

IN THE SUPREME COURT OF FLORIDA

ROBIN LEE ARCHER,

Petitioner,

vs.

FSC case no. SC05-696

Lower case no. 1991 CF

000606A

JAMES V. CROSBY, JR., Secretary,
Florida Department of Corrections,

Respondent.

-----/

ON PETITION FOR WRIT OF HABEAS CORPUS

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FACTS AND PROCEDURAL HISTORY

A. The crimes

On January 27, 1991, at 12:09 a.m., Deputy Carl Chapman of the Escambia County Sheriff's Office was dispatched to Trout Auto Parts at 5590 North W Street in Pensacola. (TR-A I 103-04). Deputy Chapman found the side door of the business ajar and the clerk, Billy Coker, lying dead behind the counter. (TR-A I 104). Crime scene technicians later found the front door to the business securely locked. They also found evidence of a robbery. (TR-A I 107-17). A security camera aimed at the front counter and drive-up window recorded two masked individuals, one of whom was Caucasian, enter the store through the drive-up window, cut the locks on the night deposit box, and leave four minutes later. (TR-A II 247-50).

It did not record the shooting of the clerk, however, because the security equipment intermittently switched to a second camera in the warehouse. (TR-A II 249). An autopsy of the victim revealed four gunshot wounds: two to the left side of the head, one to the back below the scapula, and one to the chest. (TR-A II 231-32).

B. The investigation

Archer was arrested in connection with the robbery/murder, but gave no statement to the police. On

February 26, 1991, he was indicted, along with Patrick Bonifay, Clifford Barth, and Edward Fordham, for the murder and armed robbery of Billy Coker, and the grand theft of the money from the Trout store. (TR-A IV 489-90).

C. The trials

In mid-July 1991, two juries were selected from the same venire, one for Bonifay's trial, which was to be held first, and one for Archer's, which was to immediately follow Bonifay's. (TR-A Supp. 582-670; I 19-64). Within hours of the State's closing argument in Bonifay's case, Archer's trial began. The State's theory, as presented to the jury, was that Archer was a principal in the robbery/murder: Archer and Bonifay planned it together, there was ill-will between Archer and Dan Wells, the intended victim, and Archer's benefit in participating was "revenge." (TR-A I 83-84).

To support this theory, the prosecutor called Patrick Bonifay as a witness. Bonifay testified for the first time that Archer came to his house the Thursday before the robbery/murder and showed him a "briefcase full of money."¹ Archer told Bonifay he wanted him to "do a job," i.e., murder

¹ Bonifay claimed that he had told Investigator O'Neal about the briefcase of money; it was simply not on the taped version of his statement. (TR-A I 144). Investigator O'Neal denied that Bonifay had ever mentioned it. (TR-A II 251).

the clerk working at Trout on Friday night. (TR-A I 126). Archer wanted the clerk killed because, according to Bonifay, "[t]he man got him fired and messed up something, and [Archer] had hated him ever since." (TR-A I 129). In order to make it look like a robbery, instead of a murder, Archer allegedly told Bonifay to ask the clerk for a Nissan clutch assembly so he would have to go into the warehouse to get it. Bonifay could then climb in the after-hours service window, unlock the front door to let in his accomplice, and shoot the clerk when he returned from the warehouse. Archer warned him that the store had security cameras. (TR-A I 126-28).

Bonifay testified that he had been in the Trout store once or twice before, but did not know where they kept their money. Nor did he know that the other Trout stores in town deposited their daily proceeds in a locked box on the wall of the W Street store.² (TR-A I 128). Bonifay also testified that he asked Kelly Bland to find him a handgun, which Kelly

² Both Robin Archer and his cousin, Richard, testified that they were at another Trout location with Bonifay when Bonifay asked what the locked, green box was on the wall. Robin and Richard told Bonifay that the stores deposit their proceeds in these boxes overnight. (TR-A II 354-55). Rodney Archer, who worked at the W Street Trout store in 1990, also testified that the function of the green box on the wall was no secret. Customers asked about it all the time. (TR-A II 268-69, 348).

did and gave to Archer, who in turn gave it to Bonifay.³ (TR-A I 128).

³ Bland did not testify at Archer's trial. Moreover, Investigator O'Neal testified that Bland did not mention in his taped statement that he gave the gun to Archer. (TR-A II 222). Nor did Clifford Barth mention in his taped statement that they got the gun from Archer. (TR-A II 253). However, Barth testified at Archer's trial that on Friday night he and Bonifay and Fordham drove to where Archer was staying. Archer came outside, and he and Bonifay went to Archer's truck. Bonifay returned with a gun. (TR-A II 204). Barth could not, however, identify the murder weapon as the gun he saw in Bonifay's possession. (TR-A II 235-36).

According to Bonifay, after his conversation on Thursday night with Archer, he recruited Cliff Barth and Eddie Fordham the following day to help him commit the robbery/murder. However, when Bonifay walked up to the service window at Trout to initiate the robbery, he "couldn't do it," so they left.⁴ The next day, Archer was at Bonifay's house when Archer allegedly threatened to hurt Bonifay's mother and girlfriend if he did not follow through with the plan. (TR-A I 130).

As a result of Archer's threat, Bonifay contacted Cliff Barth and Eddie Fordham, and the three returned to Trout Auto Parts on Saturday night for a second attempt. Once at the store, Bonifay walked up to the after-hours service window, but the clerk saw him before he could put on his ski mask, so Bonifay pulled out the gun he had gotten from Kelly Bland and aimed it at the clerk, who had turned to answer the phone. At that point, Barth grabbed Bonifay's shoulder, and the gun "went off." The clerk fell, and Barth yelled, "You didn't kill him. You didn't kill him." According to Bonifay, Barth

⁴ Bonifay denied that the reason he "couldn't do it" was because the clerk heard him cock his gun at the service window, but the clerk testified that he heard a gun cock and quickly closed the window. (TR-A I 152, 180-81). George Wynn and Cliff Barth both testified that Bonifay told them he cocked the gun and scared the clerk. (TR-A I 197, 205).

then grabbed the gun and shot the clerk once.⁵ (TR-A I 131-32).

⁵ Barth denied shooting the clerk. (TR-A II 207-08).

After donning ski masks, Bonifay and Barth crawled through the window. The clerk was talking about his kids. Barth was not strong enough to cut the locks off the night deposit box, so Bonifay handed Barth the gun and cut the locks off with a pair of bolt cutters Bonifay had gotten from Kelly Bland. Then Bonifay took the gun back and started to leave when Barth said, "Patrick, kill him." Because the clerk had seen his face and now knew his name, Bonifay decided that he had to kill the clerk, so he shot him twice in the head, and he and Barth left through the back door as planned.⁶ In the car, Bonifay stuck his gun in Barth's face, angry that Barth had said his name and forced him to kill the clerk. (TR-A I 132-33).

From the store, the three drove to an undescribed location and counted the money. Bonifay and Barth each received \$700, while Fordham received \$663. On the way to take Barth home, they threw the checks in a ditch full of water. Bonifay and Fordham then drove to Fordham's home and went to sleep. Bonifay later gave the gun back to Bland and

⁶ On cross-examination, Bonifay insisted that he killed the clerk not for the money Archer had promised him, nor because the clerk had seen his face and knew his name, but because he was afraid of Archer--his "gun, his associates"--particularly after Archer had threatened his family. (TR-A I 132-33, 148-49, 153-54, 154-55, 156).

told him to get rid of it because he had used it in the robbery/murder at Trout. Archer came over to Bonifay's a few days later, laughing because Bonifay had killed the wrong clerk. Archer refused to pay him any money because of it. (TR-A I 133-36).

Archer's attorney cross-examined Bonifay about the briefcase full of money, which Bonifay described as a briefcase of \$50 bills, totaling \$500,000. Bonifay conceded that Archer had not worked in almost a year, that his girlfriend was supporting him, and that he was staying with different people because he had no money for an apartment. (TR-A I 137-40). On redirect, the prosecutor was allowed to elicit over objection that Bonifay believed Archer had another source of income sufficient to generate a significant amount of cash. (TR-A I 166).

Following Bonifay's testimony, the General Manager for Trout Auto Parts testified that he fired Archer in March 1990 and that Dan Wells, who was Archer's alleged intended victim, had nothing to do with getting him fired. (TR-A I 174-75). Wells, who was the clerk on duty at Trout on Friday night, testified that he felt somewhat responsible for getting Archer fired from Trout, and that although Archer had never

threatened him, he felt threatened by Archer. (TR-A I 182-85).

George Wynn testified that Bonifay called him on Friday night and asked him to drive them to Trout, so they could rob the store. Bonifay told him that "it might involve killing somebody." Bonifay also said that Archer "asked him to do that and he wanted one person killed" because "he had problems with him at work." Bonifay claimed that Archer had told him that there would be one person in the store, the doors would be locked, and they would have to go in through the service window. Wynn declined to be the getaway driver and tried to talk Bonifay out of it. (TR-A I 192-93). On Sunday, Bonifay called and described the robbery/murder in detail. He did not say that Barth shot the clerk, nor did he ever mention the \$500,000 that Archer had offered him. (TR-A I 194-96).

Next, Clifford Barth, who was 17 years old at the time of the crime, testified that Bonifay called him on Thursday and asked him to help rob the Trout Auto Parts store on W Street.

Bonifay never told him the reason they were going was to shoot the clerk. Rather, Bonifay told him that Archer used to work for Trout and had told him where Trout kept the money that the other stores deposit there. Barth then recounted their trip to see Wynn, their trip to obtain a gun from

Archer, and their aborted attempt to rob the store on Friday night. On Saturday, Bonifay called Barth again and said he wanted to do it that night, "because Archer said it would be a good day to do it." Barth recounted the details of the robbery and murder, but denied ever shooting the clerk. (TR-A 202-11).

Daniel Webber was the State's next witness. Webber was the roommate of Archer's cousin, Rick. Archer had been staying with Webber and Rick for several weeks when the robbery/murder occurred, because Archer did not have anywhere else to stay. On the Sunday following the crime, Webber came home and found Archer asleep on the couch. When a news report about the robbery/murder came on the television, Archer woke up and asked Webber about it. Archer said he thought he knew who had committed it, that he had told them how to do it. Archer detailed the information he gave the unidentified perpetrators. (TR-A II 212-15).

In his own defense, Robin Archer testified that Timothy Eaton had fired him from Trout for "[p]oor work performance."

He believed that he and Dan Wells had gotten along well, and he had no indication that Wells was involved in his firing. (TR-A II 261-64). He also got along well with Bonifay's mother and stepfather, with whom he stayed for several days in

January 1991. He hardly knew Bonifay's girlfriend, Rachel, and denied threatening to harm either Bonifay's mother or his girlfriend. (TR-A II 275-76). Archer also denied offering Bonifay any money to kill Dan Wells. Archer had no job, was being supported by his girlfriend, who worked at Popeye's, and had no access to \$500,000.⁷ (TR-A II 277-78, 290). He further denied accepting a gun from Kelly Bland and giving it to Bonifay. (TR-A II 303). As for his comments to Daniel Webber, Archer admitted telling Webber that he thought he knew who robbed the Trout store and how someone could do it, but he denied that he told anyone to rob the store. (TR-A II 286-88, 300). He was not sure why Bonifay would implicate him in the crime, except that Bonifay had threatened to "get even" for Archer's refusal to take him to buy a pound of marijuana several days before the robbery/murder.⁸ (TR-A II 290-92).

In his closing argument to Archer's jury, the prosecutor stressed the law on principals and described the robbery/murder as a "classic inside job." (TR-A II 366-68). He then alleged that Archer knew Bonifay was going to rob the

⁷ Archer's girlfriend, Patricia Gibbs, confirmed that she supported Archer financially, because he had no money and no job. (TR-A II 311-13).

⁸ Archer's girlfriend testified that she overheard Bonifay threaten to "get even" with Archer for Archer's refusal to take him to buy drugs. (TR-A II 322).

store and kill the clerk, that his benefit was revenge in seeing the store robbed and the clerk killed, and that Archer helped Bonifay commit the crime by offering him money to "pull it off," by giving Bonifay details about the store layout and security to facilitate the robbery/murder, and by providing Bonifay with a gun. (TR-A II 369-78). "Patrick Bonifay was a loaded gun . . . pointed at Trout Auto Parts, and that loaded gun killed Billy Coker because of Robin Archer. That's why Billy Coker is dead." (TR-A 374).

The jury's verdicts, rendered after two-and-a-half hours of deliberation, were sealed until the following day. (TR-A III 433-36). The next morning, Bonifay's verdicts were published in open court, followed immediately by Archer's verdicts. Both Bonifay and Archer were found guilty as charged of first-degree premeditated and/or felony murder, armed robbery, and grand theft. (TR-B II 378-80; TR-A III 437-39). Immediately thereafter, Bonifay's penalty phase began. Upon its conclusion, Archer's penalty phase began.

D. The penalty phase and final sentencing

The State called Cliff Barth to remind the jury of the events following their entry into Trout Auto Parts on Saturday night, which culminated in Bonifay shooting Billy Coker to death. (TR-A III 454-56). In mitigation, the defense called

Archer's girlfriend, Patricia Gibbs, and his mother, Frances Archer. (TR-A III 456-61, 461-66). In closing arguments, the State urged the jury to find in aggravation that the murder occurred during the commission of a robbery, and that it was committed in a cold, calculated and premeditated manner, as well as in a heinous, atrocious, or cruel manner. (TR-A III 466-69). The defense urged in mitigation that Archer had no significant history of prior criminal activity, that he was an accomplice to a murder and that his participation was relatively minor, that he was acting under the influence of an extreme mental or emotional disturbance, that his capacity to appreciate the criminality of his conduct was substantially impaired, and that he was only 26 years old at the time of the crime. (TR-A III 469-77). The jury recommended death by a vote of seven to five. (TR-A III 484).

In sentencing Archer to death, Judge Collier found the three aggravating factors proposed by the State. In mitigation, it found that Archer had no significant history of prior criminal activity and that he was a loving son to his parents and a good family member and friend. The court assigned no particular weight to any of these factors. (TR-A IV 543-49).

E. The direct appeal

Archer raised four issues on appeal: (1) the trial court erred in denying his motion for judgment of acquittal because the murder of Billy Coker was an act independent of the agreed upon plan to kill Daniel Wells; (2) the court erred in instructing upon and finding the existence of the HAC aggravating factor; (3) the court erred in instructing upon and finding the existence of the CCP aggravating factor; and (4) the court erred in converting several of the statutory mitigating factors into nonstatutory aggravating factors. (FSC case no. 78,701; initial brief of appellant). This Court found the first issue unpreserved and, alternatively, without merit. Archer v. State, 613 So. 2d 446, 447-48 (Fla. 1993). It vacated Archer's sentence, however, because the trial court erred in instructing the jury on the HAC aggravating factor, since it could not be applied to Archer vicariously. Id. at 448.⁹

F. The resentencing and appeal

⁹ Bonifay's sentence was later vacated, as well, because the facts did not support the HAC aggravating factor. Bonifay v. State, 626 So. 2d 1310 (Fla. 1993).

At Archer's resentencing, Bonifay refused to testify, asserting his Fifth Amendment privilege, so the State read his previous testimony into evidence. (RS-A II 304-05, 330-80). The jury again recommended death by a vote of seven to five, and the trial court followed the jury's recommendation, finding the felony murder and CCP aggravating factors. (RS-A I 89, 140-42). In mitigation, it found that Archer had no significant history of prior criminal activity, to which it gave "significant weight," and that Archer had been a good family member to his grandmother, to which the court gave "some weight." (RS-A I 142-44). In a four-to-three decision, this Court affirmed Archer's sentence of death, despite an unconstitutionally vague CCP instruction, finding that each element of the aggravator existed under any definition of the terms. Archer v. State, 673 So. 2d 17, 19-20 (Fla. 1996).¹⁰

GROUND FOR RELIEF

CLAIM I

APPELLATE COUNSEL WAS INEFFECTIVE FOR
FAILING TO CHALLENGE PATRICK BONIFAY'S
TESTIMONY THAT HE WAS AFRAID OF ARCHER'S
"ASSOCIATES" AND THAT ARCHER HAD AN ILLEGAL

¹⁰ In a unanimous decision, this Court affirmed Bonifay's sentence of death, as well. Bonifay v. State, 680 So. 2d 413 (Fla. 1996).

SOURCE OF INCOME SUFFICIENT TO GENERATE A
SIGNIFICANT AMOUNT OF CASH.

A habeas corpus petition is the proper vehicle for bringing claims of ineffective assistance of appellate counsel. See Medina v. Dugger, 586 So. 2d 317, 318 (Fla. 1991). When entertaining a habeas petition based on a challenge of ineffective assistance of appellate counsel, this Court must decide "first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." Suarez v. Dugger, 527 So. 2d 190, 192-93 (Fla. 1988).

In the present case, Patrick Bonifay was the linchpin in the State's case against Robin Archer. Bonifay was the only witness who could establish that Archer was an equally culpable principal in the crimes. During his direct testimony, Bonifay revealed for the first time that Archer showed him a "briefcase full of money" on Thursday night and asked him to kill the clerk who would be working at Trout Auto Parts on Friday night. According to Bonifay, Archer wanted

the clerk killed because "[t]he man got him fired and messed up something, and [Archer] had hated him ever since." (TR-A I 129). Bonifay then testified that Archer told him to make it look like a robbery, instead of a murder, and that he gave Bonifay inside information on how to rob the store. (TR-A I 126-28).

Bonifay recruited two others, Cliff Barth and Eddie Fordham, to help him commit the robbery/murder. However, when Bonifay walked up to the service window at Trout to initiate the robbery, he "couldn't do it," so they left. The next day, Archer was at Bonifay's house when Archer allegedly threatened to harm Bonifay's mother and girlfriend if Bonifay did not complete the job. (TR-A I 130). So Bonifay called Barth and Fordham, and the three went back to the Trout store. After Bonifay wounded the clerk, gained entry into the store, and stole the day's proceeds from the night drop box, he claimed that he killed the clerk not for the money Archer had promised him, nor because the clerk had seen his face and knew his name, but because of Archer's threat. (TR-A I 132-33).

On cross-examination, Archer's attorney challenged Bonifay's testimony, particularly the briefcase full of money and the threat, neither of which Bonifay had ever mentioned before. Regarding Archer's alleged offer of \$500,000 to kill the clerk, defense counsel elicited from Bonifay that Archer had not had a job for almost a year, that Archer was staying with different people because he had no place of his own, and that Archer's girlfriend, who worked at Popeye's, was

supporting him. (TR-A I 137-40). Regarding the threat, counsel challenged Bonifay's alleged motivation for killing the clerk:

Q. [BY DEFENSE COUNSEL] But you're telling these ladies and gentlemen of the jury that you killed him because you're afraid of Robin Archer, is that right?

A. I told you that the reason I did it was because everything was messed up, and he knew my name, and if I didn't do it, he might live and know who I was, and Robbie would come back. If I did do it, Robbie would leave me alone, and everything would be okay.

Q. Well, then what you're saying, sir, is that you killed him because you're afraid of Robin Archer, is that what you're saying?

A. Yes, sir.

* * * *

Q. So you weren't planning on killing the man after all, were you?

A. (Indicates in the negative.)

* * * *

Q. You weren't going to kill him, were you?

A. Didn't want to.

Q. But that was the whole purpose of going in there, wasn't it, just to kill the man for Robin Archer, because Robin Archer told you to because he had a suitcase full of money?

A. The first night that was the reason.

Q. You didn't think you were going to get that suitcase full of money, the half million dollars, unless you killed him, were you?

A. I didn't think I was going to get it if I did it Saturday night.

Q. So you were going to get a half million dollars if you did it Friday night, but you weren't going to get it if you did it Saturday.

A. Right.

Q. Because it was a different man?

A. No.

Q. Then why weren't you going to get a half million dollars the second night?

A. Because I backed out the first night, and he was pissed off at me and he said either you do it or you lose your girlfriend and your mom.

* * * *

Q. And you're telling the ladies and gentlemen of the jury that he threatened harm to your mother and your girlfriend if you didn't go back and kill that man at the store?

A. Right.

Q. And you did it?

A. Right.

Q. Because of what he said?

A. Right.

(TR-A I 148-49, 153-54, 154-55, 156) (emphasis added).

On redirect, the State elicited highly inflammatory testimony that led the jury to believe that Archer was involved in a drug organization that could both finance the "hit" on the clerk and kill his mother and girlfriend as threatened:

Q. [BY THE PROSECUTOR] When you first talked to the police, did you tell them you were afraid of Robin Archer?

A. [BY BONIFAY] Yes, I did.

Q. Now, just a minute ago you pointed over to Robin Archer and said you weren't afraid of him. Is that true?

A. Physically, no, not of him.

Q. So what are you afraid of?

A. His gun, his associates.

(TR-A I 163) (emphasis added).

Immediately after eliciting this response, the prosecutor asked to approach the bench because he wanted to elicit further testimony regarding Bonifay's opinion of Archer's character:

MR. PATTERSON: Mr. Lang made a big deal about Mr. Archer not having a source of income sufficient to impress this witness, the fact that he could be paid for what he did. I believe this witness would say that he did believe he had that kind of money or could get that kind of money, because he felt like he was a drug dealer, and that's what he was doing with all the cash and why

he thought he had sources, large amounts of cash. I would propose that I ask him a question regarding that without an effort to get into drug dealing or anything like that, but simply say did you believe Robin Archer had a source of income and a source of cash sufficient to pay you and did you know what that source of income was, and not ask him what it was. I don't want to get into anything that's going to cause us problems.

(TR-A I 164).

Defense counsel strenuously objected, arguing that "the only connotation is what Mr. Patterson is trying to stay away from." (TR-A I 164-65). In light of defense counsel's cross-examination on the issue, the trial court agreed "to permit the questioning at that degree as to what he thought, but not going to get in any firsthand, I knew, I saw it, I participated or anything, but [only] his opinion relative to the money" (TR-A I 165). Counsel renewed his objection, but the court overruled it: "Well, that's what you've attacked is, how would he think that the guy had that much money. That's exactly what your questioning went to. So he has a right to respond why he thought he had that much money." (TR-A I 165). As a result, the State elicited the following testimony from Patrick Bonifay:

Q. Mr. Bonifay, you knew Mr. Archer wasn't working, didn't you?

A. Yes, sir.

Q. Knew he hadn't worked for some period of time, didn't you?

A. Yes, sir.

Q. Did he have a source of income other than his work?

A. Yes, he did.

Q. And did that source of income generate him significance [sic] amounts of cash?

A. Yes, it did.

Q. And you were aware of that?

A. Yes, I was.

(TR-A I 166).

This testimony was neither relevant to, nor probative of, a material issue in this case, and was both highly inflammatory and prejudicial to Archer's case. Moreover, this testimony raised the spectre of a collateral crime for the purpose of inferring Archer's bad character or propensity to commit similar crimes and therefore violated the principle enunciated in Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847 (1959). The obvious implication was that Archer was involved in something illegal that generated large sums of cash. Coupled with Bonifay's testimony that he was afraid of Archer's "gun, his associates," the jury was left to infer that Archer was a dangerous, well-connected, and well-

financed criminal, who could both afford to pay for a "hit" on the clerk and have Bonifay's family hurt or killed if Bonifay did not uphold his end of the bargain. Moreover, contrary to the prosecutor's asserted intention, Bonifay did not relate his opinion, but rather testified to his direct knowledge of Archer's nefarious dealings. This testimony was prejudicial enough to affect the jury's verdicts in this case.

Because of the harmful nature of this testimony, Archer's appellate counsel unreasonably failed to challenge it. Although trial counsel did not object to Bonifay's testimony regarding Archer's "associates," appellate counsel nevertheless had a duty to appeal it as fundamental error, since the errors, when considered together, were so egregious as to deprive Petitioner of a fair trial. See Roberts v. State, 568 So. 2d 1255, 1261 (Fla. 1990); Kilgore v. State, 688 So. 2d 895, 898 (Fla. 1997) (defining fundamental error as an error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.").

Appellate counsel's failure to do so, despite his clear and present duty, compromised the appellate process to such a degree that confidence in the correctness of the result has been undermined, thereby warranting a new trial in this cause.

CLAIM II

APPELLATE COUNSEL WAS INEFFECTIVE FOR
FAILING TO CHALLENGE AS FUNDAMENTAL ERROR
THE TRIAL COURT'S ADMISSION OF PREJUDICIAL
TESTIMONY REGARDING ARCHER'S ALLEGED
POSSESSION OF THE MURDER WEAPON.

As related in Claim I, a habeas petition is the proper vehicle for bringing claims of ineffective assistance of appellate counsel. See Medina v. Dugger, 586 So. 2d 317, 318 (Fla. 1991). Although habeas petitions should not be used to challenge matters that were not objected to at trial, Parker v. Dugger, 550 So. 2d 459, 460 (Fla. 1989), an exception may be made where appellate counsel failed to raise a claim which presents a fundamental error. See Roberts v. State, 568 So. 2d 1255, 1261 (Fla. 1990). A fundamental error is defined as an error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Kilgore v. State, 688 So. 2d 895, 898 (Fla. 1997).

Here, the State presented, and the trial court allowed, testimony whose prejudicial effect substantially outweighed any probative value it may have had. In general, the admission of evidence is left to the sound discretion of the trial court. Dessaure v. State, 891 So. 2d 455, 467 (Fla. 2004). Relevant evidence is admissible "to prove or disprove

a material fact." § 90.401, Fla. Stat. (1991). However, relevant evidence is not admissible "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." § 90.403, Fla. Stat. (1991).

In weighing the probative value against the unfair prejudice, it is proper for the court to consider the need for the evidence; the tendency of the evidence to suggest an improper basis to the jury for resolving the matter, e.g., an emotional basis; the chain of inference necessary to establish the material fact; and the effectiveness of a limiting instruction.

State v. McClain, 525 So. 2d 420, 422 (Fla. 1988) (emphasis added) (quoting Charles W. Ehrhardt, Florida Evidence § 403.1, at 100-03 (2d ed. 1984)).

During Archer's trial, Clifford Barth was allowed to testify that he and Bonifay and Fordham went to where Archer was staying on Friday night. When they arrived, Bonifay got out of the car and spoke to Archer in the yard. At one point, Archer leaned inside his truck. When Bonifay returned to the car, he had a gun. (TR-A II 204). Critically, however, Barth did not see Archer hand Bonifay the gun (TR-A II 208), nor was Barth able to identify the murder weapon, which the police recovered from Kelly Bland (TR-A II 219), as the gun he saw

Bonifay return with. (TR-A II 235-36). Thus, from this testimony, the jury was asked to stack inferences in order to conclude that Archer provided Bonifay with the gun used in the Trout robbery/murder.¹¹ See Graham v. State, 748 So. 2d 1071, 1072 (Fla. 4th DCA 1999) ("An impermissible pyramiding of inferences occurs where at least two inferences in regard to the existence of a criminal act must be drawn from the evidence and then stacked to prove the crime charged; in that scenario, it is said that the evidence lacks the conclusive nature to support a conviction."); Crain v. State, 894 So. 2d 59 (Fla. 2004) ("The State argues that the luminol evidence demonstrates that a large amount of blood was spilled in the

¹¹ The trial court did just that. In sentencing Archer to death, Judge Collier concluded, in part, that "Archer concocted the plan to get in, the use of ski masks to thwart the video, the bolt cutters to open the concealed cash box, and the smart way to exit. He aided in securing a gun, even delivering it to Bonifay himself." (TR-A IV 544-45) (emphasis added). In affirming Archer's convictions, this Court drew the same inferences: "Bonifay borrowed a handgun from a friend who gave the gun to Archer to give to Bonifay." Archer v. State, 613 So. 2d 446, 447 (Fla. 1993).

bathroom and therefore establishes that the kidnapping was committed with an intent to kill. The State's argument on this point invites this Court to stack inferences, which we decline to do.").

Archer's alleged possession of the murder weapon was a key component in the State's theory that Archer was an equally culpable principal to the crimes. Otherwise, the State had only Bonifay's frequently inconsistent and oftentimes wildly implausible allegations of Archer's involvement, and Archer's ambiguous comment to Daniel Weber that he told Bonifay how to rob the store. No other evidence linked Archer to the robbery/murder.

At trial, Patrick Bonifay testified that he asked Kelly Bland for a gun and that Bland gave the gun to Archer, from whom Bonifay retrieved it on Friday night. (TR-A I 128, 157-61). Critically, however, Bonifay never identified the murder weapon as the gun he retrieved from Archer. Even more critically, Bonifay admittedly never told the police that he obtained the gun from Archer. (TR-A I 160). Nor did Clifford Barth ever mention to the police the trip to Archer's to retrieve the gun. (TR-A II 253). Finally, Kelly Bland, who did not testify at Archer's trial, failed to mention in his initial statement to the police that he gave the gun to Archer

to give to Bonifay. (TR-A II 222). Thus, no one sufficiently established, even circumstantially, that Archer ever had possession of the murder weapon and gave it to Bonifay. And Archer adamantly denied accepting the gun from Bland and giving it to Bonifay. (TR-A II 303).

While Archer's possession of the murder weapon would be relevant to establish Archer's culpability as a principal, Barth's testimony was not sufficiently connected to the evidence to be substantially outweighed by its prejudicial effect. See O'Connor v. State, 835 So. 2d 1226 (Fla. 4th DCA 2003) (reversing conviction as principal to first-degree murder and armed robbery where evidence of shotgun and bulletproof vest seized from defendant's home was not sufficiently connected to crime to be admissible); Huhn v. State, 511 So. 2d 583 (Fla. 4th DCA 1987) (finding error in allowing state to introduce evidence of gun and gun purchase records against defendant in kidnapping and armed assault case when no connection was made between gun and charged offenses); Rigdon v. State, 621 So. 2d 475 (Fla. 4th DCA 1993) (reversing conviction for aggravated assault with a firearm where trial court erred in admitting small semi-automatic weapon found on defendant's bed, since gun did not tend to prove or disprove material fact because it was not connected to charged

offense); Sosa v. State, 639 So. 2d 173 (Fla. 3d DCA 1994) (reversing second-degree murder conviction where trial court erred in allowing bullets, which were found in defendant's vehicle, to be placed into evidence, since no weapon was found, no ballistics tests were performed and no link whatsoever was established between bullets and defendant's case). Therefore, appellate counsel was constitutionally ineffective for failing to challenge Barth's testimony about the gun, and his ineffectiveness prejudiced Archer's case to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error. As a result, Robin Archer is entitled to a new trial.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, Petitioner, ROBIN LEE ARCHER, respectfully requests that this Honorable Court grant this petition for writ of habeas corpus and remand this cause for a new trial or such other relief as this Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was hand delivered to Curtis French, Assistant Attorney General, The Capitol PL-01, Tallahassee, FL 32301; and was sent by United States mail, postage prepaid, to Robin Lee Archer, DC# 216728, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida 32026, this 22nd day of April, 2005.

SARA K. DYEHOUSE, ESQ.

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in this brief is Courier New, 12 point, a font that is not proportionately spaced.

SARA K. DYEHOUSE, ESQ.