SUPREME COURT
STATE OF FLORIDA

APPEAL CASE NO. 78,866

ROBERT LEE LARKINS,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

APPEAL FROM THE CIRCUIT COURT OF HARDEE COUNTY, FLORIDA

INITIAL BRIEF

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STATEMENT OF THE FACTS AND OF THE CASE

Robert Lee Larkins was indicted in Hardee County for the August 30, 1990, death of Roberta Faith Nicolas. The indictment included a count of armed robbery and a count of possession of a firearm by a convicted felon. (R1-2). Larkins moved to sever the felon-in-possession count from the murder and robbery counts. (R16). Larkins also moved for the appointment of co-counsel because of this being a death penalty case. (R18-19). And Larkins moved for two additional peremptory challenges. (R23). At a hearing on June 17, 1991, the motion to appoint co-counsel was denied and decisions on motions for individual voir dire (R27) were deferred. (R26). Defense counsel later filed a series of "death penalty motions." (R35-79).

At a hearing on his request for additional peremptory challenges and for individual voir dire, defense counsel pointed out that Hardee county is a very small county with a lot of newspaper coverage, that this is a death penalty case, and that it involves the death of a white store clerk and a black defendant, necessitating inquiry into racial biases. Counsel argued that prospective jurors would be more candid if examined individually. (R197). At a later hearing, counsel again pointed out that there was extensive pre-trial publicity in the newspapers and that it was a small community. (R206-07). The court denied the motion for individual voir dire. (R208).

After commencement of trial, counsel for both sides stipulated that the evidence custodian would not be a necessary witness, that the deposition of the medical examiner to perpetuate his testimony

would be read, and that certain lab personnel would not be called but instead their reports would be introduced. (R219). Defense counsel once again pointed out the size of the community and the extensive newspaper coverage and indicated that it would be necessary to have some individual questioning of jurors as to their prior knowledge of the case. (R219-20).

In his preliminary remarks to the jury, the trial judge stated:

> The recommendation of the trial jury panel by law, I must give that recommendation great weight. However, the ultimate determination according to the law whether the death penalty should or should not be imposed following a verdict of guilty of murder in the first degree rests with me.

(R230). The judge also told the prospective jurors (R246-47),

> I want to talk to you about the death penalty. Here's a question. The question is going to be this -- The question will be, and I will ask you individually: Do you have such strong feelings against the death penalty such that you could not vote to return a verdict of guilty of murder in the first degree regardless of what the evidence would show?
>
> I will ask it again. The question to you individually would be. Do you have such strong feelings against the imposition of the death penalty such that you could not vote to return a verdict of guilty of murder in the first degree regardless of what the evidence would show?
>
> Now, again, let me say that this is a very special kind of case. You will have two responsibilities. One to determine if the State has established the defendant's guilt of the offense of murder in the first degree beyond a reasonable doubt.
>
> And then in a separate proceeding, where you will have additional matters brought to your attention to make a recommendation to me, which I must give great weight to, whether the death penalty should or should not be imposed.

But the final determination of whether the death penalty would be imposed would be mine.

One of the prospects in the first panel of jurors, Ms. Lanier, stated, "I knew several of the deputies, but I know one; he's my son. So I know him." (R244). Ms. Lanier's son was one of the witnesses listed by the State. (R242). When asked whether her relationship to him would cause her to give the testimony of a law enforcement officer greater weight or lesser weight than another witness, she responded, "I don't think so." (R244). The judge asked each of the prospects in the first panel if they would have any trouble returning a not guilty verdict if the State did not prove guilt beyond a reasonable doubt, and Ms. Lanier responded, "I'm not sure." (R256-57). Ms. Lanier gave a negative response when the judge asked the jurors if they could try the case without bias, prejudice, or sympathy. (R259). When the prosecutor asked Ms. Lanier if her son testified, could she look him in the eye and be fair to both sides, she said, "I think I could." (R309)

Each of the twelve prospects in the first panel of jurors had read, heard, or both read and heard about this case. (R249-55). One juror, Mr. Roberts, when asked if he had formed any definite or fixed opinion on the merits of the case because of what he had read, replied, "No, sir. I don't think so." (R249). When asked if there was anything about the nature of the charges that would make it difficult for him to serve as a member of the jury, Mr. Roberts answered, "No, sir. I don't think so." (R264).

Juror Hall's husband is a police officer. (R273). When asked if she felt any pressure to return a verdict of guilty, she responded, "No. I don't think so." (R274). When the prosecutor

asked Ms. Hall if she would have any problem going home and telling her husband that the evidence was not there and we found the man not guilty, she responded, "Uh huh. (Affirmative response)." (R310).

Ms. Porter indicated that her nephew was shot during a store hold-up. (R287). When the judge asked her if this fact would cause her any difficulty in sitting on the jury, she responded, "I would like to think it wouldn't. ... I can't guarantee that." (R288). When the prosecutor asked her if she could put the shooting of her nephew out of her mind during this trial, she said, "I think I can." (R302).

When the first panel of jurors was questioned in chambers about having heard of the case, Mr. Roberts indicated what he had heard, and that people were saying, "Yes; this guy did it; they got him dead to rights -- and all this." (R370). Roberts had also heard rumors that the defendant had admitted to the crimes. In fact, even after he got the summons to be on the jury, someone told him that the defendant had admitted it. (R371-72). When defense counsel asked Mr. Roberts if no evidence was presented at trial that Larkins admitted to doing the crime, would Mr. Roberts "be wondering why that didn't come out?" Mr. Roberts responded, "Yes; Yes." (R373). Roberts later said that he would make his decision definitely on the evidence, but then he said, "I could put it out of my mind, I think so." (R374). The judge ended the individual voir dire of Roberts thus (R374-75):

> THE COURT: I guess all I need to do is satisfy myself, Mr. Roberts, is that you're going to try this case solely, absolutely, and exclusively on what you hear in this courtroom. Is that correct?

MR. ROBERTS: Yes, sir.

Just before Ms. Lanier was brought into chambers, the judge stated: "You know, it appears -- Are we just flailing around on her?" (R382). But the prosecutor indicated that he did not think he would call Ms. Lanier's son as a witness. (R382). Defense counsel seemed to take issue with that statement and pointed out that Ms. Lanier had indicated that it would be difficult for her to disbelieve the testimony of law enforcement officers, and he concluded, "there is a question as to whether she could actually be a fair and unbiased juror." (R383). Nevertheless, defense counsel never asked that Ms. Lanier be excused for cause. Finally, before she was brought in for examination, the prosecutor said, "I know Ms. Lanier. If she tells us she'll be fair, she will be fair." (R383).

Myles Albritton remembered from the publicity that Larkins had a prior criminal record and that he had not been out of jail very long. (R405). He acknowledged that it crossed his mind that if Larkins had not been released, this incident would not have happened. (R406).

At the end of the individual voir dire of the first panel, during which the jurors indicated more or less knowledge about the facts of the case, but all knew of it, defense counsel asked to exercise challenges for cause and challenged Myles Albritton because of his knowledge of the defendant's prior criminal record. The judge reluctantly granted the strike. (R410). The judge then asked defense counsel if he had any other cause challenges. Defense counsel answered, "Not I, Your Honor." (R410).

Defense counsel used one peremptory challenge, on Ms. Lanier.

(R411). No one challenged Mr. Roberts or Ms. Porter. Although Porter was later struck by peremptory challenge by defense counsel (R504), Roberts ultimately served on the jury.

The second panel of prospective jurors was also told by the court that if there was a penalty phase, they would be asked for a recommendation which the court must give great weight in determining what the appropriate sentence would be. The judge then asked if any of them have such strong feelings against the death penalty that they could not vote guilty of first degree murder regardless of what the evidence might be. (R428). The judge repeated the question with an individual prospect. (R432). The prosecutor asked this panel (R454),

> You understand that you as a juror would not impose any sentence, but your recommendation would carry great weight with the sentencing judge who would in fact make a final determination?

All but one of the new panel members had heard of the case prior to the commencement of the trial. (R445-58). In chambers, the jurors individually discussed what they had heard about the case. (R482-502). Besides the details of what happened, juror Evans had heard of a prior conviction and that the defendant had been recently released. (R310). The judge, again reluctantly, granted a challenge for cause. (R503). Despite extensive knowledge of the facts of the case by several of the witnesses, defense counsel announced that he had no other challenges for cause. (R503).

When the names of the next panel of prospects were called, the judge asked the first juror if he had been present in the courtroom when the judge "explained to the other jurors that this trial

involves a two-stage process; one being the so-called guilt phase and the other one being the so-called penalty phase?" (R511). The judge went on to ask the same question that he had asked previous jurors about their inability to return a verdict of guilty of murder in the first degree because of strong feelings about the death penalty. (R511). The prosecutor asked the same prospects if they understood "that your recommendation carries great weight with the Judge's ultimate decision on sentencing?" (R534).

These jurors had also heard and/or read about the case. (R546-55, 560-79). Jurors Romeo (R567) and Keene (R575) were both aware that Larkins had only recently been released from prison. Keene was challenged for cause by defense counsel and Romeo by the prosecutor. (R581-83). Romeo, apparently, was black and acceptable to the defendant because of her race. The prosecutor challenged her to be "racially neutral."

The next panel of prospects was also asked about strong feelings against the death penalty such that they could not vote to return a verdict of guilty of murder in the first degree regardless of the evidence. (R594).

The panel included only three new members. Each of them had heard about the case. (R594-95, 616-22). Juror Thomas had heard that Larkins had been arrested upstate and had come to Florida upon being released. (R620). Defense counsel indicated that he had no challenges for cause. (R454). He exercised two peremptories, neither on juror Thomas. (R627). Mr. Thomas ultimately served on the jury.

The next panel included only two prospects. (R629). The judge asked them the question about having such strong feelings

about the death penalty that they could not vote to return a verdict of guilty. (R630).

Of these two prospects, one had not read about the crime but had driven by and seen the crime scene "roped off." (R648). The other prospect had been out of the state and lived in a different community when in the state, so she had not heard about it at all. (R651-52).

The next panel included only one person, who was asked the same question as the others about strong feelings and ability to return a guilty verdict. (R657). This juror had read about the case and had heard about it. (R492). This prospect had gone to church with the victim. (R663). He also indicated that his mother asked about the victim's death and referred to her by a nickname, Robbie. He said that he had recently given her ex-husband a new couch. (R666-68). Defense counsel exercised his final peremptory on this juror despite making the following comment:

> Your Honor, my client would like to scratch Kevin Coker. I could make the argument that it should be for cause because he is so well known to the victim, but --

(R670). The judge pointed out, "You understand that's your last peremptory challenge." (R670).

The next and final prospect for the jury had read about the story in the paper and had a friend who worked at the other Circle K store in Bowling Green. (R672). This prospect, Ms. Schwartz, had a son who had been recently the victim of a robbery while at work at a Little Caesar's in Tampa. (R673). The judge asked her the usual question about strong feelings and guilty verdict. (R674). When asked by defense counsel what she had learned from

her friend who worked at the other Circle K, Ms. Schwartz indicated, "she did say that it had happened, and she told me -- she described what the place looks like because she said she walked in afterwards." (R680). At the end of the questioning of Ms. Schwartz, the court asked defense counsel if he wanted to confer with his client, and counsel said, "I don't see any need to." (R683). Defense counsel then announced that he did not have any challenges for cause. (R683). Schwartz was then made the twelfth and final member of the jury and the jury was accepted by defense counsel. (R685).

Among the prospects for alternates was Mr. Pullen, who had read that the defendant had been convicted in Missouri of an offense which Pullen understood to be murder. (R695). Pullen was successfully challenged for cause. (R697).

A trail of dimes was found leading away from the Circle K store, in an alley behind the store, heading in a northerly direction. (R590). The defendant lived nearby, and a twenty-two rifle was found next to a vacant house near the defendant's home. A path leads from that house to the defendant's house. (R766-67). No footprints were found in the alleyway although its surface is dirt and grass. (R769).

Behind the counter inside the store the floor was bloody. There was a bloody footprint on the carpet beneath the cash register. (R773). The cash register itself was missing. (R776). Roberta Faith Nicolas, the victim, was lying on the floor just past the counter. (R777).

Photographs were introduced showing the bloody foot print (R780), blood splatters (R781), and the body itself as it was

located when the crime scene investigator first saw it (R783), among others, all without objection. When the state offered state's exhibits seven and eight, which depicted the bloody front of the body after it had been turned, "to show that the officers and the paramedics looked for a head wound due to the nature of the bleeding ...," "to support the medical examiner's testimony about the nature of the track of the bullet and how blood was found in the throat area of the victim and how it was consistent with the victim throwing up blood," and "in support of the proposition that the victim did -- was in fact shot behind the cash register area, and then massive amounts of blood is coming out of the mouth and nose area due to the lung wound which she threw up on the floor as she staggered behind the counter and fell to her final resting position." (R785). Defense counsel objected that the photographs did not depict the scene at the conclusion of the robbery, had no legal evidentiary value other than to inflame the jurors, did not go to any disputed fact issue, and were more prejudicial than probative. (R786-87). The court authorized the state to pick one of the two photographs for introduction. Defense counsel asked for clarification if the photo was being admitted to establish the facts suggested by the prosecution (and quoted above), and the court indicated that that was the court's reasoning. (R787). No finger-prints found at the scene were matched to anyone. No projectiles were found at the scene, but a discharged casing was located in a display rack. (R790). A cash register key was found on the floor near the front door. (R794). The body was lying in a pool of blood. (R816).

After the body was found, a pair of shoes was taken from

Larkins. (R798). The defendant's shoes were normal high top tennis shoes and were not unique or unusual in any way. The officer who seized them did not see any blood on them. (R810). Also taken from Larkins were a pair of brown pants, a light blue pull-over shirt, a navy blue jacket, and a blue hat. Impliedy obtained from Larkins was a pair of surgical gloves. (R799). The defendant objected to the surgical gloves because there was no showing of relevance, one of the fingers was missing, and an eyewitness had testified before trial that the robber was not wearing anything unique or unusual. The court admitted the surgical gloves on the state's representation that they were relevant to show why the defendant's finger-prints were not found. (R800).

The victim's bloody clothes were retrieved from the autopsy, and, over the defendant's relevance objection that the clothing was not probative of any disputed facts, her smock was admitted and displayed to the jury. (R804-05).

By agreement, the medical examiner's deposition was read into evidence. It included graphic descriptions of the injuries, the path of the bullet, and the blood loss. (R831-33).

The next day the cash register was found in the grass next to a fence at a house which was located sixty yards away from the store. (R836-38). The rifle was found by a lawn-care person the day following the robbery. (R841-42). The stock was cut off and there was tape wrapped around it. (R842).

That night, after the robbery, Officer Clyde Hall was looking for Larkins as a suspect and located him at the Villa Alegre apartments. He asked Larkins to accompany him to the police

station, and Larkins agreed. He asked for permission to search Larkins's house, and Larkins also agreed to this request. (R847-50). In executing the consent search, Officer Hall found a green shirt which he said was similar to one given in a BOLO and that the shirt was damp as though it had been washed. He also found the pants, which were also damp. (R851-52). However, he did not find any surgical gloves. (R852). The shirt that was introduced, which others had described as blue, was the shirt Hall obtained from Larkins. Hall described it as green. (R860).

Hall admitted that he had seen Larkins earlier that night at the Villa and at that time Larkins was wearing jeans and a white t-shirt. (R855). He also indicated that after he asked Larkins to go to the station, he encountered a person known as "Nukie" and Nukie took him around to the side of Nukie's house to show him where Nukie kept his rifle. (R858).

The Circle K store was equipped with a thirty-five millimeter still camera that would have been activated by removal of money from the register. However, if the entire register was removed, the camera would not have been activated. (R863). In this case, the entire cash register was removed, and it was identified as the same one that was found nearby. (R865). When it was opened later, money was still in it. (R867). The film in the camera was developed after the robbery, and no pictures had been taken. (R870).

The trail of dimes found in the alley-way was located between the store and the location where the cash register was found. The construction of the register was such that, if it was turned on its side, money would fall out. (R873). Some tape was also found in

the alley-way. (R881-82). The tape was examined by the crime lab and there was no facial hair or other hair found stuck to the tape. (R884).

Ed Guenther, of the crime lab, was qualified as a finger-print examiner and shoe print examiner. (R886-88). He testified that none of the finger-prints found on the cash register matched Larkins. Guenther compared the bloody footprint on the carpet taken from the store with Larkins's shoes and concluded that there was a similarity. He also testified on direct that the relationship was in "class characteristics only" and that he was able to conclude that the shoe print from the store could have been made by one of Larkins's shoes. (R894-95). On cross examination, Guenther admitted that the shoe print contained no tread design and, therefore, the shoe print did not contain the same sole pattern as the tread design on Larkins's shoes. (R895-96). In fact, he concluded that the shoe print ranged in size from eight to eleven and could have been made by either a leather sole or an athletic shoe. He was unable to determine at all whether the shoe that left the print had any pattern on the sole. (R896).

The rifle that was introduced at trial was the same rifle that fired the bullet recovered in the autopsy, and it ejected the casing that was found in the store. (R904).

The state presented the testimony of one of two eyewitnesses. The state's witness was Debbie Santos. (R914). She lived in Bowling Green and knew Robert Larkins for a short time before the robbery. She was standing in the store in front of the counter and claimed to know what his voice sounded like. (R742-44). Also in the store was Reuben Hernandez. (R746). While she, her baby, her

small boy, Reuben Hernandez, and Roberta Nicolas were at or near the counter, she saw "a black guy" with tape on his face. She said she recognized him when he walked in the door. He had tape on his nose, his forehead, and each side of his face, she said. She said she recognized the man as Robert Larkins. (R922-23).

She said he had a rifle beside his leg but then he aimed it at Ms. Nicolas and asked where is the money and said he wanted the money now. (R924-25). She said Ms. Nicolas was going to give the robber the money but then he shot her. Afterwards, she said, Hernandez was standing there shaking. (R925). She said Larkins went around the counter and got into the cash register, while she kept her head down, and that when she looked up, he was backing out the door. Hernandez was supposedly still shaking. (R927-28). She said she could not tell if the robber was carrying anything as he left. And she did not look at him as he went by her. (R756). She said that she asked Hernandez if the black guy had left and Hernandez said he did not know. She claimed Hernandez said, "I'm scared to look." (R930).

She said that she left because she was afraid. She was afraid Larkins would come back and kill her. (R932-33). Later she went to the police department in Bowling Green. (R934). She claims that while she was there she heard a voice from another room and it was the voice of Robert Larkins. She said the voice was the same voice she heard in the store when the shooting occurred. (R935).

On cross examination, she admitted that she made a taped statement when she was at the police station and that she did not tell the truth in the statement. (R937-38). In that statement she said that she did not look at the robber. (R938). Contrary to her

direct testimony, she said on cross examination that she saw the robber at the cash register. And she admitted that in her taped statement she had said she saw him at the cash register and the cash register was open. (R941-42). She said that she did not see what the robber was wearing. (R942). She indicated that she heard two shots. (R943). She said she thought the robber was talking to her when he demanded money. (R943). She acknowledged that she was spending part of her time attending to her child who was crying. And she admitted telling the officers that when the person came in she was not sure she recognized his face because she was so frightened. (R944). She acknowledged making inconsistent statements at deposition concerning how much of the robber's face was visible in spite of the tape. (R946). In fact, at the deposition, she had stated that all she could see was the lips and the eyes. She also repeated that the cash register was open when the robber was standing at it. (R947).

She said she knew Larkins for about two months. She also admitted that she had said at her deposition that when someone drove up after the robbery, Hernandez asked "if it was those black guys." (R954).

Thomas "Nukie" Gibson, a four-time-convicted felon, testified that he had a semi-automatic twenty-two rifle in August of 1990. He testified he saw Ronnie Baker and Larkins in the road and that he called Larkins over to the house, leaving Ronnie Baker in the road. He wanted Larkins to keep his rifle because his probation officer was coming to his house. (R962). He said Larkins took the gun and walked down the road. (R963). He went to Larkins's house the next day and Larkins had the gun but told him it should stay

where it was because he did not know whether it had been used in the robbery. Larkins never gave the gun back. (R965). He claimed that he went looking for the gun in the area where it was found simply because he suspected that Larkins may have put it there. (R967). Nukie had surgical tape his mother had gotten at work, and he gave some to Larkins. (R967). When Nukie asked Larkins to keep the gun, he offered to pay Larkins, but Larkins refused. He had "about forty-two, forty-five hundred dollars" on him at the time. (R975-76).

Ronnie Baker was a two-time-convicted felon. Charles Baker was his cousin. (R982). Ronnie walked with Larkins to the Villa Alegre the night of the robbery. He saw Larkins talk to Nukie at Nukie's house, but he could not hear the conversation. He saw Nukie come to the door and hand Larkins a gun, a short-handeled rifle. Ronnie did not recognize the gun introduced at trial, but it was like the one he saw Nukie hand to Larkins. (R984-85). They walked on up to Mr. Hodge's house and then headed back toward the Villa. Ronnie Baker saw his cousin, Charles Baker, on the way. He walked off with Charles and Larkins continued toward his home. (R985-87).

Nukie, Ronnie, Larkins, Ricky Blandon, and others got together that evening to drink. (R992-93). Ronnie said that he gets tipsy every day and that he had "a buzz" that night. He did not know whether Larkins was intoxicated or not. (R993-94). Larkins was going to Mr. Hodge's house to borrow money. (R1000).

When asked Mr. Hodge's first name, he said "Walter." He must have said "Walter" in the form of a question because the prosecutor said, "I don't know." Defense counsel then asked Ronnie, "Are you

asking Mr. Houchin, the prosecutor, for information?". (R998). Defense counsel asked Ronnie if he was there trying to help the state attorney and he said he was just trying to get himself out of this because he did not have anything to do with it. (R998-99). Defense counsel sought to impeach Ronnie Baker with the fact that he had pending convenience store robbery charges at the time he first talked to law enforcement in this case. Defense counsel asserted that the pendency of such charges was relevant to motive and bias, specifically to help himself and to cast light on somebody else rather than himself. Defense counsel cited Davis v. Alaska in support of his proffer of impeachment. The court ruled the cross examination inadmissible. (R1002-03). The testimony was proffered and the state's objection to the testimony was sustained. (R1006-08).

Charles Baker saw his cousin, Ronnie Baker, with Larkins the night of the robbery. He said Larkins had something that looked like a gun, but he saw only the barrel and could not identify the gun introduced at trial. (R1011-14). Later that night, Charles saw Larkins on the porch at Ovieda Berrien's house. While the three of them were there, a deputy sheriff came by and told them a woman had just been killed at the Circle K. This incident occurred about and hour and a half after Charles saw Larkins with Ronnie Baker. (R1015-16).

On cross, Charles admitted that he was drunk that night and that he might have told officers that the time span from seeing Larkins with the gun and seeing him later was between forty-five minutes and a hour. (R1018). Defense counsel attempted to cross examine Charles Baker about charges that were pending at the time

of trial, but the court excluded this testimony. (R1025).

On the night of the robbery, Blandon was hanging out with some other guys, drinking. Larkins was with him. Larkins was wearing short pants that were orange or brown. Later that night Officer Eddie Hall came by and told him about the shooting and asked if Larkins had been with him. (R0127-28). Later Blandon saw Larkins and told him that "they thought he did it." Larkins said he did not do it and concluded, "they going to give me the electric chair." (R1030-31). The cut-off shorts Larkins was wearing were above the knee in length. Most of the time Larkins wore shorts and plain white t-shirts. (R1038).

Ovieda Berrien saw Larkins in front of her house later that evening, at about eleven-thirty. (R1059-60). She said Larkins asked him to make a phone call to his sister to see if his sister had any money to help him get a bus ticket to get away because the police were harrassing him about the shooting at the store. (R1060). She said she saw Larkins the next day and he told her that Nukie talked too much and that Nukie was wanting his gun back. (R1061-62). She also said that he had taken the gun to Fort Meade and pawned it. (R1063). He said he was not worried about his shoes because they had already been checked. (R1063). When Larkins came to her house that night, he was wearing stone-washed jeans and a white t-shirt. (R1067). On re-direct, over the defendant's objection to relevance, Berrien was permitted to say that she had not heard anyone else asking about money and about needing to get out of town besides Larkins. (R1072).

Joseph Torres was with the guys part of the time that night also. (R1075). He saw Larkins walk up to Nukie's house with

Ronnie Baker. Larkins was wearing brown corduroy pants and a white t-shirt. Later that night, Torres claims he saw Larkins again walking toward Highway 17. He was walking funny, "crunched up" or "bowed up a little bit." (R1079-80). He could not tell if Larkins was carrying anything. (R1080). On cross examination, Torres said that when he saw him, Larkins was wearing a blue jacket in addition to the brown cordoroy pants and that he was wearing the same pants later, at twelve o'clock. (R1083-84). He admitted that when he gave a taped statement earlier, he did not say anything about the pants being cut off. (R1086). But he said when he saw the person pass by him that night and when he saw him earlier, he had on the same pants. (R1087). The guy he said he saw walking toward 17 was also wearing a blue hat and when he called out to the person using Larkins's nickname, Bye, the person did not respond. (R1097-98). He said that the pants that were introduced at trial, which he had earlier identified, were shown to him by officers the night of the shooting. (R1102).

Timothy Burkes was a prisoner at Lake Correctional Institution at the time of trial. (R1104). While he was in the Hardee County Jail with Larkins, he said, Larkins told him "that he had shot the lady, and the lady was pleading. And he said he shot the lady 'cause not so much of her pleading but because of all of noise, and he kept saying: Be quiet.' He had told me about some shoes that the police had supposedly had got, and the pair of shoes was supposedly had some blood on them, but they had got the wrong shoes." (R1105). Burkes said that Larkins told him he got the gun he used from Nukie and that they could not find him guilty because of the time frame and where the evidence was found. (R1106).

Burkes testified that he was sentenced to the maximum possible time he could get for his crime. (R1107). On cross he admitted that Larkins also said that he did not do the crime. And that Burkes did not know what to believe. (R1111-12). He also said that people in prison brag a lot to impress other inmates and say they did things they didn't do. (R1112-13).

When the state rested, defense counsel moved for directed verdict of acquittal on the grounds that there was insufficient evidence upon which to base a verdict of guilty. The motion was denied. (R1149).

As indicated earlier, there were two eyewitnesses to the robbery/shooting. The state called one of them, Debbie Santos. The defendant called the other, Reuben Hernandez. (R1154). Hernandez was standing at the doorway by the counter when a black male came into the store. (R1157). He was wearing a blue cap, green shirt, light brown pants, and white tennis shoes. The green shirt had no sleeves from the shoulder down. (R1158). He had medical tape on his face, "enough to cover his whole face feature." (R1159). He could not see any of the man's facial features because they were all covered. (R1159). The man pointed a rifle at Hernandez and demanded some money. Hernandez told him he did not have any money. (R1159). Hernandez did not see any unusual scars or marks on the man's arms. Larkins displayed his arms at that point in the testimony, revealing tatoos. Hernandez said if the man had had tatoos like those he would have seen them, althought he also said that when a person is pointing a rifle at you, you would not examine him. (R1160). On cross examination, Hernandez said that this event had caused him emotional problems and that he had

been under a psychiatrist's care. (R1162). He also was asked to describe the location of the tape in more detail, and he said that it was all across the man's forehead, down each cheek, on his chin, on his nose, around his eyes, "I mean totally his whole face feature." (R1162-63). Hernandez said that the robber pointed the rifle at the clerk and demanded that she open the register, but the register would not open. He told her to step away from the register and she did so. She ducked down, and the man went around the corner, grabbed her by the arm, and swung her over to the soda machines. Then he fired two shots. (R1165-66). After the defendant rested, defense counsel renewed his objection to the surgical gloves, and the court withdrew them from evidence. (R1175-76). The court agreed with the defendant's request to admonish the jury to disregard any testimony about the surgical gloves. (R1177). When the exhibit was withdrawn, the court told the jury, "you are to disregard any testimony regarding that particular exhibit, and you may not use that exhibit or any testimony relating to that exhibit in your deliberations." (R1189).

In closing argument, the theory the state argued was not premeditation but felony murder. (R1192-93).

The prosecutor argued that most of his civilian witnesses were "outlaws" who had been convicted of felonies. He went on to say, "But they have nothing to gain or lose." (R1198).

In closing, defense counsel urged the jury to follow the judge's instructions. He pointed out that they had heard about rubber gloves and that Officer Hall had said that he did not get any rubber gloves from Larkins. He reminded that jury that they

had been instructed to disregard the gloves. He told him that they would be tempted to think, "no wonder there's no finger-prints, he had gloves. That's not true." And he concluded this part of his argument by pointing out that neither eyewitness said anything about rubber gloves. (R1230-31).

In rebuttal argument, the prosecutor claimed that Hernandez, an eyewitness, "simply does not have any idea what happened there that night." (R1243). The prosecutor also pointed that Detective Shumard testified he got the rubber gloves from Eddie Hall but Eddie Hall said he could not remember. Defense counsel objected that the prosecutor was misquoting the evidence, but the judge allowed the explanation about Eddie Hall to be included. (R1244).

The jury returned verdicts of guilty as to first degree murder and robbery with a firearm. (R1286).

Before evidence was presented in the penalty phase, the trial court instructed the jury (R1298-99):

> Final decision as to what punishment shall be imposed rests with the judge of this court. However, the law requires that you, the jury, render to the court an advisory sentence as to what punishment should be imposed upon the defendant. Your advisory verdict as to what sentence should be imposed on this defendant is entitled by law and will be given great weight by this court in determining what sentence to impose in this case. It is only under rare circumstances that this court could impose a sentence other than what you recommend.

During the penalty phase, the state presented the testimony of George Seper, formerly a sergeant in homicide in the St. Louis, Missouri, Metropolitan Police Department. He conducted an investigation in which two people had been shot, one of whom died. Larkins was arrested for the shootings. (R1300-02). Seper

identified Larkins as the same individual who was arrested. (R1302). The defendant objected to hearsay as to Larkins's being tried and convicted, but the objection was overruled. (R1302-03). He also objected to documentary evidence of the conviction on the ground that it failed to establish that it was the same individual that was on trial. This objection was likewise overruled. (R1303). The documents introduced showed that Larkins was convicted of one count of manslaughter and one count of assault with intent to kill with malice. (R1304).

The defendant presented only one witness in mitigation, Henry L. Dee, Ph.D, a clinical psychologist in Lakeland. (R1305). Dr. Dee's tests of Larkins placed his performance at a low average level, about the bottom twenty percent of the population. He said this placement was consistent with Larkins's "relatively barren cultural background and education, which was quite limited." (R1315). He said that Larkins could not remember whether he finished the fifth or sixth grade, but one of those grades is as far as Larkins went in school. (R1315). He said that Larkins had "a substantial memory impairment, placing him in the bottom one percent of the population." (R1315-16). Larkins had great difficulty in "reversal of orientation," for example, putting his right hand on his left eye. This difficulty is consistent with cerebral damage. (R1316). Dr. Dee said that a person with cerebral damage finds everything more irritating than other people and is likely to react with anger or aggression to such things as "simple noise, children playing, children laughing." (R1317). He also said such people are very impulsive and act without giving any thought or deliberation to the consequences of their behavior.

(R1318). His diagnosis was that Larkins suffered from an "organic brain syndrome with mixed features, including both a memory impairment and an emotional component including increased irritability and lack of impulse control." (R1318).

Dr. Dee testified that Larkins could not tell him of any accident which caused any trauma to his head. He did, however, say:

> There is another candidate that is possible that is reflected in the personality test; and that is a history of some kind of drug or alcohol abuse. His performance on a scale that is designed to measure addiction to drugs or alcohol is elevated well beyond the normal level. And we know that chronic use of any intoxicant can result in, in plain terms, in brain damage. In otherwords, alcohol, cocaine, or crack, or crank, or whatever.

(R1319). It should be noted that Burkes, the cell-mate, testified that Larkins said he knew the lady that was supposed to testify against him because he smoked drugs with her. (R1106).

Dr. Dee was unable to reach a conclusion as to how long Larkins had suffered from the organic brain syndrome. He indicated, however, that Larkins's history suggested that he may have had the problem from an early age because Larkins had learning problems, including "grave difficulties in learning to read." (R1319-20). The cause of the early damage may have been congenital or it may have been something that Larkins has forgotten. Such forgetfulness would not be suprising inasmuch as Larkins could not remember which grade he finished in school. (R1320).

Dr. Dee testified that, in his opinion, Larkins suffered from both a mental and an emotional disturbance in August of 1990 and that people suffering from such condition are typically withdrawm

and their behavior "is basically unpredictable and frequently violent." (R1320-21). He said that condition "impairs his capacity to control [his] conduct, whatever he appreciates it to be." (R1321). On cross, Dr. Dee explained that this phenomenon of being "withdrawn", would not mean that Larkins would avoid people altogether but that he would avoid close or intimate contact with others. (R1325).

In argument, the state contended that there were two aggravating circumstances: (1) "The defendant committed this crime for financial gain" and (2) "The defendant has prior convictions for the use of or the threat of use of force against people." (R1329). Defense counsel argued, among other things, that when Larkins served the minimum twenty-five year portion of a life sentence, he would be sixty-three years of age. (R1335).

At the close of penalty phase argument, the judge instructed the jury, including this paragraph (R1339):

> Now, ladies and gentlemen, your advisory verdict as to what sentence should be imposed on the defendant is entitled by law and will be given great weight by this court in determining what sentence to impose in this case. It is only under rare circumstances the court would impose a sentence other than what you recommend.

By a vote of ten to two, the jury recommended a death sentence. (R1341).

Before the final sentencing hearing, defense counsel submitted a motion for new trial. (R136-38). Among the issues raised in the motion for new trial were the introduction of state's exhibit twenty-six (rubber gloves), placing "the defendant in the untenable position of arguing against inadmissible evidence or requesting a

mistrial"; introduction of state's exhibit eight ("gruesome" photograph of victim); introduction of state's exhibit fifteen (victim's "gruesome and bloody" clothing); denial of cross-examination of Ronnie Baker and Charles Baker regarding pending charges; denial of request for additional peremptory challenges; and denial of pre-trial motions, including denial of motion to require jury fact-finding with regard to aggravating and mitigating circumstances.

In arguing his motion for new trial, defense counsel complained of having to use a peremptory challenge to remove Flo Lanier, who was the mother of the state's first witness. His argument was that the court should have granted his pre-trial motion for additional peremptory challenges, and exercise of a peremptory of juror Lanier caused the defendant to exhaust his peremptories. (R1178). The motion for new trial was denied. (R1353).

In arguing what the sentence should be, defense counsel reminded the court of his pre-trial motion to strike from the jury instructions the fact that their recommendation was just a recommendation because that instruction tends to minimize the jury's role. (R1355). The trial court responded that it had gone beyond the language of the standard instructions and further instructed the jury as to the weight that would be afforded their recommendation. (R1356). Defense counsel also renewed his motion to strike the death penalty because the decision of whether to seek the death penalty is left in the unbridled discretion of the prosecutor. (R1357). He also reasserted the racially discriminatory aspects of the death penalty, particularly as

applied to this defendant who is black and whose victim (as found by the jury) was white. (R1357).

The court sentenced Larkins to thirty years, with a minimum mandatory three years for armed robbery, to be served consecutive to a death sentence imposed on the murder count. (R1364).

In its written order, the court found as aggravating circumstances that the defendant had previously been convicted of a felony involving the use or threat of violence to a person and that the murder was committed for pecuniary gain. (R155A-56). Without expressly saying what, the court apparently found some type of statutory or nonstatutory mitigating circumstance in the testimony of Dr. Dee because the court concluded "that this mitigating circumstance is substantially outweighed by either aggravating circumstance." (R156-56). The court went on to state, "Since no other mitigating circumstance can be gleaned from the record, the imposition of the death penalty is the appropriate sanction for the offense of First Degree Murder." (R157).

SUMMARY OF THE ARGUMENT

Because of contradictions between the two eyewitnesses to this offense and the multiple inconsistencies within the testimony of the eyewitness the state chose to sponsor, the evidence is insufficient to sustain a conviction in light of the fact that the defendant presented a reasonable hypothesis consistent with innoncence.

Several evidentiary rulings resulted in a miscarriage of justice in this case. Surgical gloves used by the state to explain why the defendant's fingerprints were not found were introduced into evidence, withdrawn, then argued in closing argument. This

handling of inadmissible evidence on a critial issue constitutes fundamental error. Furthermore, two gruesome exhibits were introduced and neither of them esablished any fact in controversy but only inflamed the jury. The court also denied the defendant the right to impeach two witnesses with regard to pending charges, and they were the only ones purported to establish a pecuniary gain motive on the part of the defendant. Hearsay testimony purporting to establish the nonexistence of other guilty parties was also improperly introduced. Collectively, these evidentiary rulings constitute reversible error, even if one standing alone is not sufficient.

The trial court failed to enter a proper sentencing order setting forth the aggravating and mitigating circumstances. Furthermore, the trial court failed to find two statutory mitigating circumstances and a horde of nonstatutory mitigating circumstances that were established by the record.

The trial found that the aggravating circumstance of commission for pecuniary gain was esablished, and this finding was erroneous. Unquestionably, Larkins did not commit this killing for pecuniary gain (if he committed it at all) but committed it as a result of an impulsive reaction to the noise, which impulse was the result of organic brain damage. Thus this aggravator was not esablished beyond a reasonable doubt.

Given all of the mitigating circumstances that were established in the record but not considered by the trial court, and in light of the diminished importance of the two aggravating circumstances found by the trial court, death is a disproportional sentence in this case.

The trial court failed to grant numerous "death penalty motions" pursued by Larkins. Of particular importance are the motions dealing with the court and prosecutor denigrating the role of the jury in sentencing, the denial of co-counsel, and the denial of special verdicts setting forth the jury's findings of fact.

ARGUMENT

I. Jury Selection issues were not adequately preserved for appeal and remand is necessary to complete the record.

Before trial defense counsel moved for two additional peremptory challenges because of the pre-trial publicity. The motion was denied. Defense counsel did not then or later move for a change of venue. During voir dire, almost every prospective juror indicated knowledge to a greater or lesser degree of the facts and circumstances, or reported or rumored facts and circumstances, of this case. At least three of those prospects (Lanier, Porter, and Coker) could have been successfully challenged for cause pursuant to Singer v. State, 109 So.2d 7 (Fla. 1959), but were challenged by the use of peremptory challenges. Three other prospective jurors (Roberts, Thomas, and Schwartz) could have been challenged for cause under Singer but were not challenged for cause or peremptorily. Defense counsel used all ten of his peremptory challenges, but he did not challenge other jurors for cause unless they were aware of Larkins's criminal history, nor did he ask for additional peremptories and specify the juror or jurors he would excuse if he were given the additional strikes. Trotter v. State, 576 So.2d 691 (Fla. 1990); Pentecost v. State, 576 So.2d 691 (Fla. 1990). Furthermore, the prosecutor exercised a challenge for cause against a prospective black juror (Romeo) and gave as a reason that

the juror was aware of the defendant's prior incarceration. This reason is one that should have been advanced, if at all, by the defendant. By not challenging this juror for cause the defendant obviously opted not to excuse the black juror for reasons which were not stated on the record but which could include that felony convictions are more common in the black community and therefore do not carry the same stigma with a black juror as they would with a white juror. In any event, defense counsel did not articulate his reason for not attempting to challenge the black juror nor did he object to, pursuant to State v. Neil, 457 So.2d 481 (Fla. 1984), and Batson v. Kentucky, 479 U.S. 79 (1986), the state's exclusion of a minority juror for reasons which would not be the basis for exclusion by the state but by the defendant.

After the trial, defense counsel filed a motion for new trial on the ground that the defendant was forced to use peremptory challenges on people who had knowledge of the case because of the extensive pre-trial publicity. It is appellate counsel's conclusion that errors were made in the jury selection process but the matters were not adequately preserved for appeal. Trial counsel's pretrial request for two additional challenges and his posttrial complaints about the lack of additional challenges do not meet the commands of Trotter and Pentecost. And trial counsel failed to object to the state's discriminatory removal of a black juror as required by Neil and Batson. Because this is a death case, appellate counsel is extremely concerned about waiving an issue by not raising it or, alternatively, raising it when the record is not complete and thus waiving it for post conviction motion purposes. Accordingly, appellate counsel hereby announces

his concern about the jury selection issues set forth in this segment of the brief and requests that the court remand the case for an evidentiary hearing on these matters or expressly preserve them for purposes of a motion under rule 3.850, Florida Rules of Criminal Procedure.

II. There was insufficient evidence to sustain a verdict of guilty.

The evidence was insufficient in this case to establish that Robert Larkins was the person who committed the robbery and shooting. Sufficiency-of-the-evidence cases are legion. E.g., State v. Law, 559 So.2d 187 (Fla. 1989); Cox v. State, 555 So.2d 352 (Fla. 1989); Cochran v. State, 547 So.2d 928 (Fla. 1989). Ordinarily, appellate review of the sufficiency of the evidence is limited to entirely circumstantial-evidence cases. Here, however, we have an eyewitness (Santos) who purports to identify the defendant. But her testimony is fraught with inconsistencies, including inconsistencies with her own deposition which may be considered substantive evidence as well as impeachment pursuant to Section 90.801(2)(a), Florida Statutes. Moore v. State, 452 So.2d 559 (Fla. 1984). Furthermore, her testimony is inconsistent with the other eyewitness (Hernandez). Larkins presented a reasonable hypothesis which is consistent with his own innoncence, and fundamental fairness requires a review of the evidence to avoid conviction and execution of an innocent man.

Early in his closing argument (R1205), he offered this reasonable hypothesis as to who really robbed the store and killed Ms. Nicolas, reminding the jury of what he had told them to look for prior to the presentation of any evidence:

> You're going to hear that the rifle that was used belonged to Nukie; that Nukie had a prior criminal conviction. Nukie was at the vacant house where the rifle was found the day after the robbery. And you heard that. Nukie refused to admit that he came by and picked up that gun. And when I asked him, he refused to admit that he put the gun by that house.
>
> I told you in opening that there was going to be a lack of some evidence. That you were going to hear that the robber was so masked with tape that his facial features were totally blocked. And you heard that. I told you that you are not going to hear any witness to the robbery identify any distinctive features about the robber. And you heard that from both witnesses to the robbery. And as a matter of fact, beyond that, you heard and saw the testimony and the obvious lengthy markings on my client's arm that were not noticed by anyone at the store or witnessed that.

Nukie gave the gun to Larkins. Nukie gave Larkins the surgical tape. Nukie had more surgical tape to which he had access. Because of his mother, he no doubt had access to surgical gloves as well. He admitted to being in the yard where the gun was later found. It is reasonable to believe that he "set up" Larkins by providing Larkins the implements of the robbery only to retrieve the gun and then dispose of it where it was eventually found.

Larkins normally wore a white t-shirt. He was seen the night of the robbery by Officer Hall and others wearing a white t-shirt. None of the finger-prints found on the register belonged to Larkins. A shoeprint, disingenuously presented as being of the same "class" as Larkins's shoe, proved only that someone other than the victim stepped in the blood on the floor. The shoeprint was determined to be only within four sizes, eight to eleven, and it could not even be determined whether the soles were leather or tennis style. Those prints could have been made by anyone with

shoes of a size between eight and eleven. Most importantly, the shoes which the state offered against the defendant, had no blood on them.

Although Debbie Santos claimed to have recognized Larkins, she testified at her deposition that she could only see the robber's lips and eyes. This is consistent with the testimony of Hernandez who said that the robber's face was totally covered by tape. And it is inconsistent with her ability to be able to identify Larkins. Furthermore, Ms. Santos testified that the robber was at an open register, but the physical proof and other oral testimony indicated the register was never opened. Ms. Santos indicated she saw the defendant backing out the door, but she admitted she did not see him carrying anything. In contradiction to that, comprehensive evidence established that the robber carried the cash register out of the store. It would be impossible to miss something so large.

Ms. Santos testified she heard Larkins's voice while she was at the police station. But there was absolutely no testimony from any of the law enforcement officers that she was ever at the police station at the same time as Larkins. The prosecutor skirted this issue by presenting the following suggestive but misleading testimony:

> Q: Was Debbie Santos and the defendant ever put in the same room together?
>
> A: No.
>
> Q: Were they ever put in an area where they could see one another?
>
> A: No.
>
> Q: Can one hear from one office to the other?
>
> A: Yes, sir.

(R1127-28). Lieutenant Selph also testified that he had contact with Santos "later that morning" (R1125) but responded "yeah" when asked if "At some point in time was the defendant allowed to leave the police department that night?" (R1128). Thus it appears that Larkins left the police station before Santos ever arrived. Furthermore, the police station was described as being one small room and one large room. When asked, "big room or little room?", Santos responded, "it was a small room." (R945). It is inconceivable that Ms. Santos could have been paraded through the large room into the small room and not have encountered Larkins if he was there. And it is clear that he was there before she arrived, so there can be no conclusion other than that he left before she got there.

Larkins's motive is also greatly confused by the state's case. Nukie said he offered money to Larkins and Larkins refused. Ronnie Baker said that Larkins went to Mr. Hodge's place to ask for money. Does any of this evidence indicate a motive to rob? Nukie's testimony suggests that Larkins was not particularly interested in money at the moment. On the other hand, Ronnie Baker's testimony suggested that Larkins was looking for money. (This makes even more important the disallowed impeachment cross-examination of Baker).

Finally, Santos said she did not notice what the robber was wearing. Hernandez, on the other hand, described the robber as wearing a shirt with the sleeves cut off at the shoulders. Yet neither Santos nor Hernandez noticed anything unusual about the robber, and Larkins had very clear tatoos on his arms.

This is a case of mistaken identification. The defendant

presented a reasonable hypothesis that Nukie was the real robber. The state's case depended on the defective testimony of Debbie Santos to identify Larkins. Fundamental fairness now requires reversal of the conviction because of the unreliability of the Santos testimony.

III. The introduction, withdrawal, and argument of the surgical gloves constitutes fundamental error.

When the surgical gloves were offered into evidence, they were identified by Deputy Shumard as having been received from Officer Hall. The defendant objected to their relevance, but they were admitted on the strength of the state's argument that they were relevant to explain why the defendant left no fingerprints. However, after the gloves were admitted into evidence, Officer Hall did not agree that he had been in the chain of custody. Subsequently, the judge withdrew the surgical gloves from evidence and admonished the jury to disregard them and all testimony about them. In closing argument, defense counsel attempted to ensure that the jury would not consider the gloves or any testimony, reminding the jurors of the court's admonition and how the matter came up during the trial. During his portion of the closing, the prosecutor took issue with defense counsel's statements about who handled the gloves.

As defense counsel pointed out in his motion for new trial, the mishandling of the surgical gloves placed him in the dilemma of proceeding to trial or asking for a mistrial. Obviously, he failed to ask for a mistrial. Perhaps he should have. In any event, the whole handling of the surgical gloves issue constitutes a denial of due process and is, therefore, fundamental error. Sochor v. State,

580 So.2d 595 (Fla. 1991); Ray v. State, 403 So.2d 956 (Fla. 1981). This error was not harmless because, as argued under issue two, above, the absence of the defendant's fingerprints was a crucial element of the defendant's argument to the jury. This introduced-then-withdrawn exhibit wiped out the defendant's credibility on the issue.

IV. It was error to admit an inflammatory photograph and smock.

A photograph depicting the victim after she had been turned over after lying in a pool of blood and her bloody smock were introduced into evidence over the defendant's objections. These exhibits esablished absolutely nothing of importance to the state's case. Just as in Czubak v. State, 570 So.2d 925 (Fla. 1990), the state accomplished nothing but the inflammation of jurors' passions by introduction of these two exhibits. Not a single disputed issue was clarified by them, and their effect on the jury was to create such unfair prejudice as to insure conviction of this defendant.

V. It was error to deny the defendant the right to impeach Ronnie Baker and Charles Baker with pending charges.

At the time Ronnie Baker testified, his criminal charges had been disposed of. At the time he agreed to testify, however, they were pending, and they included allegations of convenience store robberies. Defense counsel sought to impeach Ronnie Baker with the fact that the charges were pending at the time Ronnie Baker became a state witness. The court denied the defendant the right to conduct such impeachment.

At the time Charles Baker testified, he had pending criminal charges. Defense counsel sought to impeach him with the pending charges and was prohibited from doing so.

There can be no doubt that with regard to both witnesses the exclusion of this cross-examination was error. This court has held, "When charges are pending against a prosecution witness at the time he testifies, the defense is entitled to bring this fact to the jury's attention to show bias, motive, or self-interest." Torres-Arboledo v. State, 524 So.2d 402 (Fla. 1988). Similiarly, in Fulton v. State, 335 So.2d 280 (Fla. 1976), this court held, "it is clear that if a witness for the state were presently or recently under actual or threatened criminal charges or investigation leading to such criminal charges, a person against whom such witness testifies in a criminal case has an absolute right to bring those circumstances out on cross-examination."

The error was not harmless. Only Ronnie Baker testified that Larkins was looking for money the night of the robbery. Charles Baker added credence to Ronnie Baker's testimony by corroborating Ronnie's version of how Ronnie met Charles and split up with Larkins not long before the robbery occurred. Thus, the error is undeniable and the harmfulness is obvious, so the error warrants reversal.

VI. Inadmissible hearsay was introduced.

Ovieda Berrien testified, over Larkins's relevance objection, that she had not heard anyone besides Larkins asking about money and talking about needing to get out of town. No case on this point was found. However, by analogy to Sections 90.803(7) and 90.803(10), we see a very good reason why Berrien's hearsay testimony should have been excluded. Those sections authorize proof of the absence of a business or public record if such record was "regularly made and preserved." By contrast, there is no

evidence, nor could there be, that people would "regularly" inform her of their need for money or need to leave town. Basically, she was not competent to report on the rest of the population without proof that she had spoken to all of the rest of the population, and even then, her report would be hearsay.

The objection, however, was to relevance. Before the rules of evidence were adopted, we used to make objections that proffered testimony was irrelevant, incompetent, and inmaterial. In this regard, Berrien's testimony was irrelevant because it was incompetent. It was incompetent in the sense that she was not sufficiently knowledgeable of the matter about which she spoke. Accordingly, the objection should have been sustained.

VII. The trial court failed to consider mitigating evidence in violation of the state and federal constitutions.

In a capital case, the sentencer may determine the weight to be given mitigating evidence but may not give it no weight by excluding such evidence from consideration. Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982). "The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence." Campbell v. State, 571 So.2d 415, 419 (Fla 1990). "Thus, when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved. A trial court may reject a defendant's claim that a mitigating circumstance has been proved, however, provided that the record contains 'competent substantial evidence to support the trial court's rejection of these mitigating circumstances.'" Nibert v.

State, 574 So.2d 1059, 1062 (Fla. 1990) (citations ommitted).

This court is not bound to accept a trial court's findings concerning mitigation if the findings are based on a miscontruction of undisputed facts or a misapprehension of law. Pardo v. State, 563 So.2d 77, 80 (Fla. 1990). In this case, the trial court's order reflects both a miscontruction of undisputed facts and a misapprehension of law. In his order, the trial judge stated that "Dr. Dee is of the opinion that the defendant suffers from organic brain damage ..." which somehow contributed to causing the defendant to fire his gun, killing the victim. The court's order goes on to say that Dr. Dee "does not believe that this condition is of such a nature that the defendant lacked the capacity to appreciate the criminality of his act or to conform his conduct to the requirements of law." (R156). Without saying which, or whether, Dr. Dee's testimony established any statutory mitigating circumstance, the trial judge said, "this mitigating circumstance is substantially outweighed by either aggravating circumstance." (R157).

An examination of the face of the order shows that nowhere does the trial court address mitigator 2, that the crime "was committed while [Larkins] was under the influence of extreme mental or emotional disturbance." Yet, when asked words from that statutory mitigator, Dr. Dee unequivocally answered "yes." (R1320). He went on to say, "As a matter of fact, I would say that he suffered both a mental and an emotional disturbance." (R1320). Thus by competent, unrefuted testimony, the defendant esablished that at the time of the offense he suffered from an extreme mental or emotional disturbance. Yet the trial court did not even address

this mitigator in its order. Failure to consider this clearly established mitigator is a violation of the state and federal constitutions as explained in Eddings, Campbell, and Nibert.

Perhaps the reason for the court's failure to consider mitigator 2 is that the court miscontrued both the law and the facts as presented in the penalty phase. The court's order addresses Dr. Dee's testimony in terms of organic brain damage and ability to appreciate law and conform one's conduct. It seems apparent, therefore, that the judge addressed Dr. Dee's testimony only in the context of mitigator 6. And even then, he miscontrued the testimony. When asked if the organic brian syndrome would affect Larkins's ability to appreciate the criminality of his conduct, Dr. Dee opined, "it might affect it, certainly wouldn't obliterate it. I think what is more relevant is that it impairs his capacity to control that conduct whatever he appreciates it to be.") (R1321). (emphasis added). Thus, not only has the trial court confused the two mitigators (2 and 6), it has misstated Dr. Dee's testimony to find that the mitigator does not exist when in fact Dr. Dee testified that it did exist. This finding, therefore, is also in violation of Eddings, Campbell, and Nibert, and should be set aside under Pardo.

With regard to nonstatutory mitigating evidence, the trial court indicated that "no other mitigating circumstance can be gleaned from the record ..." (R157). This statement is clearly and grossly erroneous. As Campbell, supra, holds, the trial court must find as a mitigator any proposed factor that is in fact mitigating and has been reasonably established by the greater weight of the evidence.

In his closing argument, defense counsel "proposed" the following mitigating circumstances: The prior violent felony for which Larkins was convicted was not murder but manslaughter (R1332); at the time of the offense Larkins was under the influence of extreme mental or emotional disturbance (R1333); he was a poor reader; had difficulty in learning; he dropped out of school at the fifth or sixth grade; the offense was the result of impulsivity and irritability (R1334); and at a present age of thirty-eight, Larkins would be sixty-three years old before he would even be eligible for consideration for release. (R1335). In addition to those nonstatutory or statutory mitigating circumstances, testimony as outlined in the statement of the facts above establishes the following mitigating circumstances: Larkins was drinking the night of the offense; Larkins was in the lower twenty percent of the population in intelligence; he had a barren cultural background; he had quite limited education; because of brain damage his memory loss placed him in the bottom one percent of the population in ability to remember; his mental problems are long-standing (or chronic, as defense counsel said); his mental problems may be caused by drug or alcohol abuse, according to Dr. Dee's findings on one of the tests and according to Burke's, Larkins admitted smoking dope; Larkins was withdrawn and had difficulty establishing relationships; and Larkins was drinking just before the offense.

The court was bound to consider all of this mitigating evidence. It could have rejected it, of course. But it had to consider it. It did not do so, and its sentence of death is therefore unconstitutional.

VIII. The court's sentencing order is inadequate.

Campbell, 571 So.2d at 419, instructs that, "When addressing mitigating circumstances, the sentencing court must expressely evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature." As set forth in the previous issue, the trial court clearly did not do what Campbell requires. Accordingly, even if there is no other ground for reversing the death sentence, a new sentencing order is required; therefore, reversal in this court is also required.

IX. The aggravator of commission for pecuniary gain was not estalished beyond a reasonable doubt.

The state elected to go forward with the aggravator of commission for pecuniary gain rather than commision in the course of a felony. The obvious reason is that a killing for financial gain might be considered more aggravated than a killing which occurs as an incident of another felony. The state did not esablish that this killing was done for pecuniary gain.

Dr. Dee's testimony is unequivocal that Larkins's brain damage substantially affects his ability to conform his conduct to the requirements of the law. He is irritable. He is impulsive. Dr. Dee used a child's crying as something that might trigger impulsive behavior on the part of Mr. Larkins. The testimony of Debbie Santos was that at some point during the robbery her child started crying. The testimony of Burke's was that Larkins admitted shooting the store clerk "because of all the noise, and he kept saying: Be quiet." (R1105). The robbery obviously was done for pecuniary gain. But the state's own argument was not one of

premeditated murder but of felony murder. Thus, the killing occurred not as an intentional act for the purpose of obtaining the victim's money but as an incident to the robbery. Thus, even by the state's own version, Mr. Larkins did not kill for money. By Larkins's admission, the killing occurred as a result of noise, which Debbie Santos verified, and which fits in perfectly with Dr. Dee's assessment that noise would trigger an impulse reaction on his part. Therefore, the death occurred as a result of Larkins's impulsivity and not as a result of his avarice. Accordingly, the aggravating circumstance of commission of a capital offense for financial gain was not established beyond a reasonable doubt, and the trial court's finding to the contrary was erroneous.

X. Death is a disproportional sentence in this case.

This court is entitled to set aside a trial court's sentence of death if it believes that the sentence is disproporational to similiar cases. Nibert, 574 So.2d at 1063, and cases cited therein; Watts v. State, 593 So.2d 198, 204 (Fla 1992). At first blush, this case appears to be one in which a person, having committed one murder, commits a second. Yet we have no evidence of the circumstances of the prior conviction, only proof that it was a manslaughter. Thus, although a conviction for manslaughter is not itself mitigating, the fact that it was not a capital offense somewhat diminishes the weight of this aggravating circumstance, which appellate counsel concedes was established. But the aggravator of commission for pecuniary gain was not established, or, if it was, it has only marginal weight. By contrast, the mitigating evidence establishes chronic mental problems and many other nonstatutory mitigating circumstances. Looking at the

aggravating circumstances and mitigating circumstances objectively leads to the conclusion that death is not the proper sentence in this case.

XI. The trial court and prosecutor improperly denigrated the sentencing role of the jury.

Throughout the statement of facts, above, are references to statements made by the court and/or the prosecutor having to do with the advisory role of the jury in determining Larkins's sentence. Long before the penalty phase ever began, the jury was assured that they were off the hook for responsibility for whatever sentence Larkins might receive. The trial court's effort to salvage the proceeding by telling the jury during the penalty phase that the judge could reject their recommendation only in rare cases was too little, too late.

Any instruction which minimizes the jury's sense of responsibility for determining the appropriateness of a death sentence will require a new sentencing proceeding. Caldwell v. Mississippi, 472 U.S. 320 (1988); Dugger v. Adams, 109 S.Ct. 1211 (1989); Man v. Dugger, 844 F.2d 1446 (11th Cir. 1988).

Larkins is aware that this court has found Caldwell inapplicable in Florida, but Larkins nontheless raises this issue under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. See King v. Dugger, 555 So.2d 355, 358 (Fla. 1990).

XII. The trial court erred in denying Larkins's "death penalty motions."

Larkins raised several issues in pre-trial motions. This court has ruled on most, if not all, of the various aspects within those motions and such rulings have not been favorably to the

position taken by Larkins. Nonetheless, Larkins asserted those motions below and reasserts them here under the Florida Constitution as well as the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Of particular importance are Larkins's request for additional counsel and for findings of fact by the jury. Typically in the Tenth Judicial Circuit the Public Defender's Office assigns two lawyers to a death penalty case. When private counsel is appointed, who does not have the same resources available as the public defender, only one attorney is appointed. Thus, a capital defendant represented by private counsel is denied equal protection when compared with a capital defendant represented by the public defender. There is a very good reason, particularly in a case like this, for assignment of co-counsel. Trial counsel in this case made a valiant effort to convince the jury that Larkins was not guilty of the crime. Having spent a week unsuccessfully promoting the notion that Larkins was an innoncent man, trial counsel had to shift hats and suddenly appear to admit guilt but claim that Larkins did not deserve the death penalty. Obviously, anyone making such an argument lacks credibility. Accordingly, forcing Larkins to go to trial with only one attorney denied him the effective assistance of counsel during the penalty phase.

With regard to findings of fact, the impact of no fact-finding in this case is manifest. The trial judge confused and combined the two statutory mitigating circumstances and found that no other mitigating circumstances were established. Had the jury been required to inform the court of which mitigating circumstances it found to have been esablished, the trial court would have had a

better basis for reaching its conclusion. As it is, its conclusion will have to be reversed because it confused the issues, misconstrued the facts, and failed to acknowledge the existence of mitigating circumstances, and failed to set forth all the matters required by law to be included in the sentencing order. Findings of fact by the jury might have ameliorated these problems.

CONCLUSION

Both the conviction and the sentence should be reversed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by US Mail to Robert Krauss, Attorney General, 2002 N. Lois Avenue, Tampa, Florida 33607 this 19 day of January, 1994.

Robert L. Doyel