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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES

CONSTITUTIONS

RULES

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REPLY BRIEF OF APPELLANT

STATEMENT OF THE FACTS

The state justified writing its own Statement of the Facts because it claimed "Archer's statement of the facts to be misleading and incomplete." (Appellee's brief at p. 2) Rule 9.210(c), Fla. R. App. P. provides

> The answer brief shall be prepared in the same manner as the initial brief; provided that the statement of the case and of the facts shall be omitted unless there are areas of disagreement, which should be clearly specified.

The Attorney General has the long standing habit of making statements of the sort quoted, apparently thinking that it thereby allows him to ignore the rules of appellate procedure. It does not. Henceforth, if he does not follow the rules this

court has promulgated, this appellate counsel will file a motion to strike briefs that present a general recounting of the facts as done here rather than clearly specifying the areas of disagreement.

ARGUMENT

ISSUE I

THE COURT ERRED IN INSTRUCTING THE JURY ON THE 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.

The state argues initially that Archer failed to preserve this issue because although he objected to the standard instruction, his proposed guidance "includes a proposed limitation which is neither addressed in Jackson [v. State, 648 So. 2d 85 (1994)] nor supported by any case law." (Appellee's Brief at p.11) To preserve this issue for appeal, this court has required Appellants to do two things:

> it is necessary both to make a specific objection or request an alternative instruction at trial, and to raise the issue on appeal.

Walls v. State, 641 So. 2d 381, 387 (Fla. 1994) (Emphasis in opinion.)

Archer more than met this initial burden. He not only objected to the CCP aggravator before trial (R 14) he objected at the charge conference to the court reading the standard instruction, and extensively argued the defects of that

guidance (T 425-32). Not only did he object, he proposed his own instruction which he believed overcame the constitutional infirmities he had identified.

The state seems to be arguing that not only must Archer had objected to the instruction, he must also have proposed one that somehow anticipated what this court would say in Jackson. That is not the law. He need only have alerted the court to the perceived problem. Walls. This court has never said that a defendant has to also have proposed a correct instruction to preserve this type of issue for appeal. That Archer's counsel did so is the mark of a competent lawyer, and he should be commended for trying to help the court correctly instruct the jury. To claim he waived this issue because his propsed instruction did not anticipate word for word what this court would say in Jackson is unfair, unreasonable, and not the law.

After all, if Archer had had his way, he would undoubtedly have not wanted the aggravator read at all (R 14). If the state wanted the jury told about the CCP aggravator, it should have had some burden to propose correct guidance. Instead, it objected because what Archer wanted "[is] not required by any rule." (T 432).

Undeterred, Archer's counsel further argued the unconstitutionality of the instruction, and significantly it offered the state the chance to object to his proposed guidance. "The State does not contend that my proposed instruction is an inaccurate statement of the law. It simply contends that it doesn't want the instruction given. And the fail to object--the thrust of my argument." (T 435) The prosecutor made no response other than reiterating what it had earlier said: "cruel and cold, calculated, premeditated without any pretense of moral or legal justification, is enough to inform the jury it's more than just consciously deciding to kill someone." (T 436) Thus, the state was allowed to perfect its objection, which it refused to do, so it should now be estopped from claiming Archer has somehow also not done so. State v. Dupree 20 Fla. L. Weekly S160 (Fla. April 13, 1995); Cannady v. State, 620 So. 2d 165 (1993). (The state, like the defendant, cannot raise issues on appeal that it did not present to the trial court.) Archer has preserved this issue for appeal.

The state on pages 11-12 of its brief claims Archer's proposed instruction misstated the law. First, at the trial

level it never claimed it was an incorrect statement of the law. It objected only because "it vaguely states the standard of appellant (sic) review." (T 432) Second, the requested guidance accurately presents the law on this aggravator. What Archer proposed was:

> The crime for which the defendant is to be sentencedwas committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Proof on that the killing was committed with a premeditated design is not sufficient proof of this aggravating factor. 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 81).

Counsel cited this court's opinions in Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987) and Sweet v. State, 624 So. 2d 1138 (Fla. 1993) to support that instruction (R 81). Reference to Rogers is particularly significant because in Jackson v. State, 648 So. 2d 85 (Fla. 1994), this court repeatedly drew guidance from that earlier opinion in fashioning a constitutionally acceptable CCP instruction.

The state's problem on appeal regarding the proposed instruction arises from the clause dealing with the intent. It claims that the it refers to Bonifay's intent, but a careful reading refutes that interpretation. That is, to establish this aggravator, the state had to show, 1) that the defendant had a careful plan, etc. and 2) even though the victim was killed by an accomplice, Archer intended for his carefully laid plan to be implemented.

Of course, if the state is correct, and the instruction is confusing on whose intent the proposed instruction focussed on, it certainly should have pointed out the problem to Archer at the charge conference. It did not, instead relying on the generic argument that the standard instructions were adequate. Just as the defendant cannot "sandbag" issues at trial by failing to object, Clark v. State, 363 So. 2d 331 (Fla. 1978), the state should raise all its objections to a proposed jury instruction at trial. To allow it to now complain that what Archer proposed was an incorrect statement of the law when it never raised that objection below is a waste of judicial time and effort. Problems are best identified and solved at the lowest level rather than having this court second guess what a

trial court might have ruled.

What is more, the court below never addressed the correctness of the instruction, reasoning only that if "this particular provision [of] the standard instruction is so patently unconstitutional that it is a puzzle and enigma why it has not been so addressed by our court or by the Supreme Court to be so." (T 436) Because there was no consideration of the accuracy of Archer's requested instruction of the CCP aggravator, it is now unfair for the state say the defendant is precluded from raising this issue since the trial judge never considered whether it accurately reflected the law on the CCP aggravator.

On the other hand, the standard instruction given to the jury on this aggravator has the same problem that has permeated this case. It never provided any definition of "premeditation." As mentioned in the Initial Brief, the court gave the traditional provision which was "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." (T 495)

While Archer's revised and expanded instruction correction

was a correct statement of the law, had the trial court read the guidance provided in Jackson, Archer would still be entitled to a new sentencing hearing. That is, Archer's requested guidance here, the old instruction on CCP, and the new provision all presume the jury had already received the standard guilt phase definition of premeditation. Id. at 89. (Where a defendant is convicted of premeditated first-degree murder, the jury has already been instructed [on the meaning of 'killing with premeditation.']")

This case, of course, had no guilt phase; it was a resentencing. The jury had no guilt issues to determine. It was, therefore, never instructed on what "killing with premeditation" meant.[1]

The state, on page 12, rather cleverly, seeks to redefine the problem here. It casts Archer's request for an adequate CCP instruction as one for "additional instructions." Despite the state's sleight of hand, Archer was not requesting an

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[1]This case and several others appellate counsel has been involved in suggest that this court may want to form some sort of commission to propose rules or other guidance specifically aimed at capital cases, especially resentencings. Dilbeck v. State, 643 So. 2d 1027 (Fla. 1994) (penalty phase discovery); Chaky v. State, 20 Fla. L. Weekly S107 (Fla. March 2, 1995)(Jury instructions to accompany jury when it deliberates.); Wike v. State, 648 So. 2d 683 (Fla. 1994)(order of penalty phase closing argument)

additional instruction. He repeatedly objected to the constitutionality of the standard CCP guidance, and if the court insisted on giving some instruction on it, he proposed one for the court to read. If he had had his wishes, the court would never have read it at all. His predicament did not involve the court refusing, for example, a theory of defense instruction, something he would have wanted. He was merely trying to provide the court with a constitutional instruction on an aggravator that he would have liked for the court to have ignored.

Finally, predictably, the state says whatever error occurred was harmless. Yet, to so find, this court would have to conclude that the only interpretation of the evidence presented supported the CCP aggravator. If the jury could have rejected it under some articulated defense theory, then the court's error could not be harmless. That is, using an analysis similar to that involved with circumstantial evidence, if the defense presented any reasonable theory the jury could have accepted for not finding this aggravating factor, this court must conclude the error was sufficiently prejudicial to require a new sentencing hearing. C.f., Delaware v. Van

Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) ("The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt.")

That the state could construct the evidence to support its conclusion that it had proven the CCP aggravator misses the point. Could it do so using the evidence as viewed by Archer? If so, the court's mistake was harmless. But, as presented in the Initial Brief, and extensively argued in Archer's closing argument, "all the State has proven at best, that my client allegedly had given information on how to do the robbery." (R 482) . . . "That's why Mr. Coker died. This punk goes into this place hoping to maybe get 15 or $20,000 according to Mr. Barth and goes in and kills a man because he was afraid of getting caught, not because there was any prearranged plan to kill." (T 483). The jury could very easily and reasonably believed Archer never committed the murder in a cold, calculated and premeditated manner. The court's error requires this court to revese and 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.

Under the state's rationale that a bad instruction is worse that no instruction, this court would approve the trial court in the capital sentencing phase only "instructing" the jury to "decide what sentence you think Archer should receive." That is what it means when, on page 22 of its brief, by its argument that giving a bad instruction is worse than giving none. Both are bad, and both should warrant a new trial or new sentencing proceeding.

The state claims Archer "overlooked Davis v. United States, 411 U.S. 233, 36 L.Ed.2d, 93 S.Ct. 1577 (1973)." (Appellee's brief at p. 21) He "overlooked" it because it has no bearing on this case. That case dealt with whether a defendant could, under the Rule of Federal Criminal Procedure, question the racial composition of the Grand Jury for the first time in a post-conviction habeas corpus proceeding. The national high court said that Davis could not. The distinctions with this case are obvious.

Here, the court failed to read the most fundamental law applicable: a definition of reasonable doubt. Cases such as Harris v. State, 787 So. 2d 796 (Fla. 1983) and McKinney v. State, 579 So. 2d 80 (Fla. 1991), therefore, are inappropriate because they focus on omissions far less serious, i.e. failure to instruct on lesser included offenses.

The state relies on Justice Ginsberg's concurring opinion in Victor v. Nebraska ___ U.S. ___, ___ S.Ct.___, 127 L.Ed.2d 583, 602 (1994) to support its argument that reasonable doubt is so difficult to define that courts should not make the effort to do so. (Appellee's Brief at p. 23) This is what she said:

> But we have never held that the concept of reasonable doubt is undefinable, or that trial courts should not, as a matter of course, provide a definition. Nor, contrary to the Court's suggestion, see ante, at ___, 127 L.Ed.2d at 590, have we ever held that the Constitution does not require trial courts to define reasonable doubt. . . . Whether or not the Constitution so requires, however, the argument for defining the concept is strong. . . . Several studies of jury behavior have concluded that 'jurors are often confused about the meaning of reasonable doubt,' when that term is left undefined. See Note, Defining Reasonable Doubt, 90 Colum L. Rev. 1716, 1723 (1990) (citing studies). Thus, even if

> definitions of reasonable doubt are necessarily imperfect, the alternative-refusing to define the concept at all-is not obviously preferable.

Id. at 127 L.Ed.2d 602-603.

As Justice Ginsberg has noted, the United States Supreme Court has never ruled on whether the Constitution requires a reasonable doubt instruction, so the state's conclusion on page 23 of its brief that failure to define reasonable doubt cannot possible be fundamental is wrong. Moreover, the issue in Victor arose in the context of a guilt phase reasonable doubt instruction. In light of the high court's extreme concern that the jury receive accurate and complete sentencing phase guidance, Espinosa v. Florida, 505 U.S. ___, 112 S.Ct. 2926, 120 L.Ed. 854 (1992), it is difficult to imagine them holding that the penalty phase jury in this case did not need to know what reasonable doubt was.

What is more, not all constitutional errors are fundamental, Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) and fundamental error can occur without implicating the United States Constitution. Miller v. State, 573 So. 2d 337 (Fla. 1991); Rojas v. State, 552 So. 2d 914 (Fla. 1989) (Fundamental error to not instruct on excusable and

justifiable homicide as part of the definition of manslaugther.)

Also, this court has relied on our state constitution to reject positions taken by the United States Supreme Court. Traylor v. State, 596 So. 2d 957 (Fla. 1992); Shaktman v. State, 553 So. 2d 148 (Fla. 1989)(Court order needed to install a pen register on a telephone line.) Indeed, when this court eliminated the jury instruction on circumstantial evidence, it did so because "the giving of the proposed instructions on reasonable doubt and burden of proof, in our opinion, renders an instruction on circumstantial evidence unnecessary. "Matter of Use by Trial Courts of Standard Jury Instructions in Criminal Cases, 431 So. 2d 594, 595 (Fla. 1981).[2]

As to error under state law, the state relies on four cases, but those are easily distinguishable. In Esty v. State, 642 So. 2d 1074, 1080 (Fla. 1994) the trial court had at least given some guidance on reasonable doubt. Esty just did not like it. This court rejected his argument because "'taken as a whole, the instructions correctly conveyed the concept of

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[2]Incidentally, besides not giving the reasonable doubt instruction, the court also failed to instruct on the burden of proof as contained in Fla. Std. Instr. (Crim.) 2.03.

reasonable doubt to the jury.'" Id., (Citing, Victor v. Nebraska.) Accord, Armstrong v. State, 642 So. 2d 730, 737 (Fla. 1994) (relying on Esty.) In Parker v. State, 641 So. 2d 369, 375 (Fla. 1994) Parker failed to object to the wording of the reasonable doubt instruction at trial, and was therefore, precluded from raising it on appeal. That issue had considerably less significance than here where no instruction at all was given to the jury to guide them on the meaning of reasonable doubt. In Knight v. State, 60 Fla. 19, 53 So. 541 (1910), this court held that in an arson case the instruction on alibi (that contained reasonable doubt language) was adequate even though Knight had not requested a definition of reasonable doubt.

The difference between Knight and this case needs further emphasized. This is not an arson case. Archer is fighting for his life, not 10 years in prison. In death penalty sentencing, little things mean a lot. For example, in Wike v. State, 648 So. 2d 683 (Fla. 1994) this court reversed Wike's sentence of death because the state had presented its penalty phase closing argument last, contrary to the dictates of Rule 3.780 Fla. R. Crim. P. In that case, the defendant had committed the worst

possible murder imaginable: He had kidnapped two little girls, raped one of them, bound them with tape, and slit both of their throats, killing one of them. Even though Justice Wells, in his dissent, was probably correct that no twelve people in Santa Rosa County would have voted for life, this court nevertheless remanded for yet another sentencing hearing because in the area of death penalty sentencing "the more stringently we enforce the rules laid down by this Court and the United States Supreme Court, the more confidence there will be in the legitimacy of the process and the justice of the outcome." Id. at 688 (Anstead, concurring.)

If that is the case for the order of closing arguments, how much truer is it in a case like this. Archer is not complaining he did not get the final closing argument. His problem goes far beyond that: the court never defined reasonable doubt. Can there be any more basic, more fundamental flaw in a case than failure to define the very term that itself defines and distinguishes criminal law?

This court should reverse the trial court's 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 I, SECTION 17 OF THE FLORIDA CONSTITUTION.

The court's opinion in Windom v. State, 20 Fla. L. Weekly S200 (April 27, 1995) largely supersedes the state's argument on this issue, and Archer will respond to the latter by discussing the former.

In Windom, the state offered as victim impact evidence the testimony of a police officer who had taught a drug abuse program at the school that two of one of the victim's children attended. An essay from one of them said that "some terrible things happened in my family this year because of drugs. If it hadn't been for DARE, I would have killed myself." The officer also said that as a result of the murders, "a lot of the children were afraid."

This court found section 921.141(7) Fla. Stats. (1993) constitutional generally, but held the officer's testimony inadmissible, though harmless. It also said Windom had failed to preserve the issue because he had not objected to the officer's testimony. This court also rejected the defendant's

ex post facto contention. That is, under the federal prohibition, this law could be applied retroactively since it affected only the admission of evidence and "is thus procedural."

In reaching this decision this court held that victim impact evidence is not a nonstatutory aggravating factor.

> "The evidence is not admitted as an aggravator but, instead, as set forth in section 921.141(7), allows the jury to consider 'the victim's uniqueness as an individual human being and the resultant loss to the cmmunity's members by the victim's death.'"

Id. at 20 Fla. L. Weekly S202.

The problem with this approach, however, is one of relevance. If the victim impact evidence is neither aggravation or mitigation, what relevance does it have to determining the appropriate sentence? Where in Florida's death sentencing scheme has the victim's uniqueness or loss to the community ever been considered relevant? It has not, and to the contrary, this court in Jackson v. State, 498 So. 2d 906, 909 (Fla. 1986) specifically rejected victim impact evidence as "patently improper."

Thus, how is the court to instruct the jury on how it is

to "consider" this evidence. This court is dreaming if it believes jurors will "consider" the victim impact evidence, yet it will not have any effect on their deliberations. If the state in this case believed it would have no impact on the jury why did it seek to have it admitted? Obviously, the prosecutor wanted that body to "consider" it as another reason to recommend Archer's death.

Moreover, since we are dealing with a criminal statute, it must be strictly construed in favor of the defendant. Section 775.021 Fla. Stats. (1995). When section 921.141(7) says the evidence "shall be designed to demonstrate the victim's uniqueness" then the state had to show Wayne Coker was one of a kind, and there were no others in the world like him. And though appellate counsel hates doing this, as good and decent and missed as Coker was and is, he was not unique. Even the evidence '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." (Initial Brief at pp. 45-46.)

Moreover, when the statute requires the state to show the

loss to the community's members, there must be evidence of what the community has suffered, not simply the pain and anguish Coker's wife and children have endured. A strict reading of the victim impact statute requires this.

In finding no ex post facto application of this statute, this court in Windom apparently considered only the federal constitution's prohibition. It made no mention of Article X section 9 of the Florida Constitution that has a special prohibition against retroactive applications of laws.

> Repeal or amendment of a criminal statute shall not affect prosecution for any crime previously committed.[3]

Similarly, the state, in its brief on this point ignored this constitutional provision. This court cannot, and its plain meaning forces only one conclusion: the trial court improperly allowed the jury to hear the victim impact evidence in this case.

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

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[3]That this is a special ex post facto provision is clear because Article I section 10 of the Florida Constitution explicitly prohibits ex post facto application of laws using similar language as found in the federal constitution: "No bill of attainder, ex post factor law or law impairing the obligation of contracts shall be passed."

before a new jury.

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.

Archer's counsel objected to the state's question asked of the venire, but the court overruled it (T 18). As argued in the Initial Brief, what the state asked the prospective jurors concerning their ability to recommend death if the defendant was not the triggerman was an incorrect statement of the law. (Initial Brief at pp. 55-56). That trial counsel agreed with the state's cause challenge of various prospective jurors should not be read as acquiescence. The court had earlier ruled against him regarding the state's question regarding nontriggermen, so he was entirely correct in agreeing with the state. He had lost the issue, and was bound by the court's ruling.

What trial counsel did here is similar to what members of this court regularly do. That is, in a particular case, there may be some dissenters to the majority's decision. If the issue recurs again in a later case, those dissenters often will join the majority, not because they have seen the error of

their ways, but because the majority's decision is now case law, and nothing would be advanced by objecting again. Combs v. State, 403 So. 2d 418 (Fla. 1981); Justus v. State, 438 So. 2d 358 (Fla. 1983)(ex post facto).

Archer's counsel merely did what this court had done. He had voiced his objection to the state's question and had lost. Nothing further would be gained by continuing to voice opposition to a ruling the court had made. So, in the context of that situation, even though the defense lawyer had questioned the propriety of the state's voir dire, he had to live with the court's erroneous ruling. In that context, then, much as members of this court have done, it agreed with the court's ruling. Doing so did not waive his objection to the state's improper question.

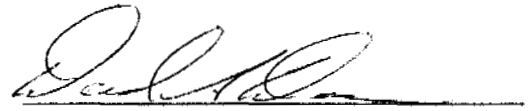
This court should reverse the trial court's sentence and remand for a new sentencing hearing.

CONCLUSION

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

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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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 12th day of June, 1995.

DAVID A. DAVIS