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

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

The appellant believes his arguments with regard to issues II, IV - VI, IX - X, and XII were adequately presented in his initial brief. This reply brief will present rebuttal to the state's arguments on issues I, III, VII - VIII, and XI.

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

Appellate defense counsel seeks review of substantial failures by trial counsel with regard to empaneling the jury. Appellate defense counsel acknowledges that the failures were not fully preserved for appeal, but raises the matter in an abundance of caution because trial defense counsel partially raised the issue by pretrial motion for additional peremptory challenges and by post-trial motion. The issue cannot adequately be reviewed on appeal without a remand, which, as the state points out at page 85 of its brief, is not "convenient." The state seems to acknowledge at page 9 that failure to obtain review of the issue on this appeal does not constitution a waiver or procedural default ("the 3.850 motion to vacate vehicle is available.") Preservation of the issue is all appellate defense counsel seeks, and preservation of the issue for collateral proceedings is sufficient if this court concludes that a remand is not necessary.

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

The appellant's position on this issue was adequately stated in the initial brief. However, the state has now engaged in an ad hominem argument, attacking defense counsel for "gotcha maneuvers" and a "sandbag tactic" (Brief, 16), accusations which are neither

fair nor borne out by the record.

The state's brief claims that Officer Hall "did in fact seize them [the rubber gloves]." (Brief, 14). The prosecutor made the representation to the court that Hall, after he testified to the contrary, reported to the prosecutor that he had seized the gloves. (R 1178). But there was no testimony to that effect. Quite to the contrary, Officer Hall testified under oath in the presence of the jury that he did not find any surgical gloves. (R 852).

As set forth in the initial brief, the presence or absence of the surgical gloves had a great bearing on the presence or absence of fingerprints on the cash register. And, contrary to the state's allegation of sandbag tactics, trial defense counsel made it clear before closing argument exactly what he intended to do in closing with regard to the gloves, at R 1177, as follows:

> The difficulty from my point of view, Your Honor, is they have been mentioned. And I think I have to address it in closing argument in terms of this Court is going to instruct you to disregard anything in reference to it. So that: Please follow the instructions of the Court-- etc.

Trial defense counsel may not have properly preserved the error, but he was not the cause of the dilemma he found himself in. It was the state's witnesses who confused the issue and the prosecutor who decided not to clarify the matter. A defendant is obviously entitled to argue the absence of any evidence, and defense counsel did so. To accuse him of sandbagging at this point is unfair and diverts this court's attention from a very important issue in this appeal.

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

The state contends that the appellant's argument on this issue is "meritless," but the state does not even address the trial court's failure to address the expert testimony that Larkins, at the time of the offense, was under the influence of both extreme mental and emotional disturbance (R 1320) or that Larkins's capacity to control his conduct was impaired. Clearly on these two statutory matters, the trial court failed to fulfill its obligation to consider these factors. Campbell v. State, 571 So.2d 415, 419 (1990).

With regard to the appellant's age, the state argues that "this court has held that age must be linked with some other factor such as immaturity or senility." (Brief, 25, citing Echols v. State, 484 So.2d 568, 575 (Fla. 1985).) Actually, Echols holds that the failure to link age to immaturity or senility goes to the weight of age as a mitigator, not whether it is a mitigator at all.

The state argues that the burden of pointing out mitigation in the trial court is shared by defense counsel, citing Lucas v. State, 568 So.2d 18, 24 (Fla. 1990). (Brief, 25). Lucas, however, is somewhat at odds with the requirement that the trial court find and weigh all valid mitigating evidence available anywhere in the record at the conclusion of the penalty phase. Cheshire v. State, 568 So.2d 908, 911 (Fla. 1990); Wickham v. State, 593 So.2d 191, 194 (Fla. 1991). Furthermore, even in Lucas, as here, the trial court's findings were inadequate, and defense counsel was given another opportunity in Lucas to point out other mitigation in the record which the state there, as here, claimed was not

adequately pointed out by defense counsel at the trial. Lucas, 484 So.2d at 574.

VIII. The court's sentencing order is inadequate.

The state's argument on this issue seems to be only that the trial court's order is in "substantial compliance" with Campbell v State, 571 So.2d 415 (Fla. 1990). (Brief, 26-27). Thus, the state implicitly acknowledges that literal compliance with Campbell was not achieved.

In support of its contention that the trial court's order was in substantial compliance, the state cites three cases which do not bolster its argument. Durocher v. State, 604 So.2d 810 (Fla. 1992), is a case in which the defendant waived the presentation of any mitigating evidence; therefore, it cannot remotely be on point with the case presently before the court. In Gilliam v. State, 582 So.2d 610, 612 (Fla. 1991), this court declined even to address the Campbell issue, finding that Campbell was not retroactive. In the final case cited by the state, Downs v. State, 572 So.2d 895, 901 n.7 (Fla. 1990), this court stated, citing Campbell, as follows:

> "We emphasize, however, that every capital sentencing court is obligated to 'expressly 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.'"

Thus, the state's cases, rather than supporting their position, undercut it. What is clear in this case is that the trial court did not comply with Campbell in its sentencing order. Accordingly, the sentencing order must be vacated and the case remanded for further sentencing proceedings.

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

For clarification, the state is correct that the appellant is complaining about comments at R 230, 246-47, 454, 1298-99, and 1339. The state's position on this issue seems to be that it has not been preserved for appeal because there was no objection. However, one of the "death penalty motions" filed by defense counsel asked the court to strike portions of the standard jury instructions as violative of the principles of Caldwell v. Mississippi, 472 U.S. 320 (1985). Similarly, defense counsel cited his pre-trial motion at the sentencing hearing. (R 1355).

CONCLUSION

The conviction and sentence of death 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 J. Landry, Attorney General, 2002 N. Lois Avenue, Tampa, Florida 33607 this 27 day of June, 1994.

Robert L. Doyel