IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,640

FRED LEWIS WAY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This appeal is from the denial of Mr. Way's motion for postconviction relief by Circuit Court Judge J. Rogers Padgett, Thirteenth Judicial Circuit, Hillsborough County, Florida, following an evidentiary hearing required by this Court in Way v. State, 630 So. 2d 177 (1993), to determine i) whether the State impermissibly withheld exculpatory photographs in violation of Brady v. Maryland, 373 U.S. 83 (1963), and ii) what effect the possession of said photographs by trial counsel would have had on the outcome of Mr. Way's trial.

The following abbreviations will be utilized to cite to the record in this cause, with appropriate page number(s) following the abbreviation:

"PC-R1." – record on appeal in the instant proceeding;

"Supp. PC-R1." – supplemental record on appeal;

"R." – record on direct appeal to this court;

"R2." – record on appeal from resentencing;

"1988-R1." – record on appeal from 1988 3.850 hearing.

This brief was prepared using a 12-point Courier font (10 cpi).

REQUEST FOR ORAL ARGUMENT

Mr. Way has been convicted and sentenced to death. The resolution of the issues involved in this action will therefore determine whether he receives a new trial and/or whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Way, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND FACTS

In 1983, the appellant, Fred Lewis Way, a 39-year-old engineer for the Federal Aviation Administration who came from humble beginnings and had no prior history of violence, was indicted on two counts of first-degree murder and one count of arson in connection with the deaths of his wife and daughter in a garage fire at their Tampa home. (PC-R1. 24). At the original trial, the State contended that Mr. Way beat both women in the head with a hammer in the family garage, doused gasoline directly upon the bodies, trailed a "wick" of flammable fluid from them to the kitchen door, ignited the wick, and set them on fire. (PC-R1. 26). After a deadlock two days into jury deliberations necessitated a charge from the circuit court judge (R. 1585), Mr. Way was ultimately convicted of the first-degree murder of his daughter, the second-degree murder of his wife, and arson. (R. 1601). At the penalty phase, the jury voted seven to five in favor of a death sentence (R. 1679), and the trial court followed the jury's recommendation, sentencing Mr. Way to death for his daughter's murder.

This Court affirmed the convictions and sentence on direct appeal. Way v. State, 496 So. 2d 126 (Fla. 1986)(Justice McDonald dissenting without opinion). In 1988, a death warrant was signed. Thereafter, Mr. Way filed a motion for postconviction relief which was denied after an evidentiary

hearing. (PC-R1. 27). Mr. Way appealed the denial to this Court and also filed a petition for a writ of habeas corpus. Id. This Court affirmed the denial of the motion for postconviction relief but granted habeas relief based on Hitchcock v. Dugger, 481 U.S. 393 (1987), vacating Mr. Way's death sentence and ordering resentencing before a new jury. See Way v. Dugger, 568 So. 2d 1263 (Fla. 1990).

At the resentencing proceeding held in 1991, the State relied heavily on Mr. Way's felony murder arson conviction from the original guilt phase. See generally R2. The resentencing jury recommended death by a vote of seven to five, again the slimmest possible margin. (PC-R1. 27). The trial court followed the jury's recommendation and sentenced Mr. Way to death. Id. During those proceedings, Mr. Way's resentencing counsel discovered that certain photographs had never been disclosed by the State and promptly filed a motion for postconviction relief. (R2. 1108-1109).

On June 15, 1988, the circuit court summarily denied postconviction relief, finding that the record conclusively refuted Mr. Way's claim. (PC-R1. 28). Mr. Way appealed the death sentence, along with the trial court's summary denial of his motion for postconviction relief. (PC-R1. 26). The proceedings in both cases were consolidated for purposes of review in this Court.

This Court, in Way v. State, 630 So. 2d 177 (Fla. 1993), withheld ruling on the merits of Mr. Way's resentencing appeal until after a "remand to the circuit court for an evidentiary hearing on Way's [postconviction motion] allegations," reversing the circuit court's summary denial while articulating:

> We are unable to conclusively determine from the record that this 'new' evidence could not support an alternative theory of the deaths of [Mr. Way's] wife and daughter and provide a basis on which a jury could find him innocent.

Way v. State, 630 So. 2d at 178-179. Thereafter, an evidentiary hearing was held before Circuit Judge J. Rogers Padgett on July 9-10, 1997.[1]

The first witness called by Mr. Way was Ms. Eleanor Posey who was accepted as an expert in both electrical engineering and forensic fire investigation. (PC-R1. 650-651; see also "Curriculum Vitae", Eleanor P. Posey, PC-R1. 242-268). Ms. Posey stated that she was provided the withheld photograph of the circuit breaker box (Appendix A) to analyze. She also identified the voluminous amount of material that she was asked to review in

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1 An evidentiary hearing was attempted in 1996, however, this Court entered a Writ of Prohibition Absolute due to the trial court judge's refusal to recuse himself after he improperly vouched for a witness. The new evidentiary hearing was held before Judge Padgett, is the subject of this appeal. At the outset of the evidentiary hearing, Mr. Way objected to the timing of the hearing as, due to legislative funding constraints, his counsel, Capital Collateral Representative, was unable to adequately prepare. The trial court overruled this objection. (PC-R1. at 640).

conjunction with the circuit breaker box. (PC-R1. 652). Ms. Posey testified that the evidence of the fire at Mr. Way's home indicated that the fire consisted of "two distinct events": the ignition of a flammable vapor mixture and a later, abrupt escalation. (PC-R1. 652-653).

When asked to identify the source of ignition for the initial event in the fire, Ms. Posey testified:

> the most probable source of ignition of that first event is coming from the circuit breaker panel, specifically from a spark created by an open breaker.

(PC-R1. 672; see also Appendix A). Ms. Posey identified the photograph of the circuit breaker box that is the subject of Mr. Way's Brady challenge as what she relied upon in coming to her conclusions.

Ms. Posey pointed out a "crow's foot pattern" of soot located on the metal breaker panel to the right of several tripped circuit breakers. (PC-R1. 674; see also Appendix A). She testified that:

> the deposit is a condensation process essentially. The products of combustion contain carbon and soot, and if they are hot they remain as smoke, for example. If they strike a cold surface then they will condense. It's very much similar to the process of moisture condensing on an ice water glass in a humid atmosphere. . . . So to have these very distinct [crows feet] suggests to me that the panel had to be cold when it occurred and that [the] ejected soot, if you will, has velocity and a direction shown to it that is different from what the

> normal gravity forces would do from [external] burn.

(PC-R1. 674-676; see also PC-R1. 707).

Ms. Posey further testified that the presence of these "crow's feet" on the right side of the panel, in light of the fact that the eventual external fire was greatest to the left of the panel, "is significant in this sense, it's different than what the hostile fire would have created." (PC-R1. 6760; see also Appendix A). Additionally, she was able to conclude from the burn patterns that the circuit breaker panel box door was closed prior to the initial explosive event and was blown open by it, explaining the condition of both the interior and exterior of the door. (PC-R1. 679-681).

Regarding the source of the vapors ignited by the circuit breaker panel, Ms. Posey identified (from photographs, evidence and testimony collected by the State, and the Affidavit of Fred Way, Jr.) several chemicals that Mrs. Way was using to refinish a table located just below the circuit breaker box and explained that the chemicals were stored in the immediate area and would naturally have splattered on the victims' clothing during the refinishing process. (PC-R1. 684-687; see also Supp. PC-R1. 315-318 (Affidavit of Fred Way, Jr.)).

The withheld photograph of the circuit breaker box also explained several other theretofore inexplicable pieces of evidence and led Ms. Posey to conclude that the first "event" of

the fire was the ignition of a flammable vapor mixture. (PC-R1. 672). First, the evidence that soot-free glass from the window in the exterior/side garage door was found in the yard 18 feet away, "a very classic sign of an explosion." (PC-R1. 654). Second, witnesses (including the only two people to witness the fire at its onset, Tiffany Way and Sean Rooker) reported hearing sounds associated with the sort of "mild" explosive event that Ms. Posey described as beginning the garage fire. (PC-R1. 657-659). Third, the scope and height of the damage caused by the fire was characteristic of "a rapid ignition of vapors where the flame goes over some distance igniting the things in its pathway." (PC-R1. 659). Fourth, there was a very distinct, "horizontal white line that appeared in the photographs [and] followed a horizontal mortar joint, and all the other above and below [were] condensed with soot," indicating that the wall had "moved enough to crack the rather brittle mortar" so that its upper, soot-covered layer was washed away during fire suppression efforts. (PC-R1. 660-661). Ms. Posey further explained how the photographs provided her with a reliable basis for explaining this evidence.

Ms. Posey identified the initial explosive event as relatively mild in contrast to other explosions (e.g., a bomb being detonated) however, she indicated that the force created by

it would have been sufficient to knock a person to the ground or into an object. (PC-R1. 657-658; PC-R1. 711).

Ms. Posey identified the "second event" of the fire as an abrupt escalation due to the introduction of an accelerant. She supported her conclusion with accounts from witnesses that there was an abrupt escalation of heat accompanied by an equally abrupt generation of heavy quantities of black smoke. (PC-R1. 663). Ms. Posey testified that this black smoke suggested the introduction of a hydrocarbon accelerant, while the dramatic increase in flames indicated:

> an accelerant, and rather than being one being allowed to pour out and accumulate and it explodes, it's poured out at one time and virtually ignited on the spot. So you have a large amount of fire but not a second explosion, just a very abrupt escalation.

(PC-R1. 663-664).

Ms. Posey further supported her conclusions with the fact that the northwest area of the garage, where a gas can and gasoline remains were found, included many combustibles which showed signs of incomplete burning. She testified:

> there was a television set in the area that shows this heavy burning, and on the floor area there is quite severe charring over the combustible components of the television set, but not too far away there are plastic portions that still remain. So that shows that you don't have this heavy fire at ten or fifteen minutes [(the approximate duration of the fire)] at that location. It shows a later event introduced once the fire was under way. . . .

(PC-R1. 664-665).

The gasoline can found in the northwest corner of the garage, and State experts' reports identifying the quantity of gasoline therein before and after the fire (more than two gallons were missing), lent further support to Ms. Posey's findings. The "liquid line" on the can, caused by the external heat of the fire coming in contact with the metal (and the internal temperature differential of the air and liquid), indicates that the can was tipped at some point *after* the fire had already started. (PC-R1. 665-666). Furthermore, Ms. Posey testified that if the quantity of gasoline missing from the can after the fire had been poured out before the fire started (as was the State's theory), "you would have a bigger fire and you would have an explosion that would have blown the walls down." (PC-R1. 667; see also PC-R1. 683). Additional evidence identified by Ms. Posey as refuting the State's theory that Mr. Way poured the gasoline out of the can before the fire began is the absence of any burn marks on the concrete floor (evidence seen in the box of photographs withheld by the State). (PC-R1. 724).

Ms. Posey further cited the fact that State experts reported smelling gasoline in the northwest area of the garage, pointing out that had the gasoline burned for the entire duration of the fire, it would have burned away to the point that a human nose would have no longer been able to detect its presence. (PC-R1.

669; 687-688). Furthermore, Ms. Posey pointed out that the presence of *components* of gasoline on the fire victims' clothing (findings made by a State expert and stipulated to by counsel at the original trial) were easily explained as coming from the fire suppression efforts wherein more than a hundred gallons of water washed through the garage, including the gasoline-saturated northwest corner, and over the victims. (PC-R1. 671-672; 687-688).

During cross examination, Ms. Posey summed-up her expert conclusion as to the cause of the garage fire, stating:

> . . . to a reasonable degree of my engineering certainty. . .this was a vapor explosion. . .and. . .it was ignited at the [electrical] panel.

(PC-R1. 729; see also Appendix A). When asked by the Court whether the "first sparking ignition of vapor is what started the fire," Ms. Posey responded, "In my opinion, yes. And the really gripping part is I cannot explain it any other way because of this [crow's feet] pattern" -- a pattern seen only in the photograph that the State had not disclosed to trial counsel. (PC-R1. 754; see also Appendix A).

The next witness called by Mr. Way was forensic pathologist Dr. John Feegel. While refuting the State's theory that Mr. Way doused his wife and daughter with gasoline and set them afire, Dr. Feegel corroborated Ms. Posey's expert testimony with his own, stating:

> In my opinion these bodies were not doused but were in close proximity to a high intensity explosive type, probably flame driven fire, such as you would expect with gas or gasoline vapor rising at a short distance away.

(PC-R1. 757).

Dr. Feegel based his expert conclusion that the fire victims' burns were not caused by dousing on, *inter alia*, the evidence of the condition of the fire victims' bodies, described by State experts as showing very little charring, stating:

> When one actually puts an accelerant on the body itself and lights the accelerant, you get greater char and literally cooking and charring of the flesh, sometimes burning away parts of it, whereas if you get a sudden but very intense blast of heat, you get searing and less actual burning.

(PC-R1. 758).

Regarding Adrienne Way's severe head wound, Dr. Feegel testified that the force of a rapid gas explosion would have been sufficient to propel her into a stationary object and cause such damage. (PC-R1. 763). He further testified that the leg-extension bar on the weight bench located to the left of Adrienne Way's head -- the bar which was attached to the bench and operative prior to the fire, but which was broken and unattached afterwards -- is of a size, shape, and material consistent with the object that caused the fracture to her skull. (PC-R1. 764-766; see also Appendix B) (photograph of broken leg-extension bar

of weight bench seen at bottom of photograph next to where Adrienne Way's head was located)).

On cross examination, Dr. Feegel testified that the components of gasoline reportedly found during the State's lab tests of the victims' clothing could likely have been deposited there by fumes. (PC-R1. 789). As he testified on cross-examination, "I don't think that this is a dousing case at all," further testifying that the withheld photograph of the breaker box helped him understand and explain the body burns. (PC-R1. 791).

Next, Mr. Way attempted to present the testimony of his son, Fred Way, Jr. The State objected to any "recanted evidence or testimony" from Fred Way, Jr. (PC-R1. 799). The Court sustained the State's objection. (PC-R1. 802). Fred Way, Jr.'s complete affidavit is part of the record on appeal. (See Supp. PC-R1. 315-318 (Affidavit of Fred Way, Jr.)).

Although limited by the court's ruling, the testimony of Fred Way, Jr., corroborated the findings of both Ms. Posey and Dr. Feegel. He testified that the weight bench was unbroken and in "fine" condition prior to the fire. (PC-R1. 803). He testified that his mother was, in fact, refinishing a table in the garage, that she used a variety of combustible materials when refinishing furniture, and that they were stored in the area

beneath the circuit breaker box. (PC-R1. 804-810; see also Supp. PC-R1. 315-318 (Affidavit of Fred Way, Jr.)).

Next, Mr. Way sought to present Sean Rooker's testimony that law enforcement had altered Mr. Rooker's statement. (PC-R1. 810). The State objected that Mr. Rooker's testimony was beyond the scope of the evidentiary hearing. Mr. Rooker's actual, undoctored statement to law enforcement was that he had seen and heard Carol and Adrienne Way fighting in the garage shortly before the fire and heard the sound of an explosion immediately before the fire. The court excluded this evidence (PC-R1. 815).

The State stipulated to the admission of the testimony of Billy Nolas, Mr. Way's 1988 postconviction counsel. (PC-R1. 817). Mr. Nolas testified that, during Mr. Way's rule 3.850 proceedings in 1988-89, he filed chapter 119 public records requests with all relevant state agencies and offices, including the State Attorney for Hillsborough County. (Supp. PC-R1. 276). He further testified that the photograph of the breaker box and the others found in the Kodak box with it were:

> not included in any of the materials provided to [him] either in [the trial attorney's] file, the sheriff's office file, in the Florida Department of Law Enforcement file, or in the files that the State Attorney's Office represented to [him] was a complete public records compliance in Mr. Way's case.

(Supp. PC-R1. 276).

Mr. Nolas explained how the photographs would have "absolutely" changed the way the defense was conducted at trial. (Supp. PC-R1. 277). He explained:

> The prosecution's theory at trial was felony murder arson. The prosecutor argued arson, arson murder in opening statement. The prosecutor presented an arson murder theory throughout the entire evidentiary presentation at trial. The prosecutor argued arson murder in closing argument. The prosecutor presented aggravating factors relating to arson, argued arson in support of the heinous, atrocious and cruel aggravator. And that was the State's theory.
>
> That was the crux of what the State was asserting when it prosecuted Mr. Way. This--this depiction of the fuse box undermines the arson theory. [Appendix A] I mean, even I, as a lay person, can see that looking at this photograph.
>
> * * *
>
> It's inconceivable to assert that your client is innocent. . .but not use something this substantial, something that so significantly undermines the State's prosecution theory and demonstrates that the State's prosecution theory was factually not accurate.

Id.

The next witness called by Mr. Way was David Rankin, Mr. Way's original trial counsel. (PC-R1. 823). Mr. Rankin testified that he had no specific recollection of what he received from the state during discovery, but that he had reviewed his original case file and the photograph of the breaker box was not in it. (PC-R1. 828).

Mr. Rankin further testified that "the evidence I had limited the argument I had" regarding the cause of the fire, that

"I didn't offer much as far as an explanation of how the fire was started," and that he would have offered the photograph of the breaker box to explain the cause of the fire if it had been turned over to him. (PC-R1. 829). He also testified that he would very much have wanted to introduce evidence which showed that the fatal wound to Adrienne Way could have been the result of her being knocked into a stationary object by the force of a mild explosive event originating at the circuit breaker box. (PC-R1. 830; see also Appendix A (photograph of scorch-marked breaker box); see also Appendix B (photograph of broken weight bench bar found next to Adrienne Way's head)).

Next, Mr. Way presented the testimony of called Craig Alldredge, Mr. Way's resentencing counsel and the witness who discovered the Brady violation. (PC-R1. 851). Mr. Alldredge testified that he went to the office of Michael Benito, the Assistant State Attorney who prosecuted Mr. Way at trial and resentencing. (PC-R1. 853). He testified that Mr. Benito:

> . . . went over to a box in one corner of his room which was a box of evidence from the Fred Way case and pulled out an envelope with photographs. He handed them to us and said anything else we wanted he would certainly provide. Then there was a pause in the conversation and he said--we looked through the photographs and said essentially, "is this it?" And then he said, "Well, just a minute," and he reached into his bottom left-hand corner of his desk drawer and pulled out a Kodak box, a Kodak film container and said, "Here's some other photographs that essentially we never used, we never showed to

> anybody. If you want them, take a look at them."

(PC-R1. 853-854) (emphasis added).

Mr. Alldredge testified that the photo of the circuit breaker box was in the Kodak box, along with other photos showing the absence of any burn marks on the floor. These photos rebut the State's theory that Mr. Way had ignited the fire by use of a "wick" of flammable fluid. (PC-R1. 854; 857; 863). He further stated that in his sworn 3.850 motion he filed on Mr. Way's behalf, he quoted Mr. Benito's exact words wherein Mr. Benito admitted the Brady violation. (PC-R1. 860; 862).

Next, Mr. Way presented the testimony of Betty Slaton, a neighbor of the Ways and a witness to the events surrounding the fire. (PC-R1. 872). Ms. Slaton would have testified that she observed Mr. Way's demeanor during the fire and that she possessed knowledge of the volatility of the relationship between Carol and Adrienne Way. (PC-R1. 872-874). The court refused to permit this testimony. (PC-R1. 877).

The State then presented the testimony of Mr. Henry Regalado, a former Hillsborough County Sheriff's Deputy who investigated the garage fire in his capacity as an arson investigator for Systems Engineering Associated, the private company that provided Mr. Way's fire insurance. Mr. Regalado testified that, "the breaker box itself had *nothing* to do with the fire" (PC-R1. 890) and he had perfect "recollection" during

direct examination of the events surrounding a thirteen-year-old investigation (e.g., he remembered every specific photograph and negative he allegedly carried in his bag--yet never produced--when he was deposed by trial counsel). (PC-R1. 897). His lack of knowledge in the area of electrical engineering was illustrated by his testimony that the fact that one of the wires running from the top of the breaker box lacked insulation was "immaterial" because the insulation was intact on all of the wires around it. (PC-R1. 889).

Cross examination revealed the many shortcomings of Mr. Regalado's investigation and theories. He admitted, consistent with Ms. Posey's theory, that the circuit breakers could have tripped before the fire started. (PC-R1. 908). Unlike Ms. Posey, he had no explanation for the crow's feet of soot found on the breaker panel. He could only speculate in very general terms that they might have been "hand prints," though he offered no explanation as to why neither their size nor their shape bore any resemblance to hands. (PC-R1. 909-911). He claimed that the breaker box was closed during the fire, but could then offer no explanation for damage to the interior of the door that matched other damage he had identified as caused by flames. (PC-R1. 914). Furthermore, he had no explanation whatsoever for the bright white line running across a single mortar joint in the garage wall. (PC-R1. 920).

While Mr. Regalado was at a loss to rebut any of Ms. Posey's theories, he was able to support several of them. He admitted that the only explanation he could think of for the clean window glass found eighteen feet from the garage was that it was caused by an explosion. (PC-R1. 916). He agreed that the garage appeared to be used to refinish furniture. (PC-R1. 918). He agreed that the refinishing materials were a potential fuel source. Id. He agreed that the increase in smoke during the fire could have been caused by an accelerant introduced after the fire had begun. (PC-R1. 919).

Next, the State called Michael Benito, the prosecutor from whose desk drawer the breaker box photo came. Though he presumably was called to rebut Mr. Alldredge's testimony regarding the withholding of the photographs, Mr. Benito had no recollection of any of the events surrounding the discovery of them. (PC-R1. 923-924).

Next, the State called Bill Myers, the Hillsborough County Sheriff's arson and fire investigator assigned to Mr. Way's case. As with Mr. Regalado, Mr. Myers' testimony on direct examination belied an impossible memory for detail (e.g., he remembered getting the call to Mr. Way's home at precisely 12:54 p.m. (PC-R1. 930)). However, notwithstanding this memory, his testimony was fraught with inconsistencies in light of other evidence adduced at trial. He remembered no broken windows. (PC-R1.

934). He claimed to remember opening the door to the breaker box, yet he also claimed that the crime scene photos, all of which showed the breaker box door in the open position, were taken **prior** to his touching anything. (PC-R1. 930; 939). He made no effort to determine how the glass found eighteen feet from the garage door had been blown out, claiming it was “totally irrelevant” to his investigation, however, he admitted that he had directed that pictures be taken of this "totally irrelevant" broken glass. (PC-R1. 950). Like Mr. Regalado, (and unlike Ms. Posey) he had no explanation for the white line in the mortar in the garage wall.

The State’s final witness was Michael Germuska, an electrical engineer with Systems Engineering Associated (the insurance company that stood to gain by a determination that an arson had occurred and the same insurance company by which the State’s arson expert, Henry Regalado, is employed). Germuska offered testimony that some of the tripped breakers might have tripped during the fire, **but admitted** that he was unable to determine whether that was in fact what had happened or whether, as Ms. Posey had concluded, some or all of the breakers had blown prior to the fire. (PC-R1. 969-970). When asked to explain the directionality of the “crow’s feet” patterns on the breaker panel (i.e., the fact that their angles indicate that the soot shot from the breakers with appreciable velocity), Mr. Germuska could

only reply, “Just by examining the photograph I don’t have all the information to make a real good judgment for you. . . .” (PC-R1. 967). When on cross examination Mr. Way attempted to explore and challenge two pages worth of testimony given by Germuska during direct examination, the court, *sua sponte*, objected to certain questions being asked and precluded Mr. Way from completing his cros-examination and fully testing the witness’s testimony and opinions. Compare PC-R1 969 (interference by court) with PC-R1. 963-964.

At the conclusion of the State’s case, it was agreed that written closing arguments would be submitted and that the court would render its decision after its reading thereof. (PC-R1. 338).

On July 23, 1997, the circuit court denied Mr. Way’s Motion for Postconviction Relief. (Supp. PC-R1. 330-333). In its Order, the court found that the photos had been disclosed to trial counsel notwithstanding the fact that the State produced no evidence at the hearing to support such a finding. (Supp. PC-R1. 330).

The court also stated in its order that “there was conflicting testimony about whether, in 1991, the prosecutor stated to post-conviction relief counsel that the disputed photos had never been shown to the defense,” notwithstanding the fact that the only evidence relating to this issue was Mr. Alldredge’s

testimony that the prosecutor told him that the photos had never been seen. (Supp. PC-R1. 331).

The court then found that "[t]hese photographs and the expert opinions drawn therefrom are not of such a nature that they would probably produce an acquittal on retrial" and denied Mr. Way's motion. (Supp. PC-R1. 302-303).

SUMMARY OF ARGUMENT

"There are cases, albeit not many, when a review of the evidence in the record leaves one with the fear that an execution would perhaps be terminating the life of an innocent person." Melendez v. State, 498 So. 2d 1258, 1262 (Fla. 1986) (Barkett, J., concurring specially). This is such a case. Fred Way is that person.

At Mr. Way's evidentiary hearing, it was established that the State withheld exculpatory photographs. Among these photographs was a picture of the malfunctioning circuit breaker box. Mr. Way established that this evidence was favorable in establishing an alternative theory for the deaths of Carol and Adrienne Way and a reasonable hypothesis of innocence. In a circumstantial case such as this, the State has the burden of presenting evidence that is not only consistent with guilt but inconsistent with any reasonable hypothesis of innocence. Had the State properly disclosed the withheld photographs, they would have been unable to meet this burden. Furthermore, this evidence serves as impeachment evidence of the State's fire experts at trial. Mr. Way's jury never knew about this evidence.

Despite the State's misconduct, Mr. Way's guilt phase jury was deadlocked for two days. His original sentencing jury and resentencing jury recommended death by only the slimmest possible margin - seven to five. The closeness of the case at trial, both

at the guilt and penalty phases, supports the conclusion that had any one aspect of the State’s case been refuted, a reasonable probability exists that the outcome would have been different.

The circuit court erroneously denied relief by misstating the facts adduced at the evidentiary hearing and applying the wrong legal standard.

Finally, the circuit court failed to evaluate the cumulative effect of all the evidence discovered since Mr. Way's trial -- that which was withheld by the State, that which was newly discovered, and that which was not presented due to trial counsel's ineffectiveness. As a result, Mr. Way has been denied a full and fair opportunity to demonstrate that he was denied a constitutionally adequate adversarial testing at both the guilt innocence phase and sentencing phases. Consequently, Mr. Way is entitled to a new trial.

ARGUMENT I

THE TRIAL COURT ERRED IN DENYING MR. WAY'S CLAIM THAT CRITICAL EXCULPATORY EVIDENCE WAS NOT PRESENTED IN VIOLATION OF BRADY V. MARYLAND. THE TRIAL COURT ERRED IN DENYING MR. WAY'S POSTCONVICTION MOTION IN THAT THE COURT'S FINDINGS WERE NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE AND THE COURT APPLIED THE INCORRECT LAW TO THESE UNSUPPORTED "FACTUAL" FINDINGS. MR. WAY WAS DENIED A FULL AND FAIR ADVERSARIAL TESTING OF THE STATE'S CASE CONTRARY TO THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. THE TRIAL COURT'S FINDINGS WERE NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

Paradigmatic of the trial court's unsupported "findings" is the first sentence of paragraph three in its Order Denying Petitioner's Rule 3.850 Motion for Post-Conviction Relief. There the court states:

> there was conflicting testimony about whether, in 1991, the prosecutor stated to post-conviction relief counsel that the disputed photos had never been shown to the defense.

The record from the evidentiary hearing shows this statement to be patently untrue. Craig Alldredge, Mr. Way's resentencing counsel who discovered the Brady violation, testified:

> [Mr. Benito] went over to a box in one corner of his room which was a box of evidence from the Fred Way case and pulled out an envelope with photographs. He handed them to us and said anything else we wanted he would certainly provide. Then there was a pause in the conversation and he said--we looked through the photographs and said essentially, "is this it?" And then he said, "Well, just a minute," and he reached into his bottom left-hand corner of his desk drawer and

> pulled out a Kodak box, a Kodak film container and said, “Here’s some other photographs that essentially we never used, we never showed to anybody. If you want them, take a look at them.”

(PC-R1. 853-854) (emphasis added). This evidence was unrebutted. (PC-R. 923-924).

There was no conflicting testimony about whether the prosecutor made statements regarding the undisclosed photographs. Mr. Benito simply testified that he did not recall the event. Mr. Alldredge on the other hand, had documented the meeting at the time he discovered the Brady violation and promptly drafted a 3.850 motion for Mr. Way. Mr. Benito's testimony does not rebut Mr. Alldredge's testimony. Black's Law Dictionary defines rebuttal evidence in this fashion:

> **Rebuttal evidence.** Evidence given to explain, repel, counteract, or disprove facts given in evidence by the acverse [sic] party. That which tends to explain or contradict or disprove evidence offered by the adverse party. *Layton v. State*, 261 Ind. 251, 301 N.E.2d 633,636.

Black's Law Dictionary, Fifth Edition, 1979, at page 1139.

Mr. Benito's testimony did not "explain," "repel," "counteract," or "disprove" any of Mr. Alldredge's testimony. The trial court's finding that there was conflicting testimony was erroneous.

In paragraph two of the trial court’s Order Denying Petitioner’s Rule 3.850 Motion for Post-Conviction Relief, the

court "finds that [the photographs at issue] were disclosed." The court relies upon a report by State witness Henry Regalado (a private fire investigator who was investigating the garage fire at the behest of his private employer) that was allegedly disclosed to the trial attorney and that contains a statement that "some" photographs were on file at Mr. Regalado's office. However, under Brady[2], such a disclosure does not relieve the State of the responsibility to disclose any and all exculpatory evidence in its possession--particularly in light of the fact that Mr. Way's Demand for Full Discovery included requests for "[a]ny tangible papers or objects. . .[which] were not obtained from or belong to the accused" and "any material information within the State's possession or control which tends to negate the guilt of the accused as to the offense charged," and the fact that the State, in its Notice of Discovery, responded that it had turned over to Mr. Way "[p]hotographs of victims and crime scene" and that there was no exculpatory information in its possession. See Mr. Way's "Demand for Full Discovery"; see also, State's "Notice of Discovery."

Additionally, during a hearing on December 9, 1983, the following colloquy occurred

> MR. RANKIN: Also the Motion for Production of photographing, [sic] Mr. Benito has assured me -- He can make the same

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2. Brady v. Maryland, 373 U.S. 83 (1963).

representation here on the the record--That he has produced for me all those photographs which are available which relate in any manner to this investigation.

THE COURT: All right.

MR. BENITO: That is correct. That motion should have been rendered moot as long as -- as well as the Motion for the Detective's notes. I did provide him with a copy of Detective Stanko's notes, I believe Mr. Rankin; is that correct.

MR. RANKIN: That is correct. As to the Motion to Compel Disclosure of All Evidence Favorable to the Defendant, Mr. Benito has also assured me that such production has occurred. And if he will represent that on the record, then that would take care of that motion.

MR. BENITO: That's correct judge.

THE COURT: That is Brady v. Maryland motion?

MR. RANKIN: That is correct.

MR. BENITO: Yes, sir.

THE COURT: All right.

(R. 1687-1688) (emphasis added).

Moreover, the trial court's finding that the photographs were disclosed does not comport with the unrebutted testimony of Mr. Alldredge:

> . . . - - we looked through the photographs and said essentially, "is this it?" And then [Mr. Benito] said, "Well, just a minute," and he reached into his bottom left-hand corner of his desk drawer and pulled out a Kodak box, a Kodak film container and said, "Here's some other photographs that essentially we

> never used, we never showed anybody. If you want them, take a look at them."

(PC-R. 853-54).[3]

Assuming *arguendo* that the photographs were disclosed to trial counsel, then counsel was ineffective. Strickland v. Washington, 466 U.S. 668 (1984). Mr. Way was denied a reliable adversarial testing and his rights under the sixth, eighth and fourteenth amendments to the United States Constitution and corresponding Florida law were violated. The jury was not afforded the opportunity to consider this compelling evidence.

B. THE TRIAL COURT APPLIED THE INCORRECT LAW TO ITS UNSUPPORTED "FACTUAL" FINDINGS.

In Kyles v. Whitley, 115 S.Ct 1555 (1995), the United States Supreme Court clearly set out the law regarding Brady and its progeny. Kyles was granted relief due to the state's withholding of favorable information from the defense, which taken as a whole raised a reasonable probability that disclosure would have produced a different result. The cumulative effect of the withheld information undermined the confidence in the verdict.

The Court in Kyles discussed the interrelationship of Brady, Agurs, and Bagley. In so doing, the Court recited the law of Brady stating ". . . the supression by the prosecution of

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3 It should not be overlooked that Mr. Alldredge correctly described the box containing the undisclosed photographs.

evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment. Kyles at 1558. The Court further explained ". . . a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal. . ." Kyles, at 1566 (citations omitted). The Court also stated: "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence". Kyles, at 1566. The Court emphasized that materiality was not a sufficiency of the evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough to convict". Kyles at 1566. The Court then stated that once Bagley materiality is shown, "there is no need for further harmless-error review." Kyles, at 1567. Regarding the state's obligation the Court stated ". . . the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." Kyles at 1567,1568.

Kyles also requires a cumulative evaluation of the evidence. Kyles, at 1569. As Kyles clearly indicates, the undisclosed information must not be analyzed in a piecemeal

fashion. A cumulative evaluation of the evidence withheld in Mr. Way's case clearly demonstrates that it had an impact upon effectiveness of trial preparation, investigation, strategy, cross-examination and development of the defense case.

The first requirement of Brady was satisfied at the evidentiary hearing. Through the testimony of defense experts Ms. Posey and Dr. Feegel and attorneys Mr. Billy Nolas, Mr. David Rankin, and Mr. Craig Alldredge, Mr. Way demonstrated that the photographs are exculpatory; the State's fire experts' testimony was impeached with the photographs; at trial, State's experts Henry Regalado and Bill Myers could have been even further impeached, as he testified that he checked the breaker panel and found no evidence of an electrical malfunction. Moreover, the photographs are favorable in that they support an alternative theory for the deaths of Carol and Adrienne Way.

The second requirement of Brady was satisfied by Craig Alldredge, Mr. Way's resentencing counsel who discovered the Brady violation, when he brought his 3.850 Motion before the trial court days after discovering the suppressed photographs. Furthermore, Mr. Alldredge testified to this fact at the evidentiary hearing at issue here.

The third requirement of Brady was satisfied at the evidentiary hearing by the testimony of Mr. Alldredge that the prosecutor admitted to him that the photographs had never been

disclosed (PC-R1. 551-563) and of Mr. Way's trial counsel, David Rankin, that he had never received the photographs from the prosecutor (PC-R1. 828-830). Notwithstanding the trial court's unfounded assertion to the contrary, there was no evidence offered to rebut this testimony.

The fourth, and final, requirement of Brady, that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different, requires a cumulative analysis of all evidence adduced to date in Mr. Way's case. See Argument III, infra. However, even without performing such an analysis, the trial court's error regarding this standard for reversal is seen in its statement that, "These photographs and the expert opinions drawn therefrom are *not of such a nature that they would probably produce an acquittal on retrial*." (Order Denying Petitioner's Rule 3.850 Motion for Post-Conviction Relief at paragraph seven) (emphasis added). The standard employed by the trial court raises the bar far higher than Brady and this Court's interpretations thereof; in effect, it requires a showing *by the greater weight of the evidence* that Mr. Way would be found *not guilty*, whereas the proper standard requires only a showing that ***a reasonable probability*** exists that Mr. Way would be ***acquitted, found guilty of a lesser offense, sentenced to life imprisonment***, or that the ***jury would have hung***, as these are all "different" outcomes than

that of Mr. Way's trial and all unquestionably reasonable probabilities in Mr. Way's case (particularly in light of the fact that the jury remained deadlocked after two days during the guilt/innocence phase and that the recommendation of death was by a narrow seven-to-five vote).

Under United States v. Bagley, 473 U.S. 667, 680 (1985), reversal is required if there exists a "reasonable probability that had the [withheld] evidence been disclosed to the defense, the result of the proceeding would have been different." However, it is not the defendant's burden to show the nondisclosure "[m]ore likely than not altered the outcome in the case." Strickland v. Washington, 466 U.S. 668, 693 (1984); Kyles v. Whitley, 115 S. Ct. 1555 (1995). A reasonable probability is one that undermines confidence in the outcome of the trial. Such a probability undeniably exists here.

The evidence adduced at the evidentiary hearing was more than sufficient to satisfy the requirements of Brady; had the trial court applied the proper standard, it would have come to the inescapable conclusion that Mr. Way is entitled to postconviction relief.

C. THE TRIAL COURT ERRED IN DISMISSING MS. POSEY'S THEORY.

Of the experts testifying in Mr. Way's case to date, only one is an expert in ***both*** electrical engineering and forensic fire

investigation: defense expert Ms. Eleanor Posey. (See PC-R1. 650-51; see also "Curriculum Vitae" at PC-R1. 242-68). In a case such as this--where an understanding of the cause and progress of the fire at issue requires an understanding of the interplay of electricity and fire--the testimony of an expert with such dual expertise should be considered especially weighty. ***No*** State expert was able to explain the presence and character of the sooty "crow's feet" patterns on the circuit breaker box depicted in the previously withheld photograph. More importantly, ***no*** State expert was able to offer any explanation for these markings that was: i) inconsistent with Ms. Posey's theory, or ii) consistent with the State's theory of an incendiary fire. Mr. Way's conviction is a miscarriage of justice and his execution would be unconscionable.

Unlike Ms. Posey's unrebutted testimony, which, detail by detail, she supported with references to the evidence, the trial court's broad, generalized assertion that Ms. Posey's theory "defies logic, is inconsistent with the physical evidence at the fire scene, and is refuted by the testimony of on-scene fire investigators and an electrical engineer" has no basis in fact and is unsupported by the record.

The trial court grossly misstated Ms. Posey's testimony. E.g., compare Order Denying Petitioner's Rule 3.850 Motion for Post-Conviction Relief ("[A]ccording to the alternative theory,

the force of the explosion caused gasoline to spill on the victim, her mother, a TV set and a box of books and then ignite.") with PC-R1. 687 (Ms. Posey's explanation of how fire suppression efforts caused components of gasoline to be found on the women's clothing) and PC-R1. 789 (Dr. Feegel's testimony that the fumes in the garage could cause components of to be found in the women's clothing) and PC-R1. 757 ("In my opinion these bodies were not doused but were in close proximity to a high intensity explosive type, probably flame driven fire, such as you would expect with gas or gasoline vapor rising at a short distance away."). By misstating the evidence, the trial court clearly erred.

1. IN ORDER TO CONVICT ON CIRCUMSTANTIAL EVIDENCE, THE STATE HAS THE BURDEN OF PRESENTING EVIDENCE THAT IS NOT ONLY CONSISTENT WITH GUILT, BUT THAT IS INCONSISTENT WITH ANY REASONABLE HYPOTHESIS OF INNOCENCE.

No witness for the State was able to rebut Ms. Posey's expert testimony that the fire in Mr. Way's garage was caused by an accidental vapor explosion originating at the circuit breaker panel.[4] When viewed in a light most favorable to the State, its experts' testimony presents, at best, an alternative, non-exclusive theory of how the fire occurred--albeit a theory which fails to take into account the totality of the evidence (e.g., the "crow's feet" scorch patterns on the breaker panel, the distinct white line across a single mortar joint on the garage wall, or the broken leg extension bar hanging from the weight bench adjacent to Adrienne Way's body).

As this Court has time and again stated

> In order to convict on circumstantial evidence, the State has the burden of presenting evidence that not only is consistent with guilt, but that is inconsistent with any reasonable hypothesis of innocence.

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4 It should also be noted that resentencing counsel proffered the testimony of fire expert Craig Tanner in support of the postconviction motion. Mr. Tanner's theory of a propane explosion ignited by the faulty circuit breaker panel is not inconsistent with Ms. Posey's theory of a vapor explosion ignited at the circuit breaker panel.

Norton v. State, 709 So. 2d 87 (Fla. 1997) (citations omitted). The evidence presented by the State, viewed in conjunction with the evidence withheld by them (which remains unexplained by any State witness or theory), fully supports Ms. Posey's eminently reasonable expert theory of an accidental fire taking place in Mr. Way's garage. Had the jury at trial been presented the evidence withheld by the State, and the theories supported thereby, there is a more than reasonable probability that the outcome of Mr. Way's trial would have been different.

ARGUMENT II

MR. WAY WAS DENIED A FULL AND FAIR HEARING. THE TRIAL COURT ERRED IN SUSTAINING THE STATE'S OBJECTION TO THE PRESENTATION OF EVIDENCE AND IN REFUSING TO CONSIDER THE TESTIMONY OF FRED WAY, JR., SEAN ROOKER AND BETTY SLATON.

At the evidentiary hearing which is the subject of this appeal, Mr. Way attempted to introduce the testimony of Fred Way, Jr., Sean Rooker and Betty Slaton. The trial court erred in refusing to admit into evidence and consider the testimony of these witnesses.

A. FRED WAY, JR.

At the evidentiary hearing, Mr. Way attempted to introduce the testimony of Fred Way, Jr., that he had not seen his father throw a hammer over the fence even though he testified that he had at trial. It was important for the circuit court to consider this evidence in light of the fact that the State's case against Mr. Way was circumstantial. To make Mr. Way look guilty, the State argued at trial that Mr. Way threw the hammer over the fence to dispose of the hammer (PC-R1. 2489). The circuit court refused to consider this evidence.

The circuit court also refused to hear Fred Way, Jr.'s testimony regarding the pressure exerted upon him and his younger sister, Tiffany, by their maternal grandparents and the police. This is also evidence the trial court should have considered, especially in light of the State's reliance upon Tiffany to make

her father look guilty in the eyes of the jury. The court erroneously refused to hear and/or consider any of this information which is contained in Fred Jr's affidavit:

> STATE OF FLORIDA)
>) ss:
> COUNTY OF HILLSBOROUGH)
>
> I, FRED WAY JR., having been duly sworn or affirmed, do hereby depose and say:
>
> 1. My name is Fred Louis Way, Jr. I am the son of Fred Lewis Way, Sr. I am 26 years old and live in Clarksville, Tennessee.
>
> 2. During my father's trial, I testified that I had seen him throw a hammer over the back fence. This was not true. I never saw him throw that hammer over the fence. The reason I said that was because the police put that picture in my head. I was 14 years old at the time.
>
> 3. What I do remember from that time was being told that the hammer had been found. I remember a policeman named Marsicano and another officer who would come to my grandparents house, pick me up, and drive me around while they talked to me. They would "help" my thoughts along. For example, if I didn't remember something they would give me options so that I could fill in the blanks. I was tired of driving around with them so I would just pick one of the options. They drilled me a lot on that hammer. But now, I know that I never saw my father throw it over the fence.
>
> 4. I do remember seeing my father that day we were cleaning up after the fire. I remember seeing him out on the patio - just standing there crying. I have a very clear picture in my head of that. I stood there and just watched him cry.

5. They worked on me for a long time about that hammer. The two faces that stick out in my mind are Marsicano's and Benito's. I remember, too, Benito asking me how I felt about the death penalty for my father. At the time I would just go along with whatever they wanted me to say.

6. Besides the police and state attorney, both my sister Tiffany and I felt incredible pressure put on us by our grandparents - my mother's parents. Tiffany and I lived with them right after the fire and they constantly tried to brainwash us against my father.

7. Right after my father's arrest, my grandmother started pressuring me to change my name. She would call my father a "sorry murdering bastard" and tell me I was just like him. "How can you keep his name?" she'd scream at me. She wanted me to change it to Louis Andrews. My sister Tiffany was younger and did change her last name to Andrews because of the constant pressure of my grandmother.

8. Before my father's trial, my grandmother talked constantly about my father, the fire, and what she thought had happened. It was the first thing we heard in the morning and the last thing we heard at night.

9. My grandmother was always prompting Tiffany. "Why would the dog bark?" she'd ask Tiffany. "Where was your father then?" I saw Tiffany change during that time. She became more and more biased against my father. My grandmother just kept working on her. They were always alone together.

10. I guess because Tiffany was so young she just bought into my grandmother's story. But I couldn't do it. That made my life miserable in that house. They kept pressuring me to go along with the story and change my name. Once, I got so frustrated that I hit the floor and broke my hand. I couldn't take it anymore. At age 15, I left.

My grandfather gave me money for the bus ticket.

11. I was glad to leave that house. My grandmother had never liked my father. She was pretty deep into astrology and I remember her telling me about a dream regarding my father. She said that Fred Way was a bunch of grapes and in this dream she was barefoot and trying to stomp the truth out of him. She really went off the deep end.

12. I remember my mother didn't even want to live in Tampa because she didn't want to be close to them. All three of my grandparent's children left the house as soon as they could and never came back. They were extremely domineering parents.

13. After I left my grandparent's house, I went to live with a friend in Atlanta. Then I lived in foster homes and sort of bounced around. I tried to block out everything about my grandparents, the fire, and my father.

14. This is the first time I have talked to anybody about what really happened regarding the hammer being thrown over the fence. I tried to block it out of my head for so long because it was too painful to remember those time. Recently, I have become a Christian and decided that I wanted to come to terms with what happened.

15. Recently, I was shown a photograph of a broken weight bench in the garage of our home on Jackson Springs Road. I know for a fact that this weight bench was not broken before the fire.

Further affiant sayeth naught.

/s FRED WAY JR.

(Supp PC-R1. 315-318).

The trial court should have considered this corroborating evidence in conjunction with the Brady evidence. It is inescapable that the evidence is intertwined - pieces individually do not show the entire picture. The State's case against Mr. Way at trial was circumstantial. At trial, the State was grasping for any way it could to implicate Mr. Way. This included presenting the testimony of Carol's mother and father. For example, Carol's father testified about retrieving keys to a locked door to the garage door, supposedly in the possession of Mr. Way. The jury should have been able to hear, and the lower court should have considered, the evidence of Carol's parents' bias against Mr. Way. Fred Jr.'s affidavit corroborates Mr. Way's claim of innocence and is relevant. It should be considered.

B. SEAN ROOKER

Counsel for Mr. Way also attempted to introduce the testimony of Sean Rooker. The trial court erred in refusing to hear this evidence. Had Mr. Rooker been allowed to testify he would have stated that he was near the Way garage the day of the fire and that he told the police that he heard Adrienne and Carol Way fighting. Furthermore, Mr. Rooker would have testified that he heard the sound of an explosion immediately proceeding the fire, thus corroborating the testimony of defense experts Ms. Posey and Dr. Feegel. However, the police report documenting Mr.

Rooker's statement states that Mr. Rooker then told the police that he was not telling the truth. At the evidentiary hearing, Mr. Rooker would have testified that, in fact, he never went back to the police and recanted the statement about Carol and Adrienne fighting. (PC-R1. 813-814).

Again this evidence should have been considered but it was not. This evidence was corroborative of an alternate theory, that Adrienne Way attacked her mother and then died in the accidental fire.

C. BETTY SLATON

The trial court refused to consider the testimony of Ms. Slaton. Ms. Slaton would have testifeed that she lived near the Way residence in 1983 and that the day of the fire she saw the commotion, put her groceries down and went to the scene. Ms. Slaton would have testified that she encountered Mr. Way, that he was shaking, seemed pale and that his eyes were glazed over. She would have further testified that she offered him a cigarette, that he fumbled with it and could not hold it, that she had to light it for him and that Mr. Way was visibly upset. She would also have testified that no one at the scene was tending to Mr. Way, that when she heard conflicting reports about Mr. Way, she attempted to talk to Mr. Way's attorneys. She would have also testified to the volatile nature of Carol and Adrienne Way's relationship. Ms. Slaton’s testimony would have been consistent

with there having been an accidental fire ignited by faulty circuit breakers--a theory which was not, but would have been, developed by trial counsel had the photographs been properly turned over by the State Attorney. As with the argument regarding Fred Jr.'s recanted testimony and Sean Rooker's testimony this evidence should have been considered. It was not.

This Court has stated that piecemeal litigation is not favored in postconviction litigation. E.g., Johnson v. State, 536 So. 2d 1009 (Fla. 1988). Counsel for Mr. Way brought the evidence of Fred Way Jr.'s affidavit, Sean Rooker, and Betty Slaton to the attention of the trial court in a timely fashion. The trial court would seem to have Mr. Way initiate a separate proceeding regarding this evidence. If this is true, then this Court should relinquish jurisdiction to the circuit court for a hearing. Mr. Way is entitled to have his claims and evidence heard and considered at a full and fair evidentiary hearing at which all the evidence can be assessed in its entirety. No court has done this. Fairness demands that one does.

ARGUMENT III

THE OUTCOME OF MR. WAY'S TRIAL WAS MATERIALLY UNRELIABLE BECAUSE NO ADVERSARIAL TESTING OCCURRED DUE TO THE CUMULATIVE EFFECTS OF THE WITHHOLDING OF EXCULPATORY AND/OR IMPEACHMENT EVIDENCE BY THE STATE, NEWLY DISCOVERED EVIDENCE, INEFFECTIVE ASSISTANCE OF COUNSEL, AND IMPROPER PRESENTATION BY THE STATE OF MISLEADING TESTIMONY AND/OR FAILURE BY THE STATE TO CORRECT MISLEADING TESTIMONY. FURTHERMORE, THE CUMULATIVE EFFECT OF THE EVIDENCE ADDUCED TO DATE IN MR. WAY'S CASE DEMANDS THAT HE BE GRANTED A NEW TRIAL.

The circuit court failed to consider the cumulative effect of all of the evidence adduced during postconviction at Mr. Way's trial as required by Kyles v. Whitley, 115 S.Ct. 1555 (1995), and this Court's precedent. See Swafford v. State, 679 So. 2d 736, 739 (Fla. 1996) (directing the circuit court to consider newly discovered evidence in conjunction with evidence introduced in the defendant's first 3.850 motion and the evidence presented at trial); see also Circuit Court Order Denying Petitioner's Rule 3.850 Motion for Post-Conviction Relief at paragraph seven (concluding that Mr. Way is not entitled to relief "based upon the testimony adduced by [him] at the evidentiary hearing"). In so doing, the court failed to give Mr. Way a full and fair evidentiary hearing on his Rule 3.850 motion. In State v. Gunsby, 670 So. 2d 920 (Fla. 1996), this Court ordered a new trial in Rule 3.850 proceedings because of the cumulative effect of Brady violations, ineffective assistance of counsel in failing to discover evidence, and newly discovered evidence. Had the circuit court considered all of the evidence presented by Mr. Way throughout his capital proceedings, it would have found that the previously undisclosed evidence, in conjunction with the evidence introduced at Mr. Way's first 3.850 hearing and his trial, undermines confidence in the outcome. See Gunsby; Swafford. Had the jury heard all of the evidence presented in Mr. Way's postconviction proceedings, there is a more-than-reasonable

probability that the outcome of his trial would have been different. It cannot be stressed enough that without the benefit of the evidence learned by virtue of the postconviction process, Mr. Way's guilt phase jury was deadlocked for two days. Additionally, the jury then came back on a lesser included offense as to Mrs. Way and then only recommended death by the narrowest of margins 7-5 as did his resentencing jury in 1991 for the death of Adrienne. Confidence in the verdict is undermined.

In the Brady context, the United States Supreme Court has explained that the materiality of evidence not presented to the jury must be considered "collectively, not item-by-item." Kyles v. Whitley, 115 S. Ct. 1555, 1567 (1995). Thus, the analysis is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. at 1566 (footnote omitted). In the ineffective assistance of counsel context, the United States Supreme Court has explained that the same totality of the circumstances approach applies:

> [A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or

> conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.

Strickland v. Washington, 466 U.S. 668, 695-96 (1984)(emphasis added).

The Supreme Court had previously described the totality of the circumstances analysis as follows:

> [I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

United States v. Agurs, 427 U.S. 97, 112-13 (1976)(emphasis added)(footnote omitted). Mr. Way's verdict is "already of questionable validity" and the additional evidence adduced by way of the postconviction process in Mr. Way's case far exceeds that "of relatively minor importance".

In the newly discovered evidence context, this Court has held that the analysis requires a judge "to evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." Jones v. State, 591 So. 2d 911, 916 (Fla. 1991). When these principles are applied to Mr. Way's claims, his entitlement to relief is clear.

THE STATE'S THEORY AT TRIAL.

At trial, the State presented a theory of arson murder, claiming that, Mr. Way wanted to take a job in Central America and his wife and daughter did not want to move there; Mr. Way sent his children away from the garage so that he could be alone with his wife; that while his children were away, he beat his wife, Carol, with twelve hammer blows to her head; that, after telling Tiffany to stay in her room and in an effort to eliminate a witness, he then called his eldest daughter, Adrienne, from the room where she was playing a game with her younger sister, Tiffany, to the garage and hit Adrienne with a hammer in the side of her head; that he then poured more than two gallons of gasoline on and around his wife's and eldest daughter's bodies;[5] that he then trailed a "wick" of lighter fluid from the women to the door leading from the garage into the kitchen of his home; that he then lit the "wick" and ignited the women and the garage; that he then went and got his cigarettes from his bathroom, passing his twelve-year-old daughter, Tiffany, in the hall on the way to and from getting his cigarettes (but not killing her or throwing her into the burning garage with her mother and sister, despite her presence in the same room from which he had called potential witness Adrienne during the alleged murders and arson;

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5 It should be noted that the evidence revealed that only ***components*** of gasoline were found on the clothing.

that he then went out to his back porch to smoke a cigarette; that Tiffany heard her sister scream from the garage; that Tiffany then looked out her bedroom window and saw the fire; that Tiffany then ran to tell Mr. Way that the garage was on fire; that Tiffany asked Mr. Way if she should call the fire department; that Mr. Way did not respond; that she ran to a neighbor's house to call the fire department; that, when passers-by arrived to help Mr. Way, he showed no emotion; that Mr. Way ignored the questions of these good Samaritans (regarding whether anyone was in the house) in an effort to give the fire time to destroy the evidence of the alleged murders; that Mr. Way, during the two days after the fire during which he had unlimited access to his home and the opportunity to destroy or remove any and all evidence from the fire scene, made no effort to do so beyond throwing a hammer (alleged, but never proven, to be the murder weapon) over the fence behind his home, during a brief period during which he was in plain view of his fourteen-year-old son, Fred Jr., and during which his antagonistic father-in-law stood only a few yards away from him.

A key element of the State's case against Mr. Way was the testimony of his youngest daughter, twelve-year-old Tiffany. As will be demonstrated, Tiffany made many statements to the police. Her initial statements to the police did not incriminate her father. In fact, these statements support the allegations in Mr.

Way's Brady claim. Her statements changed only after she had spent time with Carol Way's parents, Tiffany's maternal grandparents.

Less than twenty-four hours after the tragic fire, Tiffany told the police that she heard her mother and sister fighting for about five minutes in the garage. (PC-R1. 1508, 1512, 1515). She ***repeated*** this information in a statement to the police three days later (PC-R1. 1527, 1530-1535, 1540, 1544, 1545).

Tiffany also initially told police the day after the fire that she heard her mother and Adrienne in the garage ***after*** her dad, Mr. Way, left the garage. (PC-R1. 1507, 1516). She told police this again three days later (PC-R1. 1532-1535,1540,1544, 1545).

At trial, the State argued that Mr. Way killed his wife before calling Adrienne to the garage. However, Tiffany initially stated that she heard her mother after Adrienne went into the garage (PC-R1. 1507, 1508, 1512, 1515, 1516) telling the police this ***again*** three days later (PC-R1. 1527, 1530, 1531-1535, 1540, 1544, 1545).

Tiffany initially told police that Adrienne shot Fred, Jr. in the face with a B.B. gun (PC-R1. 1549-1551). She also initially told police that Adrienne was "bad", "nasty" and violent (PC-R1. 1541, 1548-1551, 1552, 1553) and that Adrienne and Carol had fights (PC-R1 1504, 1552).

However at trial, five months later, after living with her maternal grandparents and after being hypnotized by a State hypnotist, the jury heard an entirely different story. Tiffany testified that her mother and sister got along, cooked, sewed, and watched television together (PC-R1. 1698); that on the day of the fire her father sent her and her sister, Adrienne, to their bedroom to play a game (PC-R1. 1705); that, after ten to fifteen minutes, he told Tiffany to stay in their bedroom and called Adrienne into the garage (PC-R1. 1705, 1706); that she never heard her mother's voice after Adrienne left the garage (PC-R1. 1714); that 30-40 seconds later she heard Adrienne screaming and crying as she yelled out, "Tippie" (Tiffany's nickname) (PC-R1. 1707); that after another 30-60 seconds, her father walked from the garage, down the hall, and past Tiffany and Adrienne's room (PC-R1. 1708-1711); that he went into the bathroom to get his cigarettes (Id) that her father walked back down the hall and out to the patio in the back yard (PC-R1. 1708); that she heard Adrienne scream again (Id) that she then looked out her window and into the half-open garage door and saw a "a can rolling and a line of fire" behind it (Id) that she ran to the kitchen where her father was reentering the house from the patio (PC-R1. 1711); that she saw smoke coming from under the door from the kitchen to the garage (PC-R1. 1733); that her father told her not to open the door (PC-R1. 1711); that she asked her father if she should

call the fire department, but he did not respond (PC-R1. 1712); and that she then ran out of the house to a neighbor's to call the fire department. (PC-R1. 1712).

At the 1988 evidentiary hearing Mr. Way called Sergeant George Moore, the Hillsborough County Sheriff's Office's hypnotist who hypnotized twelve-year-old Tiffany Way before she testified at trial. (See Appendix C (Transformation of Tiffany Way's Testimony)). The substance of Mr. Moore's testimony was that he was unfamiliar with the standard susceptibility tests used most frequently by experts in his field, that he was "not sure that there is anyone that cannot be hypnotized," that he had no advanced degrees in psychology or psychiatry, and that his training in hypnosis consisted of several afternoons in people's living rooms and a single three-day workshop. (1988-R1. 70; 74; 77).

Mr. Way's jury never heard of Sergeant Moore's qualifications (or lack thereof), because Mr. Way's trial counsel never told the jury that Tiffany had been hypnotized.

At the 1988 evidentiary hearing, Mr. Way also presented the testimony of Dr. Robert Buckhout, a licensed psychologist, professor of psychology at Brooklyn College, and faculty member at the John Jay College of Criminal Justice, as an expert in memory, memory recall, memory retention, and the effects of

hypnosis on memory. (1988-R1. 100-107; see also 1988-R1. Defense Exhibit 6 (Vita of Dr. Robert Buckhout).

Dr. Buckhout was asked to examine all of the testimony given by twelve-year-old Tiffany Way in connection with this case--from her statements given to police shortly after the fire through her trial testimony. (See Appendix C (Transformation of Tiffany Way's Testimony)). Having researched for more than twelve years the effects of hypnosis on memory, he testified that hypnosis is not a scientifically valid technique for producing memory change or enhancement. See, e.g., 1988-R1. 104-5, 119, 123, and 127. He testified that hypnosis tends to reduce memory, that much of what comes out during hypnosis is false, that "fantasy" is the very nature of hypnosis, and that hypnosis "creates" memory. Id. With regard to the State's hypnosis of Tiffany Way, Dr. Buckhout testified that any testimony change that happened during or after hypnosis is highly suspect. (1988-R1. 126; see also Appendix C (Transformation of Tiffany Way's Testimony)). He testified that the methods used by the State were unreliable and condemned by experts in the field and that the method employed with Tiffany leads the subject into "lying to please [the hypnotist]." (E.g., 1988-R1. 121-122, 127-129). He testified that a child's memory is more likely to be adversely influenced by hypnosis, and of the methods of questioning Tiffany, Dr. Buckhout testified that the sessions "had more bias and downright suggestive and leading

questions in them than I have ever seen before." (1988-R1. 128-129, 133).

Regarding the conduct of the hypnosis session, Dr. Buckhout further testified that "the people conducting the interviews, including the hypnotist, were transmitting [to Tiffany] their dissatisfaction with anything but a clear-cut generation of memories that would help support a negative case against the defendant." (1988-R1. 135). He testified that such techniques "essentially lead an individual to change their verbal reports so that this falsified verbal report, if you will, becomes their memory for all practical purposes in future settings." (PC-R1. 136). Furthermore, he testified that "people who have been hypnotized generally show an increase in their overall [confidence] level" regarding the information about which they have been questioned. Id.

When questioned about Sergeant Moore's qualifications, Dr. Buckhout testified in no uncertain terms that he believed a hypnotist of Sergeant Moore's qualifications to be highly unqualified. See 1988-R1. 139-155.

Finally, Dr. Buckhout testified that in his expert opinion it appeared to him that Tiffany was trying to please the hypnotist with her answers, that based upon "how [Tiffany's] statements changed from the first one to the trial testimony . . .to a reasonable degree of medical certainty" the influence of

biased police questioning and hypnosis influenced the change in Tiffany's testimony, and that there was no doubt in his mind that both the pretrial questioning and the hypnosis session influenced Tiffany's ultimate trial testimony. (See 1988-R1. 157, 164, and 178; see also Appendix C (Transformation of Tiffany Way's Testimony)).

Dr. Sidney Merin, a psychologist on the circuit court's list of approved psychologists, testified at the 1988 evidentiary hearing and corroborated Dr. Buckhout's testimony regarding the effect of hypnosis on Tiffany Way, adding:

> "[The jury was] not even told of it, which in its very nature is so important an event it should have become a part of the total record. The effect of being hypnotized, by the way, is not a benign one, particularly is that true if it's a child being hypnotized."

(1988-R1. 224); see also 1988-R1. 226-237 (wherein Dr. Merin condemned the State's method of hypnotizing Tiffany, characterizing it as "bizarre", and attributed the changes in Tiffany's testimony--from exculpatory to inculpatory -- to the hypnosis as well as coercion on the part of her maternal grandparents, stating, "You have a totally different individual. Now she can't recognize what is real and what is not real.")); see Appendix C).

When asked to comment on whether he believed Tiffany's memory was more reliable when she first spoke to police or at trial, Dr. Merin testified:

> [A]fter three days an individual remembers about ten percent of what they heard, about thirty percent of what they have seen, and about sixty-five percent of what they have heard and seen. . . . [A]fter three days beyond that, you get into a real trouble area as to a clear and objective description of what had occurred.
>
> Now, if on top of that, during that after-three-day period, you are influenced by what others may have said or didn't say over a period of time, you are going to have some real trouble. Your degree of suggestibility and your vulnerability to the intrusion of what others want you to say becomes very great.

(1988-R1. 258).

Dr. Merin called into question the interrogatory methods of Detective Marsicano, the lead detective in the case who questioned Tiffany repeatedly over the months between the fire and the trial, stating that, "[H]e made many suggestions. . . . He introduced what he would like her to think. He questioned her thinking." (1988-R1. 259). Dr. Merin emphasized the danger of this type of questioning with a "suggestible child." Id.

In conclusion, Dr. Merin testified that to a reasonable degree of medical psychological certainty Tiffany Way's statement to the police on July 12, 1983, was more accurate and reliable than her trial testimony, and that the hypnotic session and the other questioning that took place after that statement had an undue influence on her trial testimony. (1988-R1. 267, 269).

But, again, Mr. Way's jury was never privy to these facts--just as they were never privy to the fact that the hypnosis even took place.

The foregoing discussion of the transformation of Tiffany Way's version of events and how she was coerced into dramatically changing her story--from a highly exculpatory one placing Mr. Way away from the garage where Carol and Adrienne were arguing prior to the fire, to an inculpatory one bearing little to no resemblance to her original accounts--between the days immediately following the fire and the trial months later (i.e., how *all* of the information used at trial to support the State's theory contradicted the several statements Tiffany gave to police during the days immediately following the fire), during which time she was hypnotized by the State and living with her maternal grandparents gain new meaning when viewed in light of the evidence learned from the withheld circuit breaker box photograph.

At trial, fourteen-year-old Fred Way, Jr., testified that on the afternoon after the fire he saw his father pick up a wooden-handled hammer (that later tested positive for blood but was not produced by the State at trial (see 1988-R1. 465-467; see also 1988-R1. Defense Exhibits 19 and 20))[6] in the garage and place it

6 To this day it remains unexplained that **two** hammers were found that were tested presumptively positive for blood. Again, the record taken as a whole shows that Mr. Way is entitled to relief.

back down on the floor. (PC-R1. 1865). He then testified that he thereafter saw his father pick up a rubber-handled hammer, walk to the back yard with it, and throw it over the fence behind their house. (PC-R1. 1866).

In light of Fred Jr.'s testimony at trial that he saw Mr. Way throwing a hammer over the back fence after the fire and the State's theory that Mr. Way beat his daughter, Adrienne, to death with the hammer, Fred, Jr.'s recantation and explanation that he was coerced to so testify by the police, the state attorney, and his maternal grandparents, and his statement that, in fact, he only saw his father crying in the back yard, should be considered in a cummulative analysis because it impeaches the State's theory and supports the testimony of Ms. Posey and Dr. Feegel. (Supp. PC-R1. 315-318)(Affidavit of Fred Way, Jr.). If the question for the jury came down to whether Mr. Way beat his daughter to death with a hammer, or whether an accidental explosion occurred propelling her into the weight bench, Fred Jr.'s recantation becomes highly relevant and exculpatory.

Furthermore, Fred Jr.'s sworn statement regarding how both he ***and*** his sister, Tiffany, had been coerced by the police and their grandparents would have made the jury aware of the misconduct occurring behind the scenes, would have further discredited the State's case, allowing the jury even more fully

to accept Tiffany's earliest accounts to the police and Ms. Posey's theory of an accidental fire.

At the trial, the State produced two witnesses, Randall Hielmeier and Michael Tumbelson, who testified that, in their opinions, Mr. Way failed to act appropriately during the garage fire in which his wife and daughter burned to death. But, Dr. Francis Smith, a court-recognized expert in audiology, testified at the 1988 evidentiary hearing regarding objective tests performed on Mr. Way's hearing, testifying that he was totally deaf in his left ear and suffered significant hearing loss in his right ear (which problem is exacerbated by stressful situations) at the time of the fire. (1988-R1. 38-45). Dr. Smith testified that Mr. Way should have had a hearing aid at the time of the fire, and that his lack thereof explains his failure to respond initially to the witnesses, witnesses who testified at trial that they had to repeat questions to Mr. Way (e.g., "Is anyone in the house?") before he answered them. Id.

This evidence, which has never been heard by a jury, is in direct conflict with the State's theory that Mr. Way ignored the people trying to help rescue his wife and daughter in order to give the fire time to burn. This evidence supports Mr. Way's theory of an accidental fire originating at the faulty circuit breaker panel.

In addition to addressing the problems with Tiffany's hypnotized statements, Dr. Sidney Merin also testified at the 1988 evidentiary hearing that based upon a battery of psychological tests he performed, Mr. Way suffers from right-brain impairment to such a degree that his personality is "subdued," and that within a reasonable degree of psychological certainty this would explain any non-reaction on his part at the time of the fire. (1988-R1. 216). This expert opinion, that was never heard by Mr. Way's jury due to ineffective counsel, is in direct conflict with the State's theory at trial that Mr. Way's subdued emotions indicated that he had committed the murder of his wife and daughter.

Furthermore, Dr. Merin testified that "The probabilities are very great that [Mr. Way] is not prone to violence or that type of destructive behavior." (1988-R1. 264). He testified that Mr. Way:

> was not a sociopathic personality, he did not have antisocial tendencies, and that the basis for the toned-down quality of his behavior, subdued nature, the non-reactive type of personality, was a function of characteristics other than the insensitivity of a sociopath.

(1988-R1. 217).

Ms. Slaton's proffered testimony at the most recent evidentiary hearing must be considered as well. See Argument II C., supra.

During the 1988 evidentiary hearing, Pat Doherty, an attorney accepted by the court as an expert in the local standards of practice, testified that the trial attorney's failure to seek proper psychological expert testimony was tantamount to performing surgery without washing one's hands. (1988-R1. 322). This Court should consider this evidence as well as Mr. Rankin's testimony that he had no strategic reason for his failure to properly impeach the State's theory or his failure to seek proper psychological expert testimony. (See generally, 1988-R1 346-404).

This testimony, which is both probative of innocence and relevant to sentencing, was never heard by Mr. Way's jury who were left to accept the State's unchallenged assertion that Mr. Way was a sociopath. Taken in conjunction with the exculpatory evidence learned from the photograph of the faulty circuit breaker box, the jury would have been given compelling evidence of Mr. Way's innocence.

Joseph Dunville, a former coworker of Mr. Way's who had known him and his family for several years was presented at the 1988 evidentiary hearing. Mr. Dunville testified that he "knew that there had been a history of problems [between Carol and] **Adrienne**." (1988-R1. 278 (emphasis added)). This is yet another fact that was never heard by Mr. Way's jury and which corroborates Mr. Way's testimony and theory, Tiffany's pre-

hypnosis testimony, and Fred, Jr.'s Affidavit. (See also Appendix C; Supp. PC-R1. 315-318 (Affidavit of Fred Way, Jr.)).

Also at the 1988 evidentiary hearing, Gertrude McFadden testified that she was a counselor at the Tampa Center for Women in 1983 and that Carol Way was one of her clients. Ms. McFadden testified that Carol "never discussed a problem with Mr. Way with me," but that Carol did indicate that "she was having a problem" with one of her daughters. (1988-R1. 423-424). This testimony directly rebuts the State's theories at trial that Mr. and Mrs. Way were having marital difficulties and that Carol and Adrienne Way had no interpersonal problems, and it supports Mr. Way's theory of Adrienne's having beaten her mother before the two perished in an accidental fire begun at the faulty circuit breaker panel. However, Mr. Way's jury deliberated without the benefit of ever having heard any of Ms. McFadden's testimony.

Mr. Raymond Shipley, a coworker of Mr. Way's for several years and whose family spent time with the Way family, testified at the 1988 evidentiary hearing that Mr. Way was a good husband and father and that Carol had disciplinary problems with Adrienne. (1988-R1. 431-432). Again, Mr. Way's jury never had the benefit of such testimony which rebuts the State's theory at trial and supports Mr. Way's theory that, on the day of the fire, Adrienne beat her mother to death with a blunt object and was

then thrown into the weight bench when an electrical malfunction started a fire in their garage.

Thomas Way, Mr. Way's half-brother with whom he grew up also testified at the 1988 evidentiary hearing. Thomas Way testified that he had not "ever seen Fred mad in my life, violent, or [getting] angry with anybody." (1988-R1. 440). This testimony rebuts the State's theory at trial, corroborates that of Psychologist Dr. Merin ("The probabilities are very great that [Mr. Way] is not prone to violence or that type of destructive behavior." (1988-R1. 264.)), and is highly probative of Mr. Way's innocence. However, Mr. Way's jury never had the benefit of hearing any such testimony.

Furthermore, Thomas Way testified that, after the fire and his brother's arrest, his sister called the Andrewses (Fred Way's in-laws) and Ms. Andrews hung up on her. Thomas testified that he too called the Andrewses to see if he could visit his niece and nephew, Tiffany and Fred, Jr. (1988-R1. 442). He testified that the Andrewses would not let him and his wife visit with the children alone and would only bring the children to see them at their hotel, accompanied by Mr. and Mrs. Andrews. Id. He testified that during his first visit to Tampa after the fire, Fred, Jr. said to him that he (Fred, Jr.):

> was glad Adrienne was dead, because for the last year or so, all she wanted to do was hurt someone. Mrs. Andrews corrected him right quick, said, 'Son, you ought not to say

> that, because she is not here to defend herself.'

(1988-R1. 445-446, 450).

Additionally, Thomas Way testified that:

> At the hotel Ms. Andrews made the remark several times [that the children couldn't leave to visit with Thomas and his wife because], 'After all, your brother killed our daughter,'" --

and that these statements were made in front of both Tiffany and Fred, Jr. (1988-R1. 442-443). Thomas Way further testified that on a visit with the children shortly before the trial, "everything that was said, [the children] would look at the grandparents before they answered." (1988-R1. 446).

But this testimony, which impeaches the testimony of the Andrewses (that they never discussed their thoughts about Mr. Way's guilt or innocence in front of Tiffany or Fred, Jr.), impeaches the State's theory, and corroborates the psychologists' testimony regarding the changes over time in Tiffany's and Fred, Jr.'s testimony, was never heard by Mr. Way's jury.

Ms. Lois Hackle, Mr. Way's half-sister who had spent a significant amount of time around the Way family testified at the 1988 evidentiary hearing that Mr. Way was a good husband who loved his family and never had any trouble with them. (1988-R1. 455). Though this testimony rebuts the

evidence of motive and character produced by the State, and corroborates Tiffany and Fred, Jr.'s original statements as well as the diagnoses by Doctors Merin, Smith, and Buckhout, Mr. Way's jury never had the opportunity to hear it.

Evelyn Way, Mr. Way's half-sister who knew him from childhood, testified during the 1988 evidentiary hearing that Mr. Way had "[n]o temper that I have ever seen." (1988-R1. 459). Again, this testimony rebuts the State's theory at trial, corroborates that of Psychologist Dr. Merin ("The probabilities are very great that [Mr. Way] is not prone to violence or that type of destructive behavior." (1988-R1. 264), and is highly probative of Mr. Way's innocence. However, Mr. Way's jury deliberated without the benefit of hearing any such testimony.

At trial, the State produced Bill Myers (fire and arson investigator from the Hillsborough County Sheriff's Office), William Martinez (investigator from the state fire marshal's office), and Henry Regalado (retired HCSO detective and investigator from SEA, Inc., a private firm investigating the fire on behalf of an insurance company) to support its theory that Mr. Way intentionally set the garage fire that claimed the lives of his wife and daughter.

Bill Myers, fire and arson investigator with HCSO, trained under another State witness, Henry Regalado.

Implausibly, his memory of events at the evidentiary hearing was more precise than it had been fourteen years earlier at trial. E.g., compare PC-R1. 2337 (trial transcript) ("I arrived approximately 12:45 hours.") with PC-R1. 930 (wherein Myers recalls getting the call to Mr. Way's home at precisely 12:54 p.m.).

The gist of Myers' testimony was that he had determined that the fire originated in the northwest corner of the garage because of the "strong smell of gasoline." When asked by the assistant state attorney, in whose possession the withheld photograph was later discovered, Myers further testified that he:

> "[w]ent to the electrical breaker panel that was located on the north [sic] wall and checked to see if there had been any indications of localized heat or if any of the breakers had been tripped indicating that there had been a short."

(PC-R1. 2355-2356).

Contrary to the evidence seen in the withheld photograph (Appendix A), Myers testified that he found **no such problems**. The withheld photograph clearly shows tripped breakers and soot deposits. William Martinez, the investigator from the state fire marshal's office who accompanied Myers during his investigation, likewise testified that he determined, due to the smell of gasoline, that the fire was intentionally set in the northwest corner of the garage. (PC-R1. 2388). Like Myers, and contrary to

the evidence seen in the withheld photograph, he testified that he ruled out any electrical shortages in the garage by examining the breaker panel. (PC-R1. 2390).

The State's final arson expert was Henry Regalado, a retired employee of the Hillsborough County Sheriff's Office who examined the garage on behalf of the Kemper Insurance Company. Mr. Regalado met his friend of three years, William Martinez, at the garage the day after the fire. (PC-R1. 2406-2410). Like Martinez and Myers, he testified to smelling gasoline in the northwest corner of the garage and finding two unburned books there, soaked in gasoline. Unlike Martinez and Myers, he opined that the fire started in the area near Adrienne, notwithstanding the absence of any other burned materials in her vicinity. (PC-R1. 2424).

The substance of the testimony given by Ms. Eleanor Posey, the only witness to testify to date in Mr. Way's case who is an expert in both electrical engineering and fire/arson investigation, is set out *supra* at pages 3-9. However, certain aspects warrant closer inspection in light of the required cumulative analysis and comparison with the evidence adduced by the State at Mr. Way's trial.

As was noted earlier, Mr. Way's guilt-phase jury was deadlocked for two days before being sent back by the trial judge to come up with a unanimous verdict, and his penalty phase jury came back with a seven-to-five recommendation of the death

penalty. The closeness of the jury verdicts in both instances leads one to conclude that the slimmest inroad into the State's case at trial would give rise to a reasonable probability of a different outcome. Ms. Posey's theory, borne of and supported by the withheld photograph (Appendix A), would have given the jury much more than a slim inroad into the State's theory; it would have given them an alternate theory of the fire (whereas *no* theory at all was presented by Mr. Way's trial counsel) and it would have impeached ***all three*** of the State's fire experts.

The photograph impeaches the testimony of the State experts that they inspected the circuit breaker box and found no tripped breakers (which also leads one to wonder whether the withholding of the photograph was accidental). Ms. Posey's testimony that wet gasoline would not have remained in the northwest corner of the garage if the fire had been set there impeaches the State's experts' testimony that the presence of gas is what led them to conclude that the corner was the area of origin of the fire. Ms. Posey's testimony that if Mr. Way had poured out the two-plus gallons of gas, that the State's experts claimed he had poured out before starting the fire, the garage would have been blown away by the force of the explosion, further rebuts the State's experts and theory. The jury never heard any of this evidence. As Mr. Rankin testified:

> I didn't offer much as far as an explanation as to how the fire was started.

(PC-R1. 829).

To date, there has been no evidence offered by the State to refute Ms. Posey's theory, and had Mr. Way's jury had the benefit thereof (along with the withheld photograph), there is far more than a reasonable probability of a different outcome.

The substance of Dr. John Feegel's testimony is set out, *supra*, at pages 9-11. It should be emphasized here, however, that in addition to the support it lends to Ms. Posey's conclusion that the garage fire was caused by a vapor ignition originating at the circuit breaker panel, and the fact that it rebuts the State's theory of gasoline having been poured on the two victims, it (in conjunction with Fred, Jr.'s testimony) would have given the jury a reasonable theory as to how Adrienne sustained her head wounds: she was propelled into the weight bench that was discovered broken next to her head after the fire. (See Appendix B)(photograph of broken weight bench bar). At trial, the jury had no such alternate theory to consider due to the State's withholding of the photographs at issue herein.

The proffered testimony of Sean Rooker--that the police altered his statement to destroy its exculpatory nature--is highly relevant in light of the withheld photograph. Had the statement not been falsified by the police, (or had the fact that it was falsified been disclosed and had the withheld photograph been properly disclosed), Mr. Rooker's account that he heard an

explosive “pop” come from the garage immediately before the fire started would have lent eyewitness support to Ms. Posey’s theory of a vapor explosion. However, due to misconduct by the State, Mr. Way’s jury never heard this evidence. Had they, there is no question that the outcome of his trial would have been different.

The testimony of Mr. Rankin, Mr. Way’s trial counsel, is discussed *supra* at pages 13-14. The import of his testimony--that he lacked a theory at trial of how the fire started--cannot be overemphasized in light of the fact that even without such a theory the jury was deadlocked after two days and the recommendation of death was by the slimmest possible margin. Had the withheld photographs been properly disclosed, and had Ms. Posey’s theory based thereon been presented to the jury, there can be little doubt that the outcome of Mr. Way’s trial would have been different.

In order to insure that an adversarial testing, and hence a fair trial, occur, certain obligations are imposed upon both the state and the prosecutor. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and `material either to guilt or punishment'". United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). Exculpatory and material evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/or

capital sentencing trial would have been different. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984). This standard is met and reversal is required once the reviewing court concludes that there exists a "reasonable probability that had the [unpresented] evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 680. The prosecution's suppression of evidence favorable to the accused violates due process. United States v. Bagley. The prosecutor must reveal to defense counsel any and all information that is helpful to the defense, whether that information relates to guilt/innocence or punishment, and regardless of whether defense counsel request the specific information. A defendant's right to present favorable evidence is violated by such state action. See Chambers v. Mississippi, 410 U.S. 284 (1973); see also Giglio v. United States, 405 U.S. 150 (1972). Ineffective assistance of counsel can also be a denial of the adversarial testing to which an accused is entitled. Strickland.

Whether it is due to the failure to disclose evidence, ineffective assistance of counsel or newly discovered evidence, Mr. Way was denied a full adversarial testing. Under any of the standards, he is entitled to a new trial. Mr. Way is also entitled to a new sentencing proceeding. Garcia v. State, 622 So. 2d 1325 (Fla. 1993).

CONCLUSION

As can be seen from the foregoing, the exculpatory photograph (Appendix A) that was withheld by the State gives rise to a reasonable theory that impeaches the State's theory at trial and the State's expert witnesses. When this theory is viewed in light of the closeness of the jury verdict, and in conjunction with the evidence of witness manipulation and fraudulent alteration of a police report, none of which were ever heard by Mr. Way's jury, in addition to all of the other evidence adduced during postconviction that the jury did not hear, there is but one reasonable conclusion: that had the improperly withheld photographs been disclosed prior to Mr. Way's trial, there is no question that the outcome would have been different.

Based on the foregoing, Mr. Way respectfully requests that he be granted a new trial at which he will have a fair opportunity to the adversarial testing to which he is constitutionally entitled. At a very minimum, undersigned counsel requests that this Court remand Mr. Way's case to the lower court for full and fair evidentiary development.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on November 10, 1998.

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