvantages" him. Obviously it did. The likelihood that Archer would receive a death sentence substantially increased for the very reasons the statute was

enacted: so the jury and sentencer could learn more about the victim's individuality and how his death has adversely affected the community. He is plainly substantially disadvantaged by the increased probability that he will receive a death sentence. See, Lindsey v. Washington, 301 U.S. 397, 57 S.Ct. 797, 81 L.Ed. 1182 (1937).

Article X section 9 of the Florida Constitution likewise prohibits application of this law to Archer. It provides that

> Repeal or amendment of a criminal statute shall not affect prosecution for any crime previously committed.

In Castle v. State, 330 So. 2d 10 (Fla. 1976) this court held, relying on this constitutional provision, that the defendant could not benefit from a change in the law that reduced the penalty for arson because the new law decreasing the punishment had been passed after Castle had committed his arson.

Applying the Castle rationale to this case, the victim impact statute should not have "affected the prosecution" for the crimes Archer faced. See, Ellis v. State, 622 So. 2d 991 (Fla. 1993) (Kogan, concurring).

This court should, therefore, reverse the trial court's sentence of death and remand for a new sentencing hearing before a new jury.

ISSUE V

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT THEIR SENTENCING RECOMMENDATION WAS ENTITLED TO GREAT WEIGHT, A VIOLATION OF ARCHER'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

In the sentencing phase of a capital trial, the court normally gives the jury some preliminary instructions before they hear any evidence. There is only a slight modification when, as here, a resentencing is involved.

Immediately before the state began its presentation of the evidence in this case Archer asked the court to modify the standard jury instructions to include the following:

> You, the jury, play an essential role in these sentencing proceedings. Your sentence recommendation, whether it be death or life imprisonment without the possibility of parole for 25 years, must be given great weight by the court and must be followed by the court if no reasonable person could differ with your recommendation.[1]
>
> ---
>
> [1] Tedder v. State, 322 So. 2d 908 (Fla. 1975).
>
> See also Espinosa v. Florida, 6 FLW Fed. S662 (U.S. Supreme Court, June 29, 1992); Sochor v. Florida, 6 FLW Fed S323 (U.S. Supreme Court, June 8, 1992).

(R 78).

The court refused to give the requested instruction, ruling, "I don't find it to be an accurate statement of the law. . . . I have given a special instruction to the jury, remainder (sic) of the jury is a very important and critical role, and I do not believe that they are going to be misled in light of that and in light of permissible argument in this case as to the role that they have." (T 208) Shortly, the

court then read them the standard jury instruction this court has approved. That was error because it should have added the guidance Archer requested.

This court has faced this issue, or one similar to it, several times. Uniformly it has rejected it for two reasons. In most of the cases, the defendants had not preserved it for appellate review. e.g. Wuornos v. State, 19 Fla. L. Weekly S455 (Fla. September 22, 1994); Rhodes v. State, 638 So. 2d 920, 926 (Fla. 1994); Combs v. State, 525 So. 2d 853, 856 (Fla. 1988). If they jumped that procedural block then on the merits, this court rejected the claim, holding "Florida's standard jury instructions fully advise the jury of the importance of its role and do not violate Caldwell [v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)]. Combs v. State, 525 So. 2d 853 (Fla. 1988); Grossman v. State, 525 So. 2d 833 (Fla. 1988)." Sochor v. State, 619 So. 2d 285 (Fla. 1994).

Archer has clearly overcome the procedural hurdle because he raised this issue immediately before the jury was to hear the evidence in this case (T 207-208). But what of the issue on the merits? What this court said in Sochor would seem to knock Archer out of the ring. Not so, and to understand why we must look at what this court relied on in that case to affirm the trial court's ruling on this issue.

Specifically, this court relied on Combs v. State, 525 So. 2d 853 (Fla. 1988) and Grossman v. State, 525 So. 2d 853 (Fla. 1988). In Combs, this court specifically emphasized the

superior role of the trial court over that of the jury in sentencing a defendant to life or death. "Clearly, under our process, the court is the final decision-maker and the sentencer, not the jury." Id. at 887. That is significant because those cases were decided in 1988, four years before the United States Supreme Court handed down Espinosa v. Florida, 505 U.S. ___, 112 S.Ct. 2928, 120 L.Ed.2d 854 (1992).

In Espinosa, the United State Supreme Court rejected the inferior role this court had assigned the jury. Because the trial court had to give "great weight" to the jury's recommendation, the jury had a much more vital role in sentencing than this court had recognized. The upshot of Espinosa was that the sentencing phase jury had to be much better informed about the law than previously thought because this state had placed capital sentencing authority "in two actors rather than one." Espinosa, 120 L.Ed.2d at 859. Sentencing phase juries, rather being "second class" participants in the sentencing, had, if not co-equal status, at least a much greater and significant role in determining the defendant's fate.

Consequently, the ruling of Combs that "the court is the final decision-maker and the sentencer, not the jury" needs re-examination. If the court knows that the jury's recommendation must be given "great weight" it follows that the co-sentencer, i.e. the jury, should also know how important its verdict is in the death sentencing process. In this case, the court refused Archer's instruction that would have given the

jury that knowledge. The trial court, therefore, erred when it refused to give the jury Archer's proposed instruction. This court should reverse the trial court's sentence and remand for a new sentencing hearing.

ISSUE VI

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT THEY COULD CONSIDER ARCHER'S AGE OF 26 AS A MITIGATING FACTOR IN VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

At the charge conference, Archer asked the court to instruct the jury that they could consider his age of 26 as a mitigating factor (T 426). The court, however, refused to give the requested guidance, finding instead that "26 years of age has historically not been found to be a mitigator. . . " (T 439). While rulings from this court support that conclusion, Mills v. State, 462 So. 2d 1075 (Fla. 1985), this court needs to re-examine that holding in light of the United States Supreme Court's ruling in Espinosa v. Florida, 505 U.S. ___, 112 S.Ct. 2928, 120 L.Ed.2d 854 (1992).

Specifically, when this court upheld the trial judge's finding in Mills at 1081 that "Mills' age of twenty-six at the time of the crime was not a mitigating circumstance" it effectively precluded the jury from considering the question of the defendant's age as mitigation. Before Espinosa, that may have been permissible, but not after the nation's high court emphasized the key role Florida juries play in sentencing defendants to life or death. Trial or appellate courts cannot in effect grant a state's motion for a directed verdict on a mitigating factor the defendant wants the jury instructed on, particularly when the evidence, however weak, may support giving it. Robinson v. State, 487 So. 2d 1040, 1042 (Fla.

1986). (Error to refuse to instruct on two statutory mitigators when the evidence supporting them was weak and conflicting.)

Thus, although judges at any level may have rejected finding Archer's age as mitigating, jurors may not have, and the trial court here should have erred "on the side of caution and [] permitt[ed] the jury to receive such, rather than being too restrictive." Id.

This court should reverse the trial court's judgment and sentence and remand for a new sentencing hearing.

ISSUE VII

THE COURT ERRED IN GRANTING SEVERAL OF THE STATE'S CAUSE CHALLENGES OF JURORS WHO COULD NOT RECOMMEND DEATH IF ARCHER WAS NOT THE TRIGGERMAN, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

During voir dire, the prosecutor asked the jury:

> Anybody feel that way, that couldn't -- could not recommend the death penalty of somebody convicted of first degree murder who was not actually the one that did the killing?

(T 17).

Archer objected because "that is a legitimate mitigating factor." (T 18) The court, however, overruled the complaint, and throughout the rest of the voir dire, the state repeatedly asked prospective jurors if they could not recommend death if the defendant "did not actually do the killing?" As often, several prospective jurors said they could not recommend death for non-triggermen (T 18-19, 21-22). Ultimately, the state challenged some of them because "they don't believe in the death penalty or could not recommend it for the nontriggerman." (T 71) Archer's lawyer, apparently relying on the court's earlier ruling, agreed that at least three of them could be excused for cause for that reason (T 72). He did not agree about juror number 2, Emma Pineda. Nevertheless, the court excused her and the other three (T 109). That was error.[8]

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[8]Archer's lawyer later exhausted his peremptory challenges, asked for three more, and was willing to tell the (Footnote Continued)

It was error because the state's question was an incomplete and therefore inaccurate statement of the law. In Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), the United States Supreme Court held that a defendant who aided and abetted felonies underlying a resulting murder but who did not actually kill or intend that a death result could not be sentenced to death. Non-triggermen, in short, who never intended to commit a murder, were spared a death sentence.

Five years later, the court modified that holding somewhat in Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987). In that case, the court held that even if the defendant (a non triggerman) never intended for anyone to be murdered, he could nevertheless be sentenced to death if he acted with reckless indifference to human life, watched the killing, and did nothing to help the victim.

Depending on how the jurors viewed the facts in this case, Enmund or Tison could apply. They could, for example, have believed Archer told Bonifay how to rob Trout Auto Parts but never intended anyone be killed. On the other hand, the evidence arguably supported a conclusion that by giving Bonifay a gun (that he had gotten from Kelly Bland) he showed a

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(Footnote Continued)
court on whom he would use them. The court said that was unnecessary (T 147). He later asked to strike to of the venire, Mr. Davis and Mr. McClung, but the court denied that request (T 154, 176-77). Archer, therefore, satisfied the requirements of Trotter v. State, 576 So. 2d 691 (Fla. 1990).

reckless indifference to human life though he had no idea he would probably use it. Likewise because he was not present when Bonifay murdered Coker, he obviously was unable to help him. Tison, therefore, probably would not be relevant to this case. Whether it does or does not, however, misses the point. In this case, the court simply excused any juror who could not recommend death if the defendant was not the triggerman. As Enmund and Tison explained, and as defense counsel pointed out to the court, that Archer may not have been the triggerman could be a "legitimate mitigating factor." (T 18) The court, therefore, erred in excusing those prospective jurors who could not recommend death simply because Archer was not the one who actually killed Coker.

This court should reverse the trial court's sentence and remand for a new sentencing hearing.

CONCLUSION

Based on the arguments presented in this brief, the Appellant Robin Archer, respectfully asks this honorable court to reverse the trial courts sentence and remand for a new sentencing hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Richard B. Martell, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to appellant, ROBIN ARCHER, #216728, Florida State Prison, Post Office Box 747, Starke, Florida 32091, on this 5TH day of January, 1995.

DAVID A. DAVIS