IN THE SUPREME COURT OF FLORIDA

ROBIN LEE ARCHER,

Appellant,

v. CASE NO. 78,701

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 case presents the unusual issue of whether a defendant can be held liable for the murder of a person he did not intend to kill. The defendant is Robin Archer, and the record on appeal consists of five volumes, and references to it will be by the usual "T".

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 James Bonifay with one count of first degree murder, one count of armed robbery, and one count of grand theft (T 489-90). Archer proceeded to trial before judge Lacey Collier, and he was found guilty as charged on all of the counts (T 512-13).

The jury then heard further evidence, argument and instructions regarding the sentence they should recommend, and after deliberating, they returned a death recommendation by a vote of 7-5 (T 521). 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 especially heinous, atrocious, and cruel.
>
> 3. It was committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification (T 543-45).

In mitigation, the court found that Archer had no significant history of prior criminal activity, although he had used illegal drugs for much of his life. It also held that the defendant had been a loving son to his parents and a good family member to other relatives and his girlfriend (T 546).

The court departed from the recommended guideline sentences on the remaining two counts, sentencing Archer to life in prison for the armed robbery and five years in prison

for the grand theft conviction. All sentences are to run consecutive to one another (T 567-68).

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 from November 1989 until March 1990 (T 174). In that latter month, Timothy Eaton, the general manager for the several stores fired Archer, and another employee, Daniel Wells, may have had something to do with the lay off (T 129). It is not known what the defendant did for the next several months, but in October he attended a motorcycle school in Daytona Beach (T 275). He returned on January 13, 1991, and because he did not have any money or a job he stayed with several friends and relatives over the next several weeks (T 213, 276), and his girl friend also supported him (T 278).

On Thursday 24 January, Bonifay claimed Archer, who was his cousin (T 126), asked him to kill Wells because he had been instrumental in getting him fired from Trout Auto Parts (T 129, 174). He showed Bonifay a suitcase full of money, estimated at $500,000, which the defendant said would be his if he did what

he asked.[1] 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 stares to deposit receipts at the end of the day (T 126). He also warned him about the security camera at the store.

The next night Bonifay 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 181).[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 130).[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 181).

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[1] No one else ever saw the money (T 218), nor did Bonifay mention any payment by the defendant when first questioned by the police (T 251).

[2] Bonifay denied cocking the gun (T 152) 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).

Bonifay and Barth went to the night window, and the latter grabbed Bonifay by the arm causing him to shoot Coker in the back (T 131)[4]. Noticing that the clerk was still alive, Barth took the gun and shot him again (T 132).[5]

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 132).[6] 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 132). So, Bonifay shot Coker two more times in the head (T 133), killing him (T 233).

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 161).

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 135). Bonifay did nothing because he was afraid of Archer (T 136).

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[4]Barth denied grabbing Bonifay (T 207).

[5]Which Barth denied (T 207).

[6]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 455)

Although Archer had been fired from Trout Auto Parts, he would often visit friends who worked at one of the stores (not the one involved in this case), In particular, on January 26, he had stopped and talked with Ed Bird, and he stayed initially until 8 or 9 p.m. (T 279) He left briefly to take his girlfriend home from work, but returned about 10 o'clock as Bird was closing up for the night (T 280). He rode with Bird to the W Street store (where the murder would occur in a couple of hours) so his friend could make the night deposit (T 283). While waiting for Bird to return, he saw Wayne Coker.

Shortly thereafter, the two men said good night, and Archer went to his cousin's apartment where he was living. When he got there, his relative told him that he was going to spend the night with his girlfriend, so Archer decided to bring his girlfriend to the apartment to stay with him (T 284). He drove past the W Street auto parts store and noticed several police cars (T 285).

The next night Archer heard about the robbery/murder, and he told his cousin that Bonifay might have committed the crimes because the latter had questioned him earlier about the drop box, and Archer had told him how he could break into the store and steal the money in the box (T 286-87 355-56). While the defendant may have told his cousin how he could commit this crime, he never told him to do it (T 288).

SUMMARY OF THE ARGUMENT

Archer presents one guilt and three sentencing issues. In the first issue, he argues that the trial court erred in denying his motion for a judgment of acquittal because there was insufficient evidence that he intended to have Wayne Coker, the victim, murdered. That is, he ostensibly was willing to pay Patrick Bonifay $500,000 to kill David Wells. Bonifay, instead, killed Coker. What he did was an independent act, beyond the agreement he and Archer had reached. The defendant, therefore, cannot be held liable for what Bonifay did.

In sentencing Archer to death, the court found that he committed the murder in an especially heinous, atrocious, and cruel manner. That was error for two reasons. First, the murder was not the type for which this aggravating factor has been found to apply. It was a simple killing in which the victim suffered no prolonged mental or physical torture.

Second, this court has recently held that this aggravator does not apply to defendants who may be guilty of the murder, but who were also not present when the killing occurred and who did not intend the victim to suffer needlessly.

For the same reasons that the court erred in denying Archer's motion for a Judgment of Acquittal, the court erred in finding that the defendant committed the murder in a cold, calculated, and premeditated manner without any moral or legal justification. That is, Archer coldly planned Wells' death, not Cokers', and beyond the planning involved in the former's

death, there is nothing to show that Archer personally planned to kill Coker.

In its sentencing order, the court rejected several of the statutory mitigating factors. Rather than saying something to the effect that it found no evidence of a particular factor, it found that not only did it not apply, the evidence showed to the contrary, that the defendant played a major role in the murder and that he had a clear, rational, "although evil, mind." That was error because the court converted mitigating circumstances, which are to be for the defendant's benefit, into nonstatutory aggravating factors.

ARGUMENT

ISSUE I

THE COURT ERRED IN GRANTING ARCHER'S MOTION FOR A JUDGMENT OF ACQUITTAL BECAUSE THE MURDER OF COKER WAS AN ACT INDEPENDENT OF THE AGREED UPON PLAN TO KILL WELLS.

This issue is simple, but it requires a specific knowledge of the facts of the **case** in order to reach the proper resolution. Simply put, Archer, according only to Bonifay, contracted with the latter to kill Daniel Wells, an employee of Trout Auto Parts. To hide the assassination motive, Bonifay was to steal whatever money he **could** find from **the** cash till and night deposit box in the store (T 126). Archer, again according to Bonifay, wanted that man killed **because** almost **a** year earlier he had had something to do with the defendant's being fired from his job at the store (T 161).

It is unknown if Bonifay knew Wells before the Friday in **January** in which he approached the store clerk, ostensibly to kill him. He intended to kill the putative victim that night **because** Archer had **told** him he would be working at the store as the night clerk (T 126). He apparently decided not to go through with the deed that night, but what is important for this issue **is** that Wells turned to him sometime while Archer stood at the service window (T 129). Archer must have seen the man's face and otherwise noted his **build** and other distinctive features.

This identification becomes crucial because when Bonifay returned to the parts store the next night, Wayne Coker, not

Wells, was on duty. Before killing Coker, Bonifay saw this man turn toward him, look at him, and tell him that he would "be right with you." (T 131) Bonifay shot the man because the victim had seen his face (T 131), so it stands to reason that he recognized that Coker was not Wells.

These facts are vitally important because Bonifay agreed that he would kill Wells. Archer was not willing to pay him $500,000 to kill who ever happened to be the night clerk on duty at Trout Auto Parts. Instead, he was to kill a specific, named person: Daniel Wells. The murder of Coker, therefore, was not part of the common design or plan of the two men. It was an independent act of their plan, and one for which Archer cannot be held accountable.

The law in this area is simple. Defendants, as a matter of law, are not held accountable for the independent acts of their accomplices. Crimes become such if 1) they were committed by someone other than the defendant, 2) the defendant did not participate in it, and 3) it was outside of and foreign to the common design of the defendants. Bryant v. State, 412 So.2d 347 (Fla. 1982). It is also important that the defendant was not present when the crimes charged were not committed. Id.

In Bryant, the question presented to this court was whether there was any evidence of an independent act of the co-defendant, Jackson, to justify instructing the jury on independent acts. Jackson had enlisted Bryant's assistance in burglarizing what the defendant thought was a vacant apartment,

Upon entering it, however, he saw the victim, naked and bound. Bryant retied the man, and after doing so, placed him on the bed in the room. He left the apartment 15 minutes later, at which time the victim was still alive and had not been sodomized. Two days later, Jackson gave Bryant his share of the money taken from the apartment. The victim's body was discovered, and it was evident that it had been violently sexually battered. The cause of death was strangulation due to a necktie which had been tied around the victim's neck after Bryant left the room.

This court, upon reviewing the case, agreed that the defendant was entitled to a jury instruction on independent acts. The evidence could have supported a jury finding that the victim was killed during the sexual battery and not the robbery. Because Bryant had not participated in the former crime, and it was outside the "common design of Jackson and Bryant to rob the victim" the jury could have found the defendant not guilty of the murder. The evidence could have further supported a jury finding that Bryant intended to participate only in the burglary and robbery but not the sexual battery. Hence what Jackson did was not part of what the two men had agreed upon.

On the other hand, this court rejected a similar argument in Parker v. State, 458 So.2d 750 (Fla. 1984). In that case, Tommy Groover killed Richard Padgett apparently because the latter had not paid him for some drugs he had fronted the victim. Parker was angry at Groover because the former had

also not been paid for the drugs he had given to Groover, which he had given to Padgett. Not only was Parker upset, but he had threatened to kill Groover unless the debt was paid. Afraid of Parker's violent temper, especially because he also had guns, Groover found Padgett and killed him in Parker's presence.[7]

This court, while acknowledging the law on independent acts articulated in Bryant, nevertheless said the court had not erred in denying the requested instruction. Parker had created the initial situation by threatening to kill Groover. Also, Parker was present when Padgett was killed. Finally, the rape in Bryant was not "inspired by the same criminal motivation which induced Bryant's participation in a burglary for pecuniary gain." Id. at 752.

Bryant and Parker have limited application to this case because in both of those cases, the men killed were the ones intended by the defendants who should be murdered. Not so here, and the crucial distinction between this case and the two this court has already decided is that Archer and Bonifay had agreed that a specific person, Daniel Wells, should be murdered. That was the common plan, not that any clerk at the auto parts store should be killed. Thus, whatever intent Archer may have had to kill Wells, there is no evidence it

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[7] Padgett killed two other people the same night, but those murders are irrelevant to this issue.

extended to the murder of Coker. What Bonifay did, therefore, was independent of what the two men had agreed upon.

In Bryant, the state argued that the defendant could be found guilty of the murder under a felony murder theory. This court rejected that argument because to be found guilty under that theory, the robbery had to "either cause[] or materially contribute[] to the victim's death." Id. at 350. While a felon may be liable for the acts of his partners, such vicarious culpability arises only if there is some causal connection between the felony and the murder. Id.

In this case, Bonifay admittedly robbed Coker and stole money from the store, and arguably Archer could be found guilty of the murder of the victim under a felony murder theory. Yet, upon closer analysis, that claim of culpability cannot stand. Recall that Archer told Bonifay that he wanted Wells killed. To disguise that intent or purpose, Bonifay was to take whatever money he could find in the store, thus making the homicide appear as part of a robbery. In short the primary purpose of the criminal episode was to murder Wells, and the robbery was purely ancillary to that plan. Thus, when Bonifay killed Coker, not Wells, and then proceeded to take money from the store, the robbery was not part of the plan Archer had agreed upon. The robbery, instead of being a cover-up for an assassination, became the primary motivation for killing the victim.

Thus, the key fact in this case is that Archer and Bonifay agreed upon a plan to kill Daniel Wells. When Bonifay murdered

Coker, knowing he was not Wells, that homicide was not part of what Archer intended, and he cannot be held accountable for his co-defendant's unanticipated and unilateral changing *of* the deal.

This court should reverse the trial court's judgment and sentence and remand for further proceedings.

ISSUE II

THE COURT ERRED IN INSTRUCTING THE JURY AND IN FINDING THAT ARCHER COMMITTED THIS MURDER IN AN ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL MANNER.

Over defense objection **(T 444),** the court instructed the jury in this case that it could consider that Archer committed this murder in an especially heinous, atrocious, and cruel manner. **The** court compounded that error by relying upon that aggravating factor when it sentenced Archer to death:

> Nothing could be more heinous, atrocious, and cruel than the elimination of an already severely wounded husband and father as he pled for his life. Nothing could be more torturous than to be for mercy in the name of one's wife **and** children and to **die** with the killer cursing their existence. Defendant, although not present at the killing, intended it to happen just as it did--the conscienceless and pitiless taking of a human, life, the clerk he had targeted.

(T 544).

The court committed two errors: 1) **It** found this murder to have been especially heinous, atrocious, and cruel, and 2) It applied it to Archer.

A. The murder was not especially heinous, atrocious, and cruel.

As unfortunate **as** this murder was, and no matter how much we may abhor what happened or who did it, the killing **was** simply not especially heinous, atrocious, or cruel. In State v. Dixon, **283** So.2d 1 (Fla. 1972), this court said that a murder was especially heinous, atrocious, or cruel if it was "extremely wicked or shockingly evil, outrageously wicked and vile, and designed to inflict a high degree of pain with utter

indifference to or even enjoyment of the suffering of others. The capital felony must, in short, have such additional acts as to set it apart from the nor of capital felonies. It must be one that is conscienceless or pitiless which is unnecessarily torturous to the victim." Id. at p.9. To the average man, every murder must seem to be heinous, atrocious, or cruel, but to be so according to Section 921.141(5)(h), it must be especially so. Viewed in this light, the killing of Coker cannot be said to have been especially heinous, atrocious, or cruel.

This court has consistently held that a single gunshot killing does not amount to one that is especially heinous, atrocious, or cruel. Tefteller v. State, 439 So.2d 840, 846 (Fla, 1983). Even when the defendant is shot once, is aware of his impending death for a brief period, and pleads for mercy before the final shot, the resulting death does not become heinous where the time interval between the shots is short. In Brown v. State, 526 So.2d 903 (Fla. 1983), Brown and his co-defendant Cotton fled from a robbery they had just committed in which Brown had tried to shoot a witness. A policeman pulled them over, ordered them out of the car, and told them to put their hands on the hood of his car. Brown jumped the policeman, and during the ensuing struggle, the defendant seized the officer's gun an shot him once in the arm. As he lay in the road begging for his life, Brown shot him again, killing the policeman, This court held that killing was not especially heinous, atrocious, or cruel.

Likewise, here, only a brief time elapsed between the first shot and the fatal wound, and that interval could not have been any more terrible that that in Brown, In Swafford v. State, 533 So.2d 270 (Fla. 1988), although the victim died almost instantly, Swafford had kidnapped her and had taken her to a remote location where he raped her and then shot her nine times. Most of the wounds were in her torso, and she died from a loss of blood. That murder was especially heinous, atrocious, or cruel. If the victim know for an appreciably long time of his inevitable death, the aggravating factor can apply. In Harvey v. State, 529 So.2d 1083 (Fla. 1988) this aggravating factor applied because the victims, a husband and wife, learned of their impending deaths when Harvey and his co-defendant discussed the need to dispose of witnesses. When the elderly couple tried to flee, Harvey shot both of them, killing the husband instantly. He shot the wife at point blank range.

On the other hand, in Lewis v. State, 377 So.2d 640 (Fla. 1977), the defendant shot the victim once in the chest and as he fled, he was shot several more times. This court said the murder was not committed in an especially heinous, atrocious, or cruel manner. Also, in Amoros v. State, 531 So.2d 1256 (Fla. 1988), the defendant shot his victim several minutes after he had entered her apartment. He shot her at close range as she tried to run to avoid him. As in Lewis, this court refused to find this murder different from the norm of capital felonies so this aggravating factor applied. Quick killings

which occur without any other evidence the defendant desired to inflict a high degree of pain, or who was indifferent to or enjoyed the victim's suffering are not especially heinous, atrocious, or cruel. Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990); Santos v. State, Case No. 74,467 (Fla. September 26, 1991) 16 FLW S633.

In this case, the killing occurred very quickly, and unlike the victims in Swafford and Harvey there is no evidence Coker was in fear of his life for any prolonged period. He could have been aware of his impending death for only a very short time, and such a brief duration coupled with the almost instantaneous death did not make this murder especially heinous, atrocious, or cruel.

B. This aggravating factor does not apply to Archer because he was not present when the murder was committed, and he did not direct Bonifay to commit the murder in an especially heinous, atrocious, and cruel manner.

This court's opinion in Omelus v. State, 584 So.2d 563 (Fla. 1991) controls this portion of this issue. In that case, Omelus hired a John Henry Jones to kill the victim, Willie Mitchell, so he could collect on an insurance policy he had on Mitchell. Ostensibly Jones was to use a gun to commit the murder, but when he could not get one, he used a knife, stabbing the victim 19 times. At the penalty phase of the defendant's trial, the court instructed the jury that it consider as an aggravating factor that the murder was especially, heinous, atrocious, and cruel. It recommended

death, and the court imposed that sentence, refusing, however, to find this aggravating factor.

This court reversed the death sentence and remanded for a new penalty phase hearing before a new jury, It did so because the jury could have found that Omelus "committed" the murder in an especially heinous, atrocious, and cruel manner even though he did not personally kill the victim, was not present when it was done, and did not indicate the manner in which Mitchell was to be killed.[8]

> Nowhere in this record is it established that Omelus knew how Jones would carry out the murder of Mitchell, and, in fact, the evidence indicates that Jones was supposed to use a gun. There is no evidence to show that Omelus directed Jones to kill Mitchell in the manner in which this murder was accomplished. Under these circumstances where there is no evidence of knowledge of how the murder would be accomplished, we find that the heinous, atrocious, or cruel aggravating factor cannot be applied vicariously. We note that the trial judge correctly omitted this aggravating factor from his sentencing order in finding that the death penalty would be appropriate.

Id. at 566.

The facts in this case show that Archer wanted Wells dead, and that he had hired Bonifay to commit the murder. The defendant did not kill the victim, nor was he present when the murder occurred. Like Omelus, he thought his co-defendant would use a gun, although he left the details of finding a

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[8]The jury also recommended death by an 8-4 vote. In this case, the vote for death was 7-5 (T 521).

weapon to Bonifay (T 128). The only difference between this case and Omelus is that the actual perpetrator of the murder in the latter instance used a knife rather than the intended gun. Such a distinction has no benefit to the state's case because using a gun tends to justify rejecting this aggravating factor whereas stabbings often times are especially heinous, atrocious, and cruel.

Obviously by indicating that a gun was to be used, Archer also signalled that he wanted a quick death without any undue suffering. Thus, regardless of the trial court's finding of what actually occurred, the uncontroverted testimony showed that Archer never intended for the murder to have caused Coker unnecessary pain. The court, therefore, erred in instructing the jury that they could consider this aggravating factor, and it compounded that error by using it to justify imposing a death sentence.

ISSUE III

THE COURT ERRED IN FINDING THIS MURDER TO HAVE BEEN COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER.

In justifying sentencing Archer to death, the court found that he had committed the murder of Coker in a cold, calculated, and premeditated manner without any pretense of moral, or legal justification. In pertinent part, the court said the following:

> This is the classic case of murder for hire, a contract murder, an execution. Archer sought out Patrick Bonifay for the purpose of avenging his firing from Trout Auto Parts employment by killing the one that he felt responsible. Whether payment was to be the money taken in the robbery or a satchel of money as claimed by Bonifay, the deal was struck. Archer concocated 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.
>
> This plan proceeded over a period of several days--ample time for reflection. Even after the first attempt failed, Archer directed and insisted that Bonifay try again and go through with the murder. It was carried out just as he directed except that the wrong man was on duty that fateful night. By his actions, Archer had aimed, cocked, and fired the gun just the same as though he had actually been present; his intent, his purpose, his vengeance energized the other to carry out the robbery and murder, This degree of cunning and planing over time is indicative of the heightened premeditation deserving of the ultimate penalty recognized by the jury.

(T 544-45).

The argument on this issue flows from the guilt issue presented above. Whatever was cold, calculated, and

premeditated about Archer's design applied only the desired killing of Wells. There was nothing cold and calculated about the actual murder of Coker. It was, at the court recognized, "carried out in a somewhat amateurish fashion" (T 545).

Of course, had Wells been killed, this aggravating factor would have applied to Archer, but the crucial fact is that Wells was not killed. As all of the defendant's venom was directed at that single, specific individual, it was error to find it applied to the fortuitous victim who happened, through tragic bad luck, to be working on the night of the murder rather than Wells.

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

ISSUE IV

THE COURT ERRED IN CONVERTING SEVERAL OF THE STATUTORY MITIGATING FACTORS INTO NONENUMERATED AGGRAVATION.

In discussing the mitigation in this case, the court, in its sentencing order, said the following:

> 2. There is no evidence that the capital crime was committed while the defendant was under the influence of extreme mental or emotional disturbance. To the contrary, the evidence of the carefully conceived plan--even though carried out in a somewhat amateurish fashion--is indicative of a clear and rational, although evil, mind.
>
> * * *
>
> 4. There is overwhelming evidence that the defendant was an accomplice in the capital felony which was actually carried out by another person, Patrick Bonifay, but the Court rejects, as did the jury, the assertion that his participation was relatively minor. As the jury properly found, and the Court agrees, this defendant played the major role in the murder of Billy Coker.

(T 545-46).

The court's error arises from its converting two statutory mitigating factors into non-statutory aggravation. Well settled law permits the jury and the court to consider only the listed aggravating factors in determining whether to recommend or impose a death sentence. Error occurs whenever the sentencer uses a non-statutory aggravating factor in justifying a death sentence. In Mikenas v. State, 367 So.2d 606, 609-610 (Fla. 1979), the trial court found, as an aggravating factor, that the defendant had a substantial history of prior criminal activity. The trial court, in short, had converted a statutory

mitigating factor into a non-statutory aggravation. That was error. Accord, Barclay v. **State**, 470 So.2d 691 (Fla. 1985).

In this case, the court, while not as blatant as the sentencer in Mikenas, similarly used two mitigating factors as aggravators in considering the appropriate sentence to impose. That is, the court not only rejected finding that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, it said the opposite **was** true: the murder **was** "indicative of a clear and rational, although evil, mind." (T **545)** Similarly, the court went beyond merely rejecting the mitigating circumstance that Archer's role in the murder was relatively minor and found instead that he "played the major role in the murder." (T **546)**[9]

It could be argued that the court in this **case** was merely fulfilling the obligation this court imposed in Campbell v. State, 571 So.2d 415 (Fla. 1990) in which trial courts must discuss in their sentencing orders all of the mitigation presented. There is, however, a difference between considering what has been presented to impose a sentence of life, and using a mitigating factor **as** a platform to further justify a death sentence. That is what the court did in this case, and it was improper. All the court need to have done was what it did with

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'There is no evidence that the jury, as the court asserted, found that Archer played a major role in the murder.

the other mitigating factors it rejected: simply say that there was no evidence to support it (e.g. T 546).

As this court has undoubtedly heard too many times, death is different, and what that means in practice is that errors, even mistakes that in noncapital circumstances may have been harmless, assume significant proportions in death sentencing. The heightened desire to insure that execution is truly deserved and properly imposed justifies the close scrutiny of the sentencing proceeding and the low tolerance of errors detected. So it is here. The court's mistake, while perhaps understandable, nevertheless skewed its sentencing order so much that this court cannot say with a clear conscience that the error did not affect the final result. This court should, therefore, reverse the trial court's sentence and remand for a new sentencing hearing.

CONCLUSION

Based upon the arguments presented here, Archer respectfully asks this honorable court to either 1) reverse the trial court's judgment and sentence and remand for discharge, 2) reverse the trial court's sentence and remand for a new sentencing hearing before or new jury, or 3) reverse the trial court's sentence and remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that **a copy** of the foregoing has been furnished by hand delivery to Carolyn Snurkowski, Assistant Attorney General, The Capitol, Tallahassee, Florida; and a copy **has** been mailed to Appellant, ROBIN LEE **ARCHER, #216728,** Florida State Prison, Post Office **Box 747,** Starke, Florida **32091,** on this 5TH day of March, **1992.**

DAVID A. DAVIS