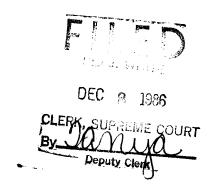
IN THE SUPREME COURT OF FLORIDA

FLORIDA SUPREME COURT DOCKET NUMBER 68,631
PINELLAS COUNTY CIRCUIT COURT CASE NO. 77-2173

STATE OF FLORIDA, Plaintiff, Appellee,

YS.

AMOS LEE KING, JR., Defendant, Appellant.



INITIAL BRIEF OF APPELLANT, AMOS LEE KING, JR.

On Direct Appeal To The Florida Supreme Court From A Final Order And Sentence Of Death Rendered By The Circuit Court Of The Sixth Judicial Circuit In And For Pinellas County, Florida, On November 7,1985.

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DESIGNATION OF THE PARTIES AND RECORD REFERENCES

Amos Lee King, Jr. was the defendant in the trial court and is the appellant here. He will be referred to as "the defendant" or "Mr. King." The State of Florida is the appellee here and will be referred to as "the state."

The clerk of the circuit court has numbered the respective pages of the record on appeal consecutively in ten volumes. That record will be referred to by the letter "R" followed by an appropriate page number, for example "[R1]."

All emphasis is supplied unless otherwise indicated. Brackets include <u>our</u> comments, not part of the actual record, unless otherwise indicated.

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STATEMENT OF THE CASE

On July 7 and 8, 1977 Mr. King was convicted and sentenced to death for the murder of Mrs. Natalie Brady by the circuit court of the sixth judicial circuit in Pinellas County, Florida, in case no. 77-2173. [R3] His conviction and sentence were affirmed by the supreme court of Florida. State v. King, 390 So. 2d 315 [Fla. 1981] After Mr. King's petition for writ of certiorari was denied by the supreme court of the United States [King v. State, 450 U. S. 989 (1981)], the governor of Florida, on November 4, 1981, signed the defendant's death warrant.

Mr. King thereafter filed a motion to set aside his state court judgment and death sentence per Fla. R. Crim. P. 3.850 alleging in part that he had been denied constitutionally effective assistance of counsel at trial [including the guilt/innocence and penalty phases

thereof], but on November 13, 1981, that motion was denied by the trial court. The supreme court of Florida affirmed the denial of the 3.850 motion. <u>State v. King</u>, 407 So. 2d 904 [Fla. 1981]

Mr. King then filed a petition for writ of habeas corpus per 28 U.S. C. §2254 in the United States district court for the middle district of Florida. That motion was also denied. However, a stay was entered by the federal district court while Mr. King sought relief in the United States Eleventh Circuit Court of Appeals.

On or about December 11, 1984 the United States eleventh circuit court reversed the federal district court in part to the extent that it was determined that Mr. King was in law and fact denied constitutionally effective assistance of counsel during the penalty phase of his state court trial. King v. Strickland, 748 F. 2d 1462 [11th Cir. 1984] After the state sought relief in the Supreme Court of the United States without success, the case was remanded to the federal district court which then granted Mr. King's habeas corpus writ and instructed the state circuit court to provide the defendant with another penalty phase re-trial in Pinellas County circuit court case no. 77-2173. [R65,66]

On November 4, 1985 a second penalty phase trial began in the Pinellas County circuit court. At the conclusion thereof, the jury recommended the death penalty by a vote of 12-0 [R471] and the trial judge re-sentenced Mr. King to death. [R472-475]

Mr. King thereafter appealed to this court. [R484]

STATEMENT OF THE FACTS

I. The Background of the Case.

On March 18, 1977, Mr. King was an inmate at the Tarpon Springs community work release center in Pinellas County, Florida. [R1372] His usual schedule required him to work at a nearby restaurant called "Nellie Kelly's" in the evenings then return to the center in the early morning hours. [R1374] According to the state, Mr. King, after returning briefly to the center that morning around 2:40 a.m. [R1374], slipped away to the home of Mrs. Brady [located only about 1500 feet from the center], broke in, raped and killed the elderly lady, set the house on fire, ran back to the center, confronted and attacked a guard [Mr. James McDonough] with a knife [R1380-1400, 6-13, 407-451], then fled into the darkness [R1382]. Mr. King turned himself in to the authorities the next day.

The state presented no eye witnesses to and very little in the way of direct evidence of the Brady homicide at the 1977 trial. However, Mr. McDonough testified that he discovered Mr. King in the bushes outside the center at about 3:40 a.m. on the 18th and noted that the crotch of his pants was drenched in what he thought was blood. [R 1375,1379] Mr. McDonough described a struggle with the defendant wherein he was stabbed repeatedly with a knife until Mr. King was apparently scared off and ran. [R1381-1399] A paring knife allegedly similar in appearance was later found in an area between the work release center and Mrs. Brady's residence. [R1292-1297] The medical examiner testified that Mrs. Brady died from "multiple injuries" including

injuries to the head, the soft tissues of her neck, her "voice box" and vagina. [R1445] The medical examiner was shown the knife found near the work release center and said that the injuries to the deceased could have come from the subject knife. [R1438, 1439]

Firemen testified that the fire at the Brady residence was set intentionally between 3:00-3:30 a.m. [R1333, 1337] The medical examiner estimated the time of death at between 2:45 and 3:45 a.m. [R1424]

II. The Aggravating Factors found by the Trial Court.

The trial court found the existence of five aggravating factors holding that [a] the crime was especially wicked, atrocious or cruel, [b] the murder was committed while the defendant was under sentence of imprisonment for a prior crime, [c] the defendant had a significant history of prior criminal conduct, [d] the murder occurred while in the course of committing other felonies [burglary and sexual battery], and the defendant knowingly created great risk of injury or death to others [R476-479]

The trial court did not find that any mitigating factors existed. [R478]

SUMMARY OF THE ARGUMENT

I. The trial court committed reversible error by allowing the state to exclude black people from the jury panel via the use of peremptory challanges in violation of <u>Neil v. State</u>, 457 So. 2d 481 [Fla. 1984]. As we shall show below, the state as much as admitted this unconstitutional exclusion during voir dire.

- 2. The trial court committed reversible error by refusing the defendant the right to present evidence of his innocence at the penalty phase retrial nothwithstanding [a] the weak, circumstantial evidence of his guilt [as found by the court in <u>King v. Strickland</u>, 784 F. 2d 1462 (1984)], [b] strong proof that he was not the person who assaulted and killed Mrs. Brady and [c] the fact that the trial court allowed the state to present significant evidence of the defendant's guilt. As a result, the defendant was denied the right to avoid the death penalty by creating a genuine, lingering doubt in the minds of the jury and trial court as to his alleged guilt, contrary to <u>Smith v. Wainwright</u>, 741 F. 2d 1248 [5th Cir. 1983].
- 3. The trial court committed reversible error by not allowing the defendant the opportunity to present sociological evidence and data that would have shown that, where the defendant is black and the victim is white, Florida's death penalty is disproportionately imposed.
- 4. The trial court committed reversible error by allowing the state to exceed the resonable bounds of Sec. 921.141, Fla. Stat. regarding presenting evidence of the defendant's guilt and evidence of aggravating factors in the case --which were based on hearsay testimony which the defendant had no fair opportunity to refute.

<u>ARGUMENT</u>

I.

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO UNCONSTITUTIONALLY EXCLUDE BLACK PEOPLE FROM THE JURY PANEL BY THE EXERCISE OF PEREMPTORARY CHALLENGES.

Amos King is black. [R1208-1212] Precisely because of the defendant's race, the state systematically excluded most [two] of the very few [three] blacks from the jury venire panel during voir dire. [R1137-1140, 1199,1200, 1208-1212] Thus, the following took place at a side bar regarding peremptory challenges made by the state against two black venire people [Mr. Coleman and Ms. Brinson] as the jury was being selected ---beginning with the state's decision to challenge Mr. Coleman, a black male [R1137-1140], peremptorily:

THE COURT: Five for the State. Robert Coleman?

MR. HARRISON: We'll accept him your Honor.

MS. McKEOWN: We'll excuse him, Judge.

THE COURT: All right. That's six for the State.

MR. HARRISON: Your Honor, if I could make an inquiry, under Neal versus State when -- I think the law is in Florida that one has to consider that

State versus Neil. Now, this new Florida Supreme Court case says when the State is involved in a situation with a black defendant and begins challenging black potential jurors peremptorially,

I would -- I don't see anything in the answers that Mr. Coleman gave to the questions asked of him which would indicate any reason why he could not be a fair and impartial juror and I respectfully request the State's reason for challenging him. And under the State versus Neil, I think if I have

raised that challenge to the State, they must respond and convince you there is some valid basis for peremptorial --

THE COURT: Doesn't that case talk about systematic --

MS. MC KEOWN: It is Parker V. State, case number 631 Southern 2nd 77, August 22, 1985. And it does talk about that. It quote, unquote, initial presumption is — this is quoting Neal — peremptories will be entered in a non-discriminitory manner, i.e. the party concerned, by the other side uses — which obviously he is doing — and he demonstrates on the record that the challenged person, i.e. us or i.e. Mr. Coleman, are members of a distinct racial group, there is a strong likelihood they have been challenged solely because of their race.

If the party can — the trial court must decide if there is a substantial likelihood peremptory challenges are so being used. If the court finds no such likelihood, no inquiry may be made of the person exercising the requested peremptories. On the other hand, if the court finds it to exist, the burden shifts to us to show the challenges were exercised on the basis of other than race.

I don't see how he can make that statement. We have just accepted the black lady on our jury. He can't say --

MR. HARRISON: The reason i'm concerned about it, Your Honor, I certainly don't infer any ill motive. It is just that the Defendant is black. I think we have gone through what, forty jurors so far, only two of them black. So, we are very concerned about that, the absence of many black people on the venire to begin with.

So, we have to be very cautious about removing black people from this jury, from the wording. So, that is the basis of our concern. I just don't see any reason why anyone would want to challenge this gentleman.

THE COURT: We don't have to ascribe reasons for other jurors unless there is a systematic exclusion. We don't have to ascribe a reason for that where the State accepted Jermima McBride, who is black, a few minutes ago and now is challenging Coleman. I wouldn't categorize that as a systematic exclusion unless if something further occurs.

I'm going to overrule the objection. Do you have anything else?

MR. HARRISON: No.

THE COURT: The objection is overruled. [R 1137-1140]

Parenthetically, we note here that there was absolutely <u>no</u> reason voiced by Mr. Coleman, a school bus driver, which would give the state any reasonable basis whatsoever to think that he would not impose the death penalty if the evidence supported it [for example, when asked about capital punishment, Mr. Coleman noted, "it depends what the circumstances might be, what occurred as it relates to the death penalty"; R1035] or that he would in any way be biased in favor of the defendant because they were of the same race.

Then with regard to Ms. Brinson, a black lady, the following occurred:

MS. MC KEOWN: I'm sorry, Judge. Mrs. Brinson, we'll excuse her.

THE COURT: Excuse?

MRS. MC KEDWN: Hmm-hmm.

THE COURT: That's eight for the State.

MR. HARRISON: Now, Your Honor, here is a lady [Ms. Brinson] who has indicated she works for law enforcement, is pro law enforcement and I don't think there is any rational basis for excusing her. She is black, the defendant is black. I think that a pattern is beginning to be established here. The State is systematically excluding black people and when you consider that so few blacks have even gotten up on the venire panel, I think that is a very serious and dangerous precedent that is being established given the fact we have, you know, the State is in effect challenging 66 percent of all black people who have an opportunity to get up on this jury. There is no rational basis for it. She is law enforcement, she works for law enforcement and I really think this is contrary to the State versus Neal decision where we have the situation where minority people of the same race as the defendant are being systematically excluded from their venire panel. I think it is not correct and so we would object on that basis.

THE COURT: Do you want to respond?

MS. MC KEDWN: Judge, I still don't believe that we have in any way set any type of systematic exclusion. There is no proof of it. If the Court feels there is, at that juncture we will give a reason for why we are excluding her.

THE COURT: I think it might be appropriate to give a reason in that the record has something in it. I think it is safe to do that.

MS. MC KEOWN: Okay. She is a young black female, the defendant is a young black male. Her response to the court's inquiry with regard to her feelings about the death penalty we felt were sufficient for us to have concern about how she would apply the law.

MR. HARRISON: Your honor, I think that the state has said it better than I could. Miss McKeown wants to excuse this lady in part because of her race, because she is black. She has said that and that is not a constitutional reason to exclude someone.

Now, there is a constitute in Florida against age discrimination. I don't think it is proper to exclude someone because of their age, relative age. Mr. King is entitled to a jury of his peers, so since he is young and black, Mrs. McKeown is saying you can excuse all young black people from this jury, at least 66 percent of them. I think we are getting in a very dangerous crossroad here and I am concerned. Under State versus Neal, I would ask that you not allow the state to peremptorially challenge this lady.

MR. SANDEFER: Miss McKeown and I are working on this together. And we agreed, although we didn't discuss our reasons for it in very much detail to excuse her. My problem that I had with this lady was she originally said she could not follow the law. She then indicated later that she could. That caused me some concern. Then she threw up a situation penalty it is not appropriate for somebody who killed one person. That caused me concern.

Apparently she feels like there has to be past murders involved. Obviously we don't have that. I have concern over her being able to follow the law because of the changes in what she said and the

final statement about the death penalty.

THE COURT: What she said, as far as my recollection is, that some defendant who killed 15 people get life imprisonment and another defendant who kills one person are given the death penalty. She is indicating the law is not evenly followed in all cases.

MR. SANDEFER: That is correct, and that is our concern.

THE COURT: She said that.

MS. MC KEOWN: Judge, I would be less than candid if I didn't state the other -- I plan on being honest with the Court. I think it is whether or not the sole basis for exclusion is race, and that is certainly not the sole basis for excluding that lady. And, as I think the Court recognizes, we have accepted, do intend to plan on accepting Mrs. McBride who is another young black female on that jury.

MR. HARRISON: Well, Your Honor, I think we have made our position clear. I think that the State has failed the Neal versus State test. They want to exclude a person because of their race, at least in part, and I think what Sandefer is doing is coming up with excuses to try to reinforce.

MR. SANDEFER: I'm not going to stand for that, no, sir. That is not -- that is exactly my reason.

THE COURT: I'll make a ruling. <u>I think her</u> statement with regard to uneven imposing of the

death penalty is certainly more than sufficient justification for excusing her. Overrule the objection. [R1208-1212]

In all due respect to the state and the trial court, it is quite obvious from the statements made by Ms. McKeown that she was challenging Ms. Brinson because of her race, at least in part. Then realizing that she as much as stated this on the record, Mr. Sanderfer came to her rescue to try to cover up the discrimination. We submit that the cat was out of the bag at this point and that the trial court committed reversible error in allowing the state to exercise a peremptory challange under these circumstances.

The reason this is so is because [contrary to what the trial court was led to believe by the state] there was in fact no other possible reason for the state to challenge Ms. Brinson except for her race as can easily be seen from the questions put to her by the state and defense counsel when she was first questioned. Those colloquies went as follows:

MS. MC KEOWN: Okay. I'm going to start up there with Mr. -- <u>Miss Brinson</u>. I see you are with the St. <u>Pete P.D.</u>

MISS BRINSON: Yes.

MS. MC KEOWN: How long have you been with them?

MISS BRINSON: Eight years.

MS. MC KEOWN: Okay. I understand that you are a clerk/typist. Do you have any special law enforcement training for that position? Did you have to go through the academy?

MISS BRINSON: No, I didn't.

MS MC KEOWN: <u>Do you feel even though this is not</u> a St. Pete case, there are no St. Pete officers involved, this is out of the Sheriff's Office, that would affect your ability to be impartial in this case?

MISS BRINSON: Yes, I do.

MS. MS KEOWN: Okay. <u>Do you feel you would give</u> more credence to a police officer's testimony of law enforcement's point of view because they are, in fact, law enforcement officers? Is that what you are saying?

MISS BRINSON: <u>Not to that basis but on the basis I</u> have been working around so many situations, I know of so many cases and stuff. You know, just on that basis.

MS. MC KEOWN: You are not involved in the actual investigation of those cases, I presume.

MISS BRINSON: No.

MS. MC KEOWN: <u>But you do come in contact as far</u> as tuping up reports for police officers?

MISS BRINSON: I have in the past, and also pictures.

MS. MC KEOWN: So, you feel all that would affect your impartiality?

MISS BRINSON: Yes.

MS. MC KEOWN: If the Judge asked you to set aside your personal feelings, follow the law, you could or could not do that?

MISS BRINSON: I don't think so.

MS. MC KEDWN: Okay. Have you ever been a juror

before?

MISS BRINSON: Yes, I have.

MS. MC KEOWN: On a criminal or civil case?

MISS BRINSON: It was armed robbery.

MS. MC KEOWN: That is obviously a criminal case. Was that while you were with the St. Pete P.D.

prior to --

MISS BRINSON: Just after I first started working there. Maybe a year or less.

MS. MC KEOWN: Obviously the prosecutors and defense lawyers were probably asking the same type questions about setting aside personal feelings, following the law. Do you think your feelings have so changed after being there seven more years with St. Pete you would be unable to do at this juncture -- I presume if you were a juror before you were able to set aside personal feelings and follow the law.

Okay. Do you feel you could do that this time?

MISS BRINSON: No, I don't think so. [R1144-1147]

MR. HARRISON: ... Now, Mrs. Brinson, are you married, ma'am? Is it Miss?

MRS. BRINSON: Mrs.

MR. HARRISON: You indicated that you had -- you were currently working for the police department and your experience on the police department might tend to make you a little partial towards the State is that correct?

MRS. BRINSON: It might.

MR. HARRISON: Pardon?

MRS. BRINSON: It might.

MR. HARRISON: It just might, but, ma'am, when you are working for a law enforcement agency certainly you realize the importance of following our rules and regulations of the court. You certainly believe in that part don't you?

MRS. BRINSON: Yes, sir.

MR. HARRISON: Pardon?

MRS. BRINSON: Yes.

MR. HARRISON: You do? And, therefore, if His Honor instructed you on the law in this case, you

would follow it, wouldn't you?

MRS. BRINSON: <u>I would have to if the Judge told me</u> to, yes, sir. [R1199-1200]

MS. MC KEOWN: Judge, based on Mrs. Brinson's statement to me about no being able to be impartial, I did not inquire of the death penalty. I did inquire of everyone else. I think Baya rehabilitated her as far as her being able to be fair and equal.

THE COURT: She said she would follow the law.

MS. MC KEDWN: Earlier she said she would not.

This may well be the last voir dire. In fact,
I hope it would be, we would have a jury I would
hope after this. Would the Court inquire or allow
me to inquire of her with regard to her feelings
with respect to the death penalty before we take a
break.

MR. HARRISON: That's fine with me.

THE COURT: We don't want to talk to the Doctor anymore. Do you want to inquire anymore? Very briefly, a couple of questions?

MS. MC KEDWN: 1 wouldn't ---

MR. HARRISON: And I object if you do.

THE COURT: I'll inquire very briefly.

(OPEN COURT.)

THE COURT: Mrs. Brinson, if I may address one or two questions to you, you indicated you would be able to follow the law as the Court would instruct you on the law, Mrs. Brinson; is that correct?

MRS. BRINSON: <u>Pardon? I would have to, Your Honor.</u>

THE COURT: Okay, You did not indicate and I believe counsel didn't ask you your views on the death penalty. Do you have any views with regard to the death penalty?

MRS. BRINSON: It comes down to the death penalty if a man goes out and kills fifteen people, he gets life in prison. One person goes out and kills one person and they get the electric chair. Now, where do you draw the line at? I'm in the middle, I guess you could say.

THE COURT: Let me ask you, do you feel there are certain cases where it would be appropriate, other cases where it would not?

MRS. BRINSON: It would have to be like that.

THE COURT: All right. You have strong feelings one way or the other, either pro or against?

MRS. BRINSON: I guess I'm in the middle.

THE COURT: You are in the middle on that?

MRS. BRINSON: Yes. [R1203-1205]

In other words, it is obvious from the discussion set out above that if Ms. Brinson had any bias, it was in favor of the state since she

was an employee of the St. Petersburg Police Department. Furthermore, completely contrary to the representations made by the state to the trial judge, Ms. Brinson said that she was "in the middle" on the issue of the death penalty, not any way opposed to recommending it. And, as noted above, there was absolutely no reason whatsoever for the state to be concerned about Mr. Copeland except for the color of his skin.

In <u>Neil v. State</u>, 457 So. 2d 481 [Fla. 1984], the Florida Supreme Court made it crystal clear that it would not condone systematic elimination of blacks from juries—via the exercise of peremptory challenges. It also established a procedure for the trial court to follow in order to prevent this type of racial discrimination. See also <u>Batson v. Kentucky</u>, 106 S. Ct. 1712 [1986] which greatly eased the defendant's burden of proving a claim of discrimination in a case like this as had been previously required because of <u>Swain v. Alabama</u>, 380 U.S. 202 [1965].

Neil requires defense counsel to make a timely objection to and a case against alleged systematic exclusion of blacks. In the case at bar, this is exactly what defense counsel did by objecting in detail just as soon as the state challenged Mr. Coleman and Ms. Brinson. [R1137-1140, 1208-1212]

Having done this, the trial court must then "decide if there is a substantiah itelihood that the peremptory challenges are being exercised solely on the basis of race." Neil, 457 So. 2d at 486. In the instant case, it would certainly appear that the trial court felt that there was [or might be] such a likelihood of racial exclusion as far as Ms. Brinson was concerned since after the state challenged Mr. Coleman peremptorily, it required the state to establish a valid reason for the challenge to Ms. Brinson. [R1137-1140, 1208-1212]

Then, "...the burden shifts to the [state] to show that the questioned challenges were not exercised solely because of the prospective jurors' race." Neil, 457 So. 2d at 486,487. Thus, in this case, the question becomes whether the state carried its burden of showing that race was not the sole cause of its alleged discriminatory action.

We think the quotations from the record set out above including the flimsy excuse offered by the state for the exercise of peremptory challenges to Mr. Coleman and Ms. Brinson fail to carry that burden. There was absolutely nothing Mr. Coleman said that would suggest that he would be biased against either side or that he was against capital punishment. And, as documented above, if Ms. Brinson had any bias in her bones, it was in favor of the state.

Mr. King is entitled to a new trial on this basis.

H.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN THIS PARTICULAR CASE WHEN IT REFUSED TO ALLOW THE DEFENSE TO PRESENT EVIDENCE OF THE DEFENDANT'S ALLEGED INNOCENCE YET IT ALLOWED THE STATE TO PRESENT SIGNIFICANT EVIDENCE OF HIS ALLEGED GUILT.

A. The Defense Proffered Important Innocence Evidence In This Case

The defendant went to great lengths during the trial and pre-trial to be allowed to introduce evidence tending to show that Mr. King did not murder Mrs.Natalie Brady. [RI56-159, 162, 254-257, 277-280, 336, 337, 362-399, 400-408, 779-790]

This included proffering the sworn deposition and trial testimony of F.B.I. agent Robert Neil who would have attested to the fact that there were human hairs found in Mrs. Brady's bedsheets, clothing and on her person that were Caucasian but did not belong to her and were not Negroid. [R362-374, 400-408] Furthermore, agent Neil found textile fibers in among Mrs. Brady's fingernail scrapings which did not come from the defendant's clothing. [R370]

The defense also attempted to show that the knife found near the work release center was inconsistent with the knife wounds sustained by Mrs. Brady [R162], that Mr. King had an alibi [R255], that the case against Mr. King was circumstantial at best [R255], and that generally speaking [according to University of Florida sociology professor Michael Ratlett], many innocent people such as the defendant have been executed by the state. [R255]

This attempt was virtually mandated by the federal appeals court which originally quashed Mr. King's death sentence and insodoing stated "King was convicted on circumstantial evidence which however strong leaves room for doubt that a skilled attorney might raise to a sufficient level that, though not enough to defeat conviction, might convince a jury and a court that the ultimate penalty should not be exacted, lest a mistake may have been made." <u>King v. Strickland</u>, 748 F.2d 1462,1464 [11th Cir. 1984]

Notwithstanding the existence of this important exculpatory evidence and the efforts of defense counsel to present it, the state

trial court refused to allow the jury to hear it. [R261,263] Essentially, the trial court ruled that the issue of guilt/innocence was moot and irrelevant. [R261,263]

B. This Evidence Was Relevant To Create Genuine, Lingering Doubt

In <u>Smith v. Wainwright</u>, 741 F.2d 1248 [11th Cir. 1984] the federal circuit court of appeals affirmed that a defendant was denied sixth amendment effective assistance of counsel regarding the sentencing phase of his capital trial when, during the guilt/innocence phase, his counsel failed to bring out evidence bearing on whether or not he was guilty of the underlying crime [murder] itself. In this regard, the court said:

The failure of counsel to use the statements to impeach the Johnsons may not only have affected the outcome of the guilt/innocence phase, it may have changed the outcome of the penalty trial. As we have previously noted, jurors may well vote against the imposition of the death penalty due to the existence of "whimsical doubt." In rejecting the contention that the Constitution requires different juries at the penalty and guilt phases of the capital trial, we stated:

The fact that jurors have determined guilt beyond a reasonable doubt does not necessarily mean that no juror entertained any doubt whatsoever. There may be no reasonable doubt -- doubt based upon reason -- and yet some genuine doubt exists. It may reflect a mere possibility; it may be but the whimsy of one juror or several. Yet this whimsical doubt -- this absence of absolute certainty -- can be real.

The capital defendant whose guilt seems abundantly demonstrated may be neither obstructing justice not engaged in an exercise in futility when his counsel mounts a vigorous defense on the merits. It may be proffered in the slight hope of unanticipated success; it might seek to persuade one or more to prevent unanimality for conviction; it is more likely to produce only whimsical doubt. Even the latter serves the defendant, for the juror entertaining a doubt which does not rise to reasonable doubt can be expected to resist those who would oppose the irremedial penalty of death."

Smith v. Balkcom, 660 F.2d 573, 580-81 (5th Cir. Unit B 1981), medified, 677 F.2d 20, cert. denied, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982). In this case, use of Wesley and Patricia Johnson's prior inconsistent statements might have created a whimsical doubt that would discourage the court and advisory jury from recommending the death penalty.

Clearly, the eleventh circuit was finding that while a jury may lack reasonable doubt as to whether a person has committed a capital offense, it may have a genuine, lingering doubt nevertheless. And this genuine, lingering doubt may be considered as a reason not to impose the death penalty.

In Mr. King's case, the trial court effectively and arbitrarily ruled out <u>any</u> doubt as to whether Mr. King killed Mrs. Brady even though he was not the original trial judge and therefore could not have certain knowledge to that effect. That is exactly the danger the Eleventh Circuit Court of Appeals warned against in <u>Smith v. Wainwright</u>, supra

and Smith v. Balkom, 660 F.2d 573 [5th Cir. Unit B 1981]. The trial court's ruling in this regard also runs contra to the supreme court's ruling in Lockett v. Ohio, 438 U.S. 573 [1978] holding that the presentation of mitigating evidence in a capital case is limited only by reasonable notions of relevancy. The issue of how to define "relevancy" was resolved in <u>Green v. Georgia</u>, 442 U.S. 95 [1979] which held that the due process clause bars trial judges from applying local evidentiary rules to exclude Lockett type mitigating evidendce in capital cases. The trial court in <u>Green</u> had applied Georgia's hearsay rule to exclude a hearsay statement. The supreme court held, as a constitutional matter, that the state was required to allow the statement in evidence. Quoting from Chambers y. Mississippi, 410 U.S. 284, 302 [1972], the court reasoned that "in these unique circumstances, the hearsay rule may not be applied mechanically to defeat the ends of justice. Chambers, 442 U.S. at 97. Thus the relevancy standard for mitigating evidence at the penalty phase in a capital trial derives from the eighth amendment.

C. The Burr Decision Is Inapplicable In This Case

The trial court in Mr. King's retrial most likely relied upon <u>Burr v.</u>

<u>State</u>, 466 So.2d 1051[Fla. 1985], but that case can easily be distinguished from the facts in Mr. King's case. In <u>Burr</u>, the court, quoting directly from <u>Buford v. State</u>, 403 So.2d 943,953 [Fla. 1981], restated the truism that:

A convicted defendant cannot be 'a little bit guilty.' It is unresonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonale doubt and, in the next breath, to say someone else may have done it, so we recommend mercy.

Burr is inapplicable here because the jury in King's case did not say "in one breath" that he was guilty beyond a reasonable doubt. That jury could not say anything about his guilt because it did not consider his case until some seven years after his original conviction. Instead, the trial court told the jury in effect that Mr. King was guilty and that was all there was to it. [R459] With the utmost due respect, we contend that the trial court's position in this matter constitutes reversible error for the reasons stated in Smith v. Wainwright above.

If this court upholds the trial court's ruling regarding the presentation of exculpatory evidence, Mr. King will have been singled out for special, unequal treatment <u>vis a vis</u> other Florida defendants convicted of capital offenses. That is, each and every time the same judge and jury hear both phases of a capital case, there is built into that proceeding the possibility that said judge and jury will have the option to opt for a life sentence for the accused based upon genuine, lingering doubt of guilt nothwithstanding a lack of reasonable doubt about that issue and nothwithstanding <u>Burr</u>. This is so because the judge and jury will necessarily have heard the parties' evidence on the guilt/innocence issue. But Mr. King, through no fault of his own linstead through the fault of the State of Florida in denying him

constitutionally effective assistance of counsel in the first place], is denied the same treatment. This should have been reason enough for the trial court to make an exception to the rule referred to in <u>Burr</u>, supra. But there is a final consideration that must be noted.

E. The Trial Court Let The State Present Evidence of Guilt

The trial court allowed the state to present argument and evidence of Mr. King's alleged guilt during the penalty phase retrial while, as noted above, consistently denying the defendant the right to counter with argument and evidence of his alleged innocence. For example, Manuel Pendakas, lead detective in the case, testified that Mr. King got back from work to the release center on the day of the homicide at 2:40 a.m. [R1284] He described [using an aerial photograph of the work release center in relation to the location of the Brady residence) how close (only about 1000 feet) the center was to Mrs. Brady's home. [R1290-1292] He noted further that the time of the fire and the time of death were essentially the same, that is: between 2:45 a.m. and 3:45 a.m. [R1275] He stated that Mr. King was then seen by Officer McDonough outside the work release center at 3:40 a.m. sweating profusely with blood on the crotch of his pants and appearing to be "high", whereupon [after entering the center] he [King] proceeded to stab him [McDonough] with a knife taken from Mrs. Brady's residence that was consistent with her wounds. [R1284,1285,1292,1293,1296] Mr. Pendakas added that one leaving the center would necessarily drive

past Mrs. Brady's residence and the knife was found between the center and her house. [R1292] Defense counsel's many objections to this testimony [For example, R1294,1295] were to no avail.

This testimony could serve no other purpose other than to summarize the circumstantial evidence of the defendant's alleged guilt. It has nothing to do with any aggravating factor related to the death penalty.

Officer Rosario Canaglioni testified albeit briefly that he was on his way to the release center regarding the McDonough stabbing when he passed the Brady residence which was on fire, entered the house and found Mrs. Brady who still had a slight pulse but did not otherwise appear to be alive. [1315–1319] This testimony has nothing to do with whether the death penalty should or should not be imposed but instead served to buttress Detective Pendakas' testimony as to the nexus between the Brady fire and King's return to the work release center.

Mr. Joseph Ladika, an expert arson investigator, over objection from defense counsel, established the time of the fire at between 3:00 -3:30 a.m. [R1332-1337] and that it was intentionally set. [R1335] Again, this is simply another example of the state's effort to tie King to the Brady fire and therefore her murder.

Former work release center guard James McDonough established that Mr. King returned to the center from his job at between 2:35 and 2:40 a.m. [R1374] One hour later he conducted a bed check discovering Mr. King missing. [1375,1376] After going outside, he discovered the

defendant in the bushes and his "crotch area was literally soaked in blood." [R1379] Mr. McDonough identified the knife used to stab him which was the same knife Detective Pendakas said came from Mrs. Brady's residence. [R1399] This testimony linked King to the Brady rape and murder.

Medical examiner Joan Wood, M.D., established the time of death at between 2:45 and 3:45 a.m. [R1424]. Over strong objection from defense counsel, Dr. Wood asserted that Mrs. Brady's wounds were consistent with state exhibit 10, the knife found between the Brady residence and the release center, and identified by Detective Pendakas and Mr. McDonough as the one used to stab McDonough. [R1436-1439]. In stating his objection, defense counsel reminded the trial judge that he had been ruled out of order when he earlier requested the appointment of experts to try to disprove the alleged nexus between the knife and Mr. King. [R1436,1437]

Dr. Wood noted that, because of the significant amount of bleeding from the victim's vagina, blood would be likely to appear on the assailant's pants including the crotch thereof. [R1456,1457] Dr. Wood associated the extensive amount of bleeding with state's exhibit 8b, the broken wooden dowels [1447-1449] found outside Mrs. Brady's house with, according to Detective Pendakas, a spot of blood on them. [R1279]

Obviously, Dr. Wood's testimony as described above explains [related to the dowels] why Mr. McDonough would observe that King's

pants were soaked in blood. It also emphasizes the connection between the knife used to kill Mrs. Brady and attack McDonough, and accentuates the close sequence of events between the time King was missing from the release center, the time of the fire and the time of Mrs. Brady's death. This testimony has no valid relationship to the factors to be considered as far as the imposition of the death penalty is concerned—but only to show that the jury and judge had the right man before them for imposition of the death penalty.

The state did not limit itself to hammering away at the defendant's "guilt" via presentation of testimony. For example, during voir dire, the state made repeated references to this "fact." [R858, 859, 873, 882, 885, 920, 921, 942, 943] An example is the prosecutor's unsolicited statement that "we are not going to send you back immediately with no information. One of things that is absolutely given is that he is guilty of first degree murder." [R942] Another example is the prosecutor's comment during closing argument that "now you heard Dr. Wood. She can't say positively one hundred percent this is the knife, but you have heard the evidence. Not only that this knife is consistent with every one of those knife stabbing injuries but with McDonough's testimony it is consistent with the knife that occurred to him." [R1680] This argument goes directly to the heart of guilt/innocence, an area of proof declared by the trial court to be off limits to the defense.

In summary on this subpoint, it is obvious that the language in

<u>Burr</u> [essentially to the effect that a defendant cannot be "a little bit guilty"] becomes nothing more than unfair and prejudicial rhetoric when, as in the case at bar, the trial court denies the defendant the opportunity to avoid the death penalty by presenting evidence of his claimed innocence— yet at the same time allows the state to obtain the death penalty by beating the defendant over the head with evidence of his alleged guilt.

III.

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH DESPITE THE FACT THAT THE DEATH PENALTY IS APPLIED DISPROPORTIONATELY AGAINST BLACK MEN WHEN THE VICTIM IS WHITE AND IN REFUSING TO LET THE DEFENDANT PRESENT EVIDENCE TO THIS EFFECT.

The defendant moved to require the court to declare Florida's death penalty statute, particularly \$921.141, Fla. Stat., unconstitutional because the death sentence has been shown to be applied in a disproportionate and discriminatory manner where the defendant is black and the victim is white [R199-227, 765-775] but the trial court denied the motion. [R270, 774, 775] The defendant also attempted to have the trial court consider evidence from University of Florida sociologist Michael Ratlett to this effect but the trial court denied this request as well holding that any such evidence was irrelevant. [R766-775] This was reversible error since this type of racial discrimination is real and therefore quite relevant. See also in this regard, McCleskey v. Kemp., 106 S. Ct. 331 [1986] and Hitchcock v. Wainwright, 106 S. Ct. 2888 [1986].

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT EVIDENCE OF THE DEFENDANT'S GUILT AND EVIDENCE REGARDING AGGRAVATING CIRCUMSTANCES OF THE CASE BASED UPON HEARSAY TESTIMONY THAT WENT BEYOND THE LAWFUL BOUNDS OF SEC. 921.141, FLORIDA STATUTES.

During the penalty phase retrial, the state was permitted to present much of the testimony regarding the defendant's alleged guilt and circumstances regarding aggravating factors in the case --based upon hearsay testimony that the defendant could not fairly refute. This violated Sec. 921.141, Fla. Stat. which provides in part that "any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements." This included the completely unsubstantiated hearsay testimony of Detective Pendakas that [a] Mrs. Brady was aware that someone was trying to break into her house on the night of the murder [R1267], [b] the broken dowels found in the yard came from Mrs. Brady's home [R1276, 1277, 1279-1282] and most importantly, [c] the knife found between the work release center and Mrs. Brady's residence came from her "residence" [R1292, 1293-1296]. As indicated by the uncontrovoted notation in the record, defense counsel had tried earlier in the proceedings to have the court appoint experts to challange the nexus between the knife found near the work release center and the instrument used to stab Mrs. Brady. (R157, 236,

239, 255, 256] However that request had been denied since, according to the trial court's ruling, that went to the issue of guilt/innocence and therefore would be irrelevant. [R261]

It is impossible to underestimate the prejudice done to the defendant by allowing Detective Pendakas' hearsay testimony, especially as it related to the knife found near the work release center.

If this court will examine its opinion originally rendered in May of 1980 [R6-18] regarding Mr. King's initial appeal, it will observe that there is no mention whatsoever of the only piece of "evidence" [the knife] which actually linked King to Mrs. Brady's residence. Would not this court have referenced this piece of evidence as proof positive of King's guilt had it been in the original record on appeal? Would the 11th circuit court of appeals have made it a point to expound on the state's weak "circumstantial" evidence of the defendant's guilt [King v. Strickland, 748 F. 2d at 1464 (11th Cir. 1984)] if the original trial record contained proof [as Pendakas so casually lead the re-trial jury to believe] that the knife used by King to stab Officer McDonough came from Mrs. Brady's kitchen? No way!

By allowing Pendakas to testify matter of factly that Mr. King in effect had to have been in Mrs. Brady's house or otherwise he could not have secured the knife used to stab McDonough, the trial court allowed the state to present a much better case of King's guilt in the retrial than it had the capacity to present in the original trial. And as a result, the defense had no way whatsoever of disproving that

testimony. This is so because the defendant could not cross examine a ghost. Pendakas had neither the expertise nor the actual knowledge as to why someone could claim that the knife in question came from Mrs. Brady's so cross examination of him was fruitless. And, as has been pointed out so often, the trial court would not allow the defense to bring in experts to challenge this hearsay testimony since, according to the trial court and the state, this would be improperly getting into the guilt/innocence aspects of the case. The trial court's actions in this regard constitute a serious violation of the hearsay limitations set forth in \$921.141, Fla. Stat., thus the defendant's death sentence must be reversed.

CONCLUSION

For the reasons set out above, the court is requested to [1] reverse the judgment of the circuit court rendered on November 7, 1986, [2] vacate the death sentence imposed upon Mr. King on that date, [3] remand the cause to the Pinellas County circuit court for a new trial and [4] grant Mr. King such other and further relief as deemed appropriate in the premises.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I certify that a true copy of appellant's initial brief has been furnished to Michael J. Kotler, Esq., Assistant Attorney General, The Florida Department of Legal Affairs, counsel for appellee State of Florida, the Park Trammel Building, Eighth Floor, 1313 Tampa Street, Tampa, Florida 33602, by United States mail, this 8th day of December, 1986.

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