IN THE SUPREME COURT OF FLORIDA

AMOS LEE KING, JR.,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 68,631
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

AMOS LEE KING, JR. will be referred to as the "Appellant" in this brief or by proper name and the STATE OF FLORIDA will be referred to as the "Appellee" or by "State". The Record on Appeal will be referenced by the symbol "R" followed by the appropriate page number.

SUMMARY OF THE ARGUMENTS

Issue I: While appellant has shown that two prospective jurors who were challenged belonged to a "distinct racial group", it is clear that he has failed to demonstrate "a strong likelihood" that these prospective jurors were challenged solely on the basis of their race. It is the State's position that the record before this Court does not reveal the requisite likelihood of discrimination to require an inquiry by the trial court and a shifting of the burden to the State. However, even if defense counsel met this burden, an examination of the proceeding reflects nothing more than a normal jury selection process (R.848-1217). Cf. Parker v. State, 476 So.2d 134 (Fla. 1985).

Issue II: What appellant seeks is a second bite at the apple. In his first trial he sought to establish his innocence by way of attacking the circumstantial nature of the State's case. Now that that strategy has failed, appellant seeks to present new evidence to the jury which was available, but not pursued in the first proceeding, under the theory that all evidence is admissible at the sentencing hearing. This is not the purpose of the sentencing phase of the trial. Cf. Burr v. State, 466 So.2d 1051, 1054 (Fla. 1985) and Buford v. State, 403 So.2d 943 (Fla. 1981), **cert. denied**, 454 U.S. 1163 (1982).

Defense counsel also complains that the State was permitted to introduce substantial evidence of appellant's guilt at the penalty phase. Appellee would submit that no error is present

here. First, the jury is not required to decide appellant's sentence in a vacuum. An understanding of the facts as they existed at trial is absolutely necessary in order to reach a just determination as to the sentence to be imposed. The State stayed within this guideline, relating facts to the jury as they appeared in the trial court record. Second, the State's evidence went to establish the aggravating circumstances they sought to prove. As such, this evidence was clearly admissible.

Issue III: In the instant cause, appellant contends that the death penalty is being imposed in a discriminatory manner based on the race of the victim. This claim has also been consistently rejected by this Court. See, Smith v. State, 457 So.2d 1380 (Fla. 1984); State v. Henry, 456 So.2d 466 (Fla. 1984) and Adams v. State, 449 So.2d 819 (Fla. 1984).

Issue IV: Section 921.141(1), Florida Statutes clearly provides that the State may present evidence on any matter the court deems relevant to the nature of the crime and defendant's character. The only limitation is that the defendant be provided a fair opportunity to rebut any hearsay statements. Here, the State presented the facts of the murder through Officer Manuel Pendakas (R.1253-1314), in order that the jury have a basic understanding of this crime. While Officer Pendakas' testimony encompasses some hearsay, there is nothing unduly prejudicial in its content and certainly nothing that could not be rebutted by defense counsel.

ISSUE I

THE TRIAL COURT DID NOT ALLOW THE STATE TO UNCONSTITUTIONALLY EXCLUDE BLACK PEOPLE FROM THE JURY PANEL BY THE EXERCISE OF PEREMPTORY CHALLENGES.

In State v. Neil, 457 So.2d 481 (Fla. 1984), this Court established the following test for analyzing a claim that prospective jurors have been excused in a discriminatory manner:

> The initial presumption is that peremptories will be exercised in a nondiscriminatory manner. A party concerned about the other side's use of peremptory challenges must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group **and that there is a strong likelihood that they have been challenged solely because of their race.** If a party accomplishes this, then the trial court must decide if there is a substantial likelihood that the peremptory challenges are being exercised solely on the basis of race. If the court finds no such likelihood, no inquiry may be made of the person exercising the questioned peremptories. On the other hand, if the court decides that such a likelihood has been shown to exist, the burden shifts to the complained-about party to show that the questioned challenges were not exercised solely because of the prospective jurors' race.

See also Taylor v. State, 491 So.2d 1150 (Fla. 4th DCA 1986)

While appellant has shown that two prospective jurors who were challenged belonged to a "distinct racial group", it is clear that he has failed to demonstrate "a strong likelihood" that these prospective jurors were challenged solely on the basis of their race. It is the State's position that the record before

this Court does not reveal the requisite likelihood of discrimination to require an inquiry by the trial court and a shifting of the burden to the State. However, even if defense counsel met this burden, an examination of the proceeding reflects nothing more than a normal jury selection process. (R.848-1217) Cf. Parker v. State, 476 So.2d 134 (Fla. 1985).

The exclusion of a significant number of black potential jurors is insufficient in and of itself, to warrant reversal of a trial court's determination not to make inquiry. Finkler v. State, 471 So.2d 608, 610 (Fla. 1st DCA 1985). This is so because the reasons for excusing such persons may be readily apparent to the judge and others in attendance at the voir dire. Woods v. State, 490 So.2d 24 (Fla. 1986).

In the instant cause, the trial judge did not see fit to inquire as to the State's motivation for Mr. Coleman's excusal. (R.1137) The reason is quite obvious. First, there is nothing in the State's questioning of Mr. Coleman which would in any way indicate that he was being challenged solely because of his race. Second, this was the first black person to be excused from the jury panel. (R.1139) It is important to remember that Mrs. McBride, who was also black, was questioned during the same period of time (R.1080-1087, 1120, 1122). The State accepted Mrs. McBride on the panel without hesitation (R.1136, 1138). At the time, Mr. Harrison must have had doubts as to whether the State's challenge of Mr. Coleman was exercised solely because of the juror's race. Defense counsel in his comments to the court

explained that he did not intend to infer any ill motive (R.1139).

As previously noted, defense counsel must demonstrate on the record that the challenged persons are not only members of a distinct racial group, but that there is a strong likelihood that they have been challenged solely because of their race. State v. Neil, supra. The trial judge correctly found that no such showing had been made (R.1139).

The State also exercised one of its peremptory challenges to excuse Mrs. Brinson, who was black (R.1208). When defense counsel voiced objection, the trial judge determined that further inquiry was necessary (R.1209). The assistant state attorneys gave the following explanation for Mrs. Brinson's excusal:

> 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.

(R.129)

* * * * * * * * *

> MR. SANDDEFER: 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 she could. That caused me some concern. Then she threw up a situation where she said in my reading of the death 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 gets life imprisonment and another defendant who kills one person are given 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.

(R.1210-1211)

The reasons given for exclusion need not be equivalent to those for a challenge for cause. The prosecutor need only show that the challenges were based on the particular case on trial, the parties or witnesses or characteristics of the challenged persons other than race State v. Neil, supra, at 487. In considering whether a reason is valid, Justice Alderman in his dissenting opinion noted that it is important to remember the nature of a peremptory challenge:

> The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control. **State v. Thompson**, 68 Ariz. 386, 206 P.2d 1037 (1949); **Lewis v. United States**, 146 U.S. 370, 378 [13 S.Ct. 136, 139, 36 L.Ed. 1011]. While challenges for cause permit rejection of jurors on

> a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable. **Hayes v. Missouri**, 120 U.S. 68, 70 [7 S.Ct. 350, 351, 30 L.Ed. 578]. It is often exercised upon the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another," **Lewis, supra**, [146 U.S.], at 376 [13 S.Ct. at 138], upon a juror's "habits and associations," **Hayes v. Missouri, supra** [120 U.S.], at 70 [7 S.Ct. at 351] or upon the feeling that "the bare questioning [a juror's] indifference may sometimes provoke a resentment," **Lewis, supra**, [146 U.S.] at 376 [13 S.Ct. at 138]. It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror is a particular race or nationality is in fact partial, but whether one from a different group is less likely to be. It is well known that these factors are widely explored during the **voir dire**, by both prosecutor and accused, **Miles v. United States**, [13 OTTO 304], 103 U.S. 304 [26 L.Ed. 481]; **Aldridge v. United States**, 283 U.S. 308 [51 S.Ct. 470, 75 L.Ed. 1054]. This Court has held that the fairness of trial by jury requires no less. **Aldrige, supra.** Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried.
>
> State v. Neil, supra, at 488-489.

As previously mentioned, there is a presumption that a peremptory challenge will be exercised in a non-discriminatory manner. State v. Neil, supra; Taylor v. State, supra. Here, review of Mrs. Brinson's testimony certianly supports the State's challenge of Mrs. Brinson:

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

MISS BRINSON: Yes, I do.

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

MISS BRINSON: Not to that basis but on the basis I have been working around as 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 case, I presume.

MISS BRINSON: No.

MS. MC KEOWN: But do you come in contact as far as typing 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 KEOWN: 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. or 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.

(R.1145-1147)

* * * * * * * * * *

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.

(R.1204-1205)

While there may not have been sufficient evidence to excuse Mrs. Brinson for cause, the State was only exercising a peremptory challenge. The State was extremely concerned about how Mrs.

Brinson would apply the law (R.1209-1212). The trial judge obviously shared this concern:

> THE COURT: I'll make a ruling. I think her statement with regard to uneven imposing of the death penalty is certainly more than sufficient justification for excusing her. Overrule the objection.
>
> (R.1212)

Here, the State challenge to Mrs. Brinson was not exercised solely because of race, but rather because of her feelings about the death penalty. Again, it should be pointed out that the State had previously accepted another black juror, Mrs. McBride. Cf. Hamilton v. State, 487 So.2d 407 (Fla. 3d DCA 1986) and Johnson v. State, 484 So.2d 1347 (Fla. 4th DCA 1986). Under the circumstances, appellee would submit that no error is present here.[1]

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[1] In Taylor v. State, 491 So.2d 1150, 1152 (Fla. 4th DCA 1986), the Court noted that since the Neil decision, neither this Court nor any Florida district court had specifically found a reason given by a prosecutor for the peremptory challenge of a juror to be unacceptable.

ISSUE II

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

Appellant argues that the trial court erred in failing to allow him to present new evidence of his innocence during the penalty phase of his trial. Appellant's argument is without merit. The assistant state attorney never objected to appellant taking the stand and denying any participation in this crime (R.785-787). Similarly, the trial judge never imposed any restrictions on defense counsel arguing appellant's innocence to the jury. In fact, the trial judge informed Mr. King that he could take the stand and say anything he wanted to (R.787). The only caveat the trial judge issued was that defense counsel's evidence should be relevant to some mitigating circumstance (R.789-790).[2]

The guilt/innocence phase of this trial had previously been litigated. The remand from the Eleventh Circuit Court of Appeals and the Federal District Court directed the trial judge hold a new sentencing hearing, not to conduct another review of the facts. Cf. Strickland v. Washington, 748 F.2d 1462, 1464 (11th Cir. 1984). That is exactly what the trial judge did.[3] What

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[2] Appellee would point out that appellant did not take the stand and deny his guilt. In addition, defense counsel did not see fit to argue his client's innocence before the jury.

[3] This Court, the Federal District Court and the Eleventh

defense counsel sought to present at sentencing was new evidence tending to show appellant's innocence. This, however, would have gone beyond the directives of the Eleventh Circuit Court of Appeals.

In Songer v. State, 365 So.2d 696 (Fla. 1978), this Court was faced with a situation very similar to our own. Songer argued on appeal that the trial court had erred in refusing to impanel a jury and conduct a new sentencing hearing in accordance with Section 921.141, Florida Statutes. Songer also argued that the trial court erred in refusing to allow him to subpoena prison inmates as character witnesses to speak on his behalf at resentencing. The State responded that the cause had been remanded by both the United States Supreme Court and this Court for the sole purpose of "consideration in light of Gardner v. Florida." This Court found Songer's arguments to be without merit, holding:

> ". . . We hold that the trial court did not err in refusing to impanel a jury upon resentencing or to hear witnesses in mitigation of the sentence and that the trial court properly complied with Rule 3.720(b), Fla.R.Crim.P. This Court's order of May 17, 1977, remanded the case to the trial court for resentencing 'only consistent with the opinion of the Supreme Court of the United States in **Gardner.**' Under that order, the case was remanded to the trial court to ensure that the sentence was not imposed on the basis of any information which the appellant did not have an opportunity to rebut or explain. . ."

Circuit Court of Appeals have previously found that the State of Florida presented strong circumstantial evidence of King's guilt on the murder charge (see appellee's Issue IV, fn. #6).

See also, Funchess v. State, 399 So.2d 356 (Fla. 1981), in which the case was also remanded for consideration in light of Gardner v. Florida, the defendant, however, attempted to expand the scope of the remand. This Court rejected the defendant's position as follows:

> ". . . Funchess makes a number of legal attacks on the propriety of instructions given to the jury at the sentencing proceeding of his first trial, arguing that the order remanding for so-called **'Gardner** relief' should have included a mandate for reconvening an advisory jury. We reject all of these contentions. The purpose for our remand was to comply with the dictates of the United States Supreme Court in **Gardner v. Florida;** it was not to provide an entirely new sentencing proceeding at which a new advisory jury could be reconvened. **Songer v. State,** 365 So.2d 696 (Fla. 1978), **cert. denied,** 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979). Complying with our mandate, the trial court properly rejected all legal points raised by Funchess' counsel. . . "

What appellant seeks is a second bite at the apple. In his first trial he sought to establish his innocence by way of attacking the circumstantial nature of the State's case. Now that that strategy has failed, appellant seeks to present new evidence to the jury which was available, but not pursued in the first proceeding, under the theory that all evidence is admissible at the sentencing hearing. This is not the purpose of the sentencing phase of the trial. Cf. Burr v. State, 466 So.2d 1051, 1054 (Fla. 1985) and Buford v. State, 403 So.2d 943 (Fla. 1981), **cert. denied,** 454 U.S. 1163 (1982).

Finally, defense counsel complains that the State was

permitted to introduce substantial evidence of appellant's guilt at the penalty phase. Appellee would submit that no error is present here. First, the jury is not required to decide appellant's sentence in a vacuum. An understanding of the facts as they existed at trial is absolutely necessary in order to reach a just determination as to the sentence to be imposed. The State stayed within this guideline, relating facts to the jury as they appeared in the trial court record. Second, the State's evidence went to establish the aggravating circumstances they sought to prove. As such, this evidence was clearly admissible.

ISSUE III

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

This Court has on numerous occasions upheld the constitutionality of Florida's death penalty statute against each of the attacks enumerated by defendants. In the instant cause, appellant contends that the death penalty is being imposed in a discriminatory manner based on the race of the victim. This claim has also been consistently rejected by this Court. See, Smith v. State, 457 So.2d 1380 (Fla. 1984); State v. Henry, 456 So.2d 466 (Fla. 1984) and Adams v. State, 449 So.2d 819 (Fla. 1984); Sullivan v. State, 441 So.2d 609 (Fla. 1983); Thomas v. Wainwright, 767 F.2d 738, at 747 (11th Cir. 1985) and cases cited therein; Hitchcock v. Wainwright, 770 F.2d 1514, at 1516 (11th Cir. 1985); Hitchcock v. Wainwright, 745 F.2d 1332, at 1342 (11th Cir. 1984).

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT EVIDENCE OF APPELLANT'S GUILT AND EVIDENCE REGARDING AGGRAVATING CIRCUMSTANCES OF THE CASE.

It is well established that evidentiary questions of materiality, competency, and relevancy are for resolution by the trial court in the exercise of sound discretion. Welty v. State, 402 So.2d 1159 (Fla. 1983); United States v. Acosta, 769 F.2d 921 (11th Cir. 1985); United States v. Diecidue, 603 F.2d 535 (5th Cir. 1979); Booker v. State, 397 So.2d 910 (Fla. 1981), **cert. denied**, 454 U.S. 957; United States v. Valdez, 545 F.2d 957 (5th Cir. 1977); State v. Wright, 473 So.2d 268 (Fla. 1st DCA 1985); Bradford v. State, 460 So.2d 926 (Fla. 2d DCA 1984), **cert. denied**, 467 So.2d 999. Nothing but an abuse of that discretion, fraught with a reasonable likelihood of prejudice to the defendant would ordinarily warrant appellate court interference. United States v. Sarmiento, 724 F.2d 898 (11th Cir. 1984); United States v. Sans, 731 F.2d 1521 (11th Cir. 1984); Ashley v. State, 370 So.2d 1191 (Fla. 3d DCA 1979); Rodriguez v. State, 327 So.2d 903 (Fla. 3d DCA 1971); United States v. Wellever, 601 F.2d 203 (5th Cir. 1978).

The test for the admissibility is relevancy. Blanco v. State, 452 So.2d 520 (Fla. 1984); Mann v. State, 420 So.2d 578 (Fla. 1982); Reddish v. State, 167 So.2d 858 (Fla. 1964); Beagles v. State, 373 So.2d 796 (Fla. 1st DCA 1973) and Johnson v. State,

130 So.2d 589 (Fla. 1961). Relevancy is not a precise concept and the use as a test for admissibility most often rests upon the Court's informed notions of logic, common sense and simple fairness. Stano v. State, 473 So.2d 1282 (Fla. 1985), **cert. denied**, 106 S.Ct. 869; Henderson v. State, 463 So.2d 196 (Fla. 1985), **cert. denied**, 105 S.Ct. 3042; Wadsworth v. State, 201 So.2d 836 (Fla. 4th DCA 1976); Zamora v. State, 361 So.2d 776 (Fla. 3d DCA 1976) and Drayton v. State, 291 So.2d 395 (Fla. 3d DCA 1974).

Section 921.141(1), Florida Statutes provides in relevant part as follows:

> (1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY. -- Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). 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. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.
>
> (emphasis added)

This section clearly provides that the State may present evidence on any matter the court deems relevant to the nature of the crime and defendant's character. The only limitation is that the defendant be provided a fair opportunity to rebut any hearsay statements. Here, the State presented the facts of the murder through Officer Manuel Pendakas (R.1253-1314), in order that the jury have a basic understanding of this crime. While Officer Pendakas' testimony encompasses some hearsay, there is nothing unduly prejudicial in its context and certainly nothing that could not be rebutted by defense counsel.[4]

Appellant first complains that the trial court permitted Pendakas to testify that ". . . Mrs. Brady was aware that someone was trying to break into her house on the night of the murder . . . ." (Appellant's brief, p.30). Appellee would point out that

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[4] This cause was remanded by the Eleventh Circuit Court of Appeals only for resentencing. King v. Strickland, 748 F.2d 1562 (11th Cir. 1984) and King v. Strickland, 714 F.2d 1481 (11th Cir. 1983). The determination as to appellant's guilt has previously been made and upheld by this court, King v. State, 390 So.2d 315 (Fla. 1980); the Federal District Court, King v. Strickland, Case No. 81-1052-T-W.C., M.D. Fla.; opinion issued February 10, 1982) and the Eleventh Circuit Court of Appeals. King v. Strickland, 714 F.2d at 1495; King v. Strickland, 748 F.2d at 1463.

Appellant has not accurately transcribed this statement from the record. The testimony appears in the record as follows:

> A ". . . I mentioned Fire Fighter Leonard, he tried to go into the one door. When he got into the door, he had to jam it, shove it, push it to get in because there was a chair on the inside somebody had propped up against a door knob as if put there to prevent that door from opening. . ."
>
> (emphasis added) (R.1267)

Appellant did not object when this testimony was presented. Under the circumstances, appellee would submit that any error has been waived. See Castor v. State, 365 So.2d 701 (Fla. 1978) and Clark v. State, 363 So.2d 331 (Fla. 1978). It is appellee's position that Pendakas' statement is substantially accurate, however, even if appellant has properly preserved this issue for appellate review, there is nothing in the record to indicate King was without an opportunity to rebut it. Appellant could have requested a continuance and called a rebuttal witness. Defense counsel was familiar with the witnesses at trial and their testimony. Counsel, however, never bothered to make this request and the reason is obvious. Counsel did not consider the statement to be prejudicial. No error is present here.

Appellant next refers this Court to Pendakas' statement in which he said, ". . .the broken dowels found in the yard came from appellant's home. . ." Again, appellee would submit that this statement was properly admitted into evidence. Defense

counsel had been provided with the name of the person who related this information and was told that she would be a witness (R.1277-1278). Mr. Harrison could have deposed her and presented her testimony at sentencing. Counsel, instead, chose to do nothing.[5] Under the circumstances, appellant is not in a position to complain that he could not rebut this hearsay.

Finally, appellant complains that Pendakas was allowed to testify that ". . .the knife found between the work release center and Mrs. Brady's residence came from her residence. . ." (R.1292) Again, it is appellee's position that Pendakas' testimony in this regard is substantially accurate. A review of the following passage from the Eleventh Circuit Court of Appeals' opinion supports this conclusion:

> The government presented strong circumstantial evidence of King's guilt on the murder charge. Joan Wood, the medical examiner who performed an autopsy on the deceased, for example, testified that King's blood type was present in Brady's vaginal washings. Wood stated that if Brady's assailant had raped Brady with his pants on after causing the tear to the wall of her vagina, blood would have been present on the clothing, as McDonough had found on the crotch area of King's pants. She testified the paring knife used by King to assault McDonough was "consistent" with the wounds found on Brady, but she admitted she could not say this knife caused the wound. A knife salesman testified that the paring knife was manufactured by the same company and was similar in design to other kitchen knives found in Brady's house. An old friend of the

[5] Defense counsel argued that the State had allegedly prevented him from deposing witnesses because their deposition had previously been taken. The trial judge noted that if Harrison had complained, the court would have ruled on this issue, however, it was never brought to the Court's attention (R.1278).

deceased testified that the paring knife resembled one Brady kept in her house.[6]

King v. Strickland, 714 F.2d 1481, at 1484 (11th Cir. 1983).

It is the State's position that Pendakas' testimony is substantially in conformance with the proof at trial. Even if it was incorrect, appellant has not demonstrated how he was denied his right to rebut this testimony or any prejudice arising therefrom. Under the circumstances, appellee would maintain that no error is present here.

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[6] This paragraph rebuts Mr. Harrison's statement on page 31 of his brief that the Eleventh Circuit found that there was weak circumstantial evidence of appellant's guilt. Appellant's reference to King v. Wainwright, 748 F.2d at 1464 (11th Cir. 1984), in no way supports his allegation that the court found the circumstantial evidence of guilt to be weak. This Court also found that the evidence was ". . .Clearly sufficient to sustain each of the convictions. . ." King v. State, 390 So.2d 315, at 319 (Fla. 1980).

CONCLUSION

Based on the foregoing arguments and citations of authority the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Baya Harrison, Esquire, 317 E. Park Ave., The Murphy House, Tallahassee, Florida 32301, this 30th day of December, 1986.

OF COUNSEL FOR APPELLEE