IN THE SUPREME COURT OF FLORIDA

FRED LEWIS WAY,

Appellant,

vs. **CASE NO.78,640**

STATE OF FLORIDA,

Appellee.

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ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

The following abbreviations will be utilized to cite to the record in this case:

“PCR” - record on appeal in the instant proceeding;

“SPCR” - supplemental record on appeal in the instant proceeding;

“R” - record on direct appeal.

“R1" - record on appeal from 1988 3.850 hearing

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is presented in 12 point Courier New, a font that is not proportionately spaced.

STATEMENT OF THE CASE AND FACTS

Appellee objects to the statement of case and facts as presented by the appellant as incomplete, misleading and argumentative. Accordingly, the following is offered to supplement and/or clarify the statement of the case and facts recited by the appellant:

Procedural History

Way was charged with the first degree murder of his wife and daughter in the garage of their home. At the original trial, the State established that Way beat both women in the head with a hammer, poured gasoline on them, and set them on fire. Way was convicted of the first-degree murder of his daughter, the second-degree murder of his wife, and arson. He was sentenced 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).

Subsequently, Way filed a motion for postconviction relief which was denied after an evidentiary hearing. Way appealed the denial to this Court, raising the following issues:

> CLAIM I
> MR. WAY WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.
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> CLAIM II
> MR. WAY WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL PROCEEDINGS,

IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM III

THE PRINCIPLES OF FLOYD V. STATE, 479 SO. 2D 1211 (FLA. 1986), LOCKETT V. OHIO, 438 U.S. 586 (1978), AND HITCHCOCK V. DUGGER, 107 S. CT. 1821 (1987), WERE VIOLATED BY THE TRIAL JUDGE'S FAILURE TO ADEQUATELY INSTRUCT THE JURY ON MITIGATING CIRCUMSTANCES, AND MR. WAY'S SENTENCE OF DEATH THEREFORE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM IV

MR. WAY WAS DENIED HIS RIGHTS TO AN INDIVIDUALIZED AND FUNDAMENTALLY FAIR AND RELIABLE CAPITAL SENTENCING DETERMINATION AS A RESULT OF THE PRESENTATION OF CONSTITUTIONALLY IMPERMISSIBLE VICTIM IMPACT INFORMATION, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM V

THE USE OF UNCONSTITUTIONALLY UNRELIABLE HYPNOTICALLY INDUCED TESTIMONY AGAINST MR. WAY AT HIS CAPITAL TRIAL VIOLATED HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM VI

THE TRIAL COURT RELIED ON MISINFORMATION OF CONSTITUTIONAL MAGNITUDE IN SENTENCING MR. WAY TO DEATH, THEREBY RENDERING HIS DEATH SENTENCE FUNDAMENTALLY UNRELIABLE AND VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM VII

THE TRIAL COURT'S RELIANCE ON AGGRAVATING CIRCUMSTANCES (5)(C) IN ITS FINDINGS IN SUPPORT OF THE DEATH SENTENCING, AFTER DENYING THE STATE'S REQUEST FOR A JURY INSTRUCTION ON THAT ISSUE, VIOLATED MR. WAY'S RIGHTS UNDER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM VIII

THE COURT'S INSTRUCTIONS ON FELONY MURDER WERE IN ERROR SINCE THE PROSECUTION'S THEORY WAS THAT THE KILLING WAS THE INTENDED RESULT OF THE ARSON.

CLAIM IX

MR. WAY WAS DENIED HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS BY THE TRIAL COURT'S REFUSAL TO ALLOW THE TESTIMONY OF MR. WAY'S CLINICAL PSYCHOLOGIST.

CLAIM X

THE EIGHTH AMENDMENT WAS VIOLATED BY THE SENTENCING COURT'S REFUSAL TO FIND THE MITIGATING CIRCUMSTANCES CLEARLY SET OUT IN THE RECORD.

CLAIM XI

THE LACK OF STANDARDS GUIDING AND CHANNELING SENTENCING DISCRETION IN THE APPLICATION OF THE "HEINOUS, ATROCIOUS, OR CRUEL" AND "COLD, CALCULATED, AND PREMEDITATED" AGGRAVATING CIRCUMSTANCES VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XII

MR. WAY'S DEATH SENTENCE IS PREDICATED UPON THE FINDING OF AN AUTOMATIC, NON-DISCRETION-CHALLENGING, STATUTORY AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

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THROUGHOUT THE COURSE OF THE PROCEEDING RESULTING IN MR. WAY'S CAPITAL CONVICTION AND SENTENCE OF DEATH, THE JURY WAS PROVIDED WITH MISINFORMATION WHICH SERVED TO DIMINISH THEIR SENSE OF RESPONSIBILITY FOR THE AWESOME TASK THAT THE LAW WOULD CALL ON THEM TO PERFORM, IN VIOLATION OF CALDWELL V. MISSISSIPPI, 105 S. CT. 2633 (1985), AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XIV

THE TRIAL COURT'S UNCONSTITUTIONAL SHIFTING OF THE BURDEN OF PROOF IN ITS INSTRUCTIONS AT SENTENCING DEPRIVED MR. WAY OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XV

THE STATE'S COMMENT AND TRIAL COURT'S INSTRUCTIONS THAT A VERDICT OF LIFE IMPRISONMENT HAD TO BE RENDERED BY A MAJORITY OF THE JURY MATERIALLY MISLEAD THE JURY AS TO ITS ROLE AT SENTENCING AND CREATED THE UNCONSTITUTIONALLY UNACCEPTABLE RISK THAT DEATH MAY HAVE BEEN IMPOSED DESPITE FACTORS CALLING FOR LIFE, IN VIOLATION OF MR. WAY'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIMS XVI
THE IMPROPER INTRODUCTION OF INFLAMMATORY AND PREJUDICIAL PHOTOGRAPHS AT MR. WAY'S CAPITAL TRIAL VIOLATED HIS EIGHTH AMENDMENT RIGHT TO A RELIABLE CAPITAL TRIAL AND SENTENCING DETERMINATION.

Way also filed a petition for a writ of habeas corpus raising the Hitchcock claim.

This Court affirmed the denial of the motion for postconviction relief but granted habeas relief based on Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). This Court vacated Way's death sentence and ordered resentencing before a new jury. Way v. Dugger, 568 So.2d 1263 (Fla. 1990).

At the resentencing proceeding, the jury again recommended death by a vote of seven to five. The trial court followed the jury's recommendation and sentenced Way to death. Way then appealed his death sentence. Contemporaneously, Way also sought review of the summary denial of his second motion for postconviction relief. The proceedings in both cases were consolidated for purposes of review in this Court.

On appeal from the denial of his motion for postconviction relief, Way alleged that the State had withheld photographs which show an electrical breaker box in the garage, with four or five tripped circuits, in close proximity to a propane gas tank. He alleged that the circuit breakers tripped because of an electrical malfunction, thereby causing a spark that ignited the propane gas and that the photographs showing the tripped breakers and the

proximity of the breaker box to the propane tank would have supported this theory of defense. (Initial Brief of Appellant-dated March 1, 1993, pgs.9-10).

This case was remanded by this Court to the lower court for an evidentiary hearing to be held with regard the photographs. Ruling on the direct appeal from resentencing was withheld pending the outcome of the evidentiary hearing. Way v. State, 630 So.2d 177, 178-179 (Fla. 1993)

Upon remand, an evidentiary hearing was held before Honorable Bob Anderson Mitcham, Circuit Judge, in and for the Thirteenth Judicial Circuit. After hearing all the evidence, Judge Mitcham denied relief on September 19, 1996. (Vol 1, SPCR. 180-85) After this Court granted Way's Writ of Prohibition, Way v. Mitcham, 682 So.2d 1101 (Fla. 1996), a second evidentiary hearing was held before the Honorable J. Rogers Padgett, Circuit Judge, in and for the Thirteenth Judicial Circuit.

After hearing the evidence and argument from counsel, Judge Padgett issued an Order Denying Petitioner's Rule 3.850 Motion for Post-Conviction Relief on July 23, 1997. (Vol. 1, PCR 333) Judge Padgett found that Way failed to demonstrate he was entitled to relief under Brady v. Maryland, 373 U.S. 83 (1963). *The court specifically found that the photograph in question was disclosed, that the alternative theory of defense was incredible and that the*

opinion of fire expert Eleanor Posey defies logic. The court also found that Ms. Posey's opinion was inconsistent with the physical evidence at the fire scene and was refuted by the testimony of on-scene fire investigators and an electrical engineer. (Vol II, PCR 330-31) Specifically, the court found in pertinent part:

> 2. Specifically, although the court believes that trial counsel did not have possession of the disputed photos at trial, *the court finds that they were in fact disclosed*. . . .
>
> * * *
>
> 6. And even if presented at a new trial as exculpatory in support of an alternative theory of defense the likelihood of a different outcome is nil. This is so because the suggested alternative theory of defense is incredible. The victim of the capital murder suffered two (2) severe, one probably even lethal, blows to her skull. According to the alternative theory these wounds occurred when she was knocked down against a weight-lifting bench by the force of an explosion which occurred when unknown flammable vapors were ignited by some unknown malfunction of the circuit breaker box. Incredibly, according to the alternative theory, this occurred a moment after the victim had inflicted about a dozen severe wounds, identical to her own and again probably even lethal, to the skull of her mother. Then, according 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.
>
> 7. There was not a withholding of the photographs by the prosecution. Even if there was, the overwhelming circumstantial evidence admitted at trial supports the conclusion that no reasonable probability exists that possession of the photographs by Petitioner prior to trial would have resulted in a different outcome. These photographs and the expert opinions drawn therefrom are not of

> such a nature that they would probably produce an acquittal on retrial. The opinion of fire expert Eleanor Posey 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. The testimony of Petitioner's expert in forensic pathology, Dr. Feegel, merely reiterated expert testimony presented by defense expert Dr. William Gibson during trial. Viewed in the light most favorable to Petitioner, the defense theory that an accidental fire occurred simultaneous with the victim's mutual combat is implausible. No rational juror could have found a reasonable doubt based upon the testimony adduced by Petitioner at the evidentiary hearing.
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> (Vol. II, R. 331-332)(emphasis added)

The instant appeal ensued.

Facts

a) trial evidence

The following evidence was introduced at Way's initial trial:

On July 11, 1983, the defendant, Fred Way, lived in a single family home at 8030 Jackson Springs Road with his wife of seventeen years, Carol Way, and their three children, Adrienne (15 years of age), Fred, Jr. (14 years of age) and Tiffany (12 years of age). (Vol. 6, R. 827-830) The home was a single-story structure with an attached garage. The front garage doors faced west. Access to the garage could be made from the back yard through a door on the east wall of the garage. This door was further secured by full-length iron burglar bars which were on the exterior of the door. Entry from the garage into the residence could be made through a door on

the southern wall of the garage. This door opened to a pantry area and ultimately led to the kitchen and living room of the house.

Fred Way was employed by the Federal Aviation Administration as an engineer. He had moved his family from the Atlanta area in January of 1983 following a promotion. (Vol 7, R. 1033; Vol. 8, R. 1250) While in Tampa the Ways marriage was a turbulent one. By Fred Way's account, during this time he had "serious" arguments with his wife wherein she threatened him with divorce. (Vol. 8, R. 1319) The frequency and severity of the Ways' arguments were obvious to their children. According to Fred Way, Jr., his parents had "pretty violent work arguments" concerning Fred Way's frequent absences from home on work-related travel. (Vol 7, R. 1069) In fact, two weeks before Carol Way's murder, Fred Way, Jr. overheard his mother tell the appellant that she was going to leave him and move in with her parents. (Vol 7, R. 1071) "I won't let you," the appellant warned his wife. (Id.) Tiffany Way recalled her mother repeatedly threatening to leave her father. (Vol 6, R. 833) Jacqueline Adams described the appellant as "excited" about the job offer (Vol 7, R. 1015) as did Tiffany Way (Vol. 6, R. 834) and Fred Way, Jr. (Vol. 7, R. 1073)

Shortly before the homicides, Fred Way advised his family that he had a lucrative job offer in Central America that would pay him more than $80,000 annually and provide the family with a home, luxury automobiles and tuition for the children. (Vol. 7, R. 1015;

Vol. 7, R. 1039) On July 3, 1983, or eight days before the homicides, appellant told his in-laws, George and Jacqueline Andrews, that the consent of the government of Nicaragua had been obtained thereby removing the last obstacle to Way's new employment. (Vol. 7, R. 1040) George Andrews, who had retired after a thirty (30) year career in the Air Force where he had achieved the rank of Colonel, described Fred Way as “enthusiastic” about the job offer. Carol Way's reaction to the proposal of moving to Central America, however, was far different. Her parents and her children all described Carol Way as unwilling to move to Central America due to the civil unrest and resultant danger to which her family would be exposed. (Vol. 6, R. 834-835; Vol. 7, R. 1040) Adrienne Way also resisted the proposed move to Central America. Only the two children that survived the events of July llth, Fred, Jr., and Tiffany, indicated that they would have gone to Central America with their father. (Vol. 6, R. 835, 852; Vol 7, R. 1073-74).

On July 11, 1983, the entire Way family was home when Tiffany awakened at 8:00 a.m. Later that morning, however, Fred Way took deliberate steps to secure the presence of his children at various locations away from the garage. At approximately mid-morning appellant told Fred, Jr., that “it would be a good idea for (the boy) to play basketball” at a nearby school. (Vol. 7, R. 1078) The teenager complied with his father's suggestion. Once Fred, Jr.,

was out of the house, the appellant told Tiffany and Adrienne to play in their shared room so Fred could “be alone with mama.” (Vol. 6, R. 836) The daughters complied with this directive.

Ten to fifteen minutes later Fred Way called out from the kitchen “Adrienne, come here.” (Vol. 6, R. 836) Way told Tiffany to stay in the room. (Vol. 6, R. 838) Only thirty (30) to forty (40) seconds after Adrienne left the bedroom Tiffany heard Adrienne from the garage screaming and crying out “Tippie”. (Vol. 6, R. 839) Tiffany Way was too scared to run to the garage. Three to four minutes after hearing her sister's scream, Tiffany saw her father walk down the hall separating the girls' bedroom from the bathroom. (Vol. 6, R. 840, 867) Fred Way winked at Tiffany as he went into the bathroom. He stayed in the bathroom briefly, then walked to the back patio where he smoked a cigarette. (Vol. 6, R. 840) Within moments, Tiffany heard a scream, looked out the bedroom window and saw “a can rolling and a line of fire” in the garage. (Vol 6, R. 840-841)[1] The twelve-year-old girl immediately ran through the house to the door connecting the pantry and the garage. Fred Way told Tiffany not to open the closed door. (Vol. 6, R. 843) With Fred Way only three feet from a phone, Tiffany asked him if he wanted her to call the fire department. Fred Way did not respond. (Vol. 6, R. 844) She gathered up the family dog, ran three doors

[1] The Jackson Springs residence was "L-shaped" allowing an unobstructed view from the girls bedroom to the front of the garage.

down to a neighbor's house and called the fire department. (Vol. 6, R. 844)

Within minutes, a T.E.C.O. power theft investigator, Randy Hierlmeir, happened upon the scene. He stopped his automobile upon observing smoke coming from the residence. (Vol. 4, R. 522) Hierlmeir saw Fred Way standing on the driveway near the garage door with a garden hose in his hand. Way was spraying the back of a car parked in the garage. According to Hierlmeir, Way was “very calm”. (Vol. 4, R. 526) The passerby observed that although a lot of smoke was coming out of the garage, it did not appear very hot. (Id.) Hierlmeir asked Way whether there was anyone in the garage. Way did not answer. The T.E.C.O. investigator tried a second time, but still did not elicit a response from Fred Way. Hierlmeir then heard a scream from within the garage. “[W]ho in the hell is inside the garage,” he demanded. Only then did Fred Way acknowledge that his daughter was in the garage. (Vol. 4, R. 527, 555) Hierlmeir took the hose from Way and sprayed him down completely. Nonetheless, it took Hierlmeir's push to motivate Fred Way to attempt to enter the garage where his wife and first born child were being burned alive. (Vol. 4, R. 529) Even then, Way ran only five feet into the garage before he immediately turned and ran out of the garage. (Id.) Hierlmeir heard more screams from within the garage. He then observed that smoke hovered two feet above the ground, allowing him to see a body engulfed in flames just to the

left (or North) of the car. (Vol. 4, R. 530-31) "Try to crawl towards the door," Hierlmeir encouraged this person. This individual tried to move, but just collapsed. (Vol. 4, R. 531) Fred Way stood behind Hierlmeir as the T.E.C.O. investigator encouraged the burning body to crawl to safety. During the entire time that the fire burned in the garage, no one ever had to restrain Fred Way from entering the garage. (Vol. 4, R. 536, 551) When the garage door fell shut in front of Fred Way and Randy Hierlmeir, both men went to the rear or East door of the garage.[2] Hierlmeir asked Way whether he had a key to the burglar bars which secured this door. Way denied having one, insisting that the landlord had not given him one. (Vol. 4, R. 532) This was disproved by a number of sources.

The landlord that rented this residence to Fred Way, Ira McCorriston, testified that he told Way that a key to these burglar bars was hanging on the wall in the garage and that after the Ways moved in, McCorriston replaced a water heater in the garage with a new one that he carried through this East door, which had been open upon his arrival. (Vol. 4, R. 562) Way's next door neighbor, William Fickes, saw this burglar-barred gate open "a few times" while the Way family lived next to him. (Vol 4, R. 572) Fred Way, Jr., recalled an incident where his father opened this gate to

[2] The main or front garage door, which Tiffany Way described as only three feet open when she first noticed fire, was approximately six feet open by the time Hierlmeir arrived on the scene to find Fred Way standing in front of this opened door.

allow him to run an electric cord through it. (Vol. 6, R. 653) Upon Fred Way's arrest at the home of his father-in-law, George Andrews, Way gave Andrews his key chain which contained one key with which Andrews was able to open this East door and gate. (Vol. 6, R. 624-626) Andrews later gave this key to the case detective in addition to two other keys that Andrews had recovered from the appellant's personal jewelry box. (Vol. 7, R. 625) A locksmith later determined that each of these three keys opened the dead bolt lock to the burglar bars. (Vol. 6, R. 506) Way also denied having keys to the burglar bars covering this door to a second passerby who had stopped to assist, William T. Brown. He told Brown that he didn't have keys to these burglar bars as he was merely a renter. (Vol. 4, R. 552)

Although unable to open the burglar bars, Hierlmeir was able to punch out the glass of the door behind the bars, reach in and unlock this door. (Vol. 4, R. 532) Later, a Hillsborough County paramedic, Robert Blums, opened the burglar bars with a crowbar. (Vol. 4, R. 578) Once the fire was extinguished, the bodies of Carol Way and Adrienne Way were found in the garage.

Each victim suffered 100% body burns. (Vol. 5, R. 764; Vol. 6, R. 792) According to Associate Medical Examiner Charles Diggs, the burns to each victim were consistent with gasoline having been thrown on each individual and ignited by a match. (Vol. 6, R. 813) In the view of Dr. Diggs, who conducted each autopsy and had the

benefit of observing each body at the crime scene, the burns to each victim were caused by the burning of the actual fire. (Vol 6, R. 813) The presence of “black soot deposit” (i.e., carbon particles) in the larynx, trachea and bronchus of each victim conclusively established that Carol Way and Adrienne Way were alive while the fire burned. (Vol. 5, R. 786-87; Vol. 6, R. 803) Results of tests conducted on the clothing worn by the victims by the Florida Department of Law Enforcement revealed that these clothes contained components of gasoline. (Vol. 5, R. 755)

The autopsy of Carol Way revealed that she had suffered twelve distinct and separate “deep lacerations over the head". (Vol. 5, R. 765) The shape of each of the twelve lacerations was consistent with the blunt trauma blows having been inflicted with a hammer. (Vol. 5, R. 769) Each of the blows to Carol Way's head penetrated the scalp causing contusions, swelling and hemorrhaging of the brain. (Vol. 5, R. 769-74) One of the blows produced a four-inch laceration over the lower part of the back of Carol Way's head and a skull fracture. (Vol. 5, R. 781-83) According to Dr. Diggs, each of the wounds, standing alone, was potentially fatal and could have rendered Carol Way delirious, disoriented or unconscious. (Vol 5, R. 769-84) In Dr. Diggs view, it was “not probable” that the victim remained standing after even one of the blows was inflicted. (Vol 5, R. 776) It was possible, according to Diggs, but “these individuals generally go down.” (Vol. 5, R. 767) The autopsy of

Adrienne Way revealed she had suffered two blunt impact injuries to the left side of her head. (Vol. 6, R. 792) These lacerations were also caused by a blunt instrument such as a hammer and were similar in appearance to the wounds to the head of Carol Way. (Vol. 6, R. 798) Each of the wounds, standing alone, could have produced unconsciousness and death. (Vol. 6, R. 801) One of the two wounds resulted in a depressed skull fracture "so severe that a portion of the brain tissue was seen entering the wound itself." (Vol. 6, R. 800) The blunt instrument causing this injury came into actual or direct contact with the brain tissue itself. (Vol. 6, R. 801) Dr. Diggs characterized this as "a wound which would knock you down immediately". (Id.) After these two wounds Adrienne could not have moved very much. (Vol. 6, R. 802) Each woman died as a result of blunt trauma to the head and total body burns. (Vol. 5, R. 787; Vol. 6, R. 803) An extreme amount of pain was associated with the wound to each of the victim's head. (Vol. 6, R. 807) The probability that the head wounds suffered by Adrienne and Carol Way were the result of mutual combat between the mother and daughter "is almost nil," according to Dr. Diggs. He opined that a "third person had to be involved". (Vol. 6, R. 805) The severity of each victims' head wounds ruled out a mutual combat scenario. Because Adrienne would have been incapacitated by the blow that fractured her skull, under a mutual combat scenario she would have had to

have struck each of the twelve blows to her mother's head before suffering this would. (Vol 6, R. 806)

At his first opportunity, Fred Way suggested that the demise of his wife and daughter was the result of mutual combat. Although Adrienne Way was in the garage for no more than forty (40) seconds before screaming for “Tippie,” Fred Way told everyone he could that he witnessed a violent argument between Carol and Adrienne in the garage. Way told the first deputy to arrive that while he was in the garage his wife and daughter engaged in an argument that escalated into a shoving match. (Vol. 5, R. 628-29) At that point, Carol Way fell and hit her head on some weights, according to his version. (Id) Although Way was the acknowledged disciplinarian in the house (Vol. 8, R. 1346), he obeyed his wife's direction to leave the garage and allow her to handle this situation. (Vol. 5, R. 629)

Way's accounts of the dispute between mother and daughter were rarely consistent. While still at the scene, Way told Detective Staunko that Carol Way slipped and hit her head when she stepped around the desk. At that point, according to this version, Adrienne ran over to mother and hit Carol over the head with an unknown object. (Vol. 5, R. 626) Carol refused to allow Fred Way to intercede, instead warning Adrienne: “either you are going to straighten out or I am going to kill you.” (Vol. 5, R. 627) In yet another version of the events leading up to his departure from the

garage, Way told Detective Marsciano on the day after the fire that, while working in the yard, he heard, but did not see, Carol fall while in the garage. (Vol. 6, R. 893) Way complied with his wife's request to call Adrienne to the garage. Upon entering the garage, according to this version, Adrienne immediately started arguing with her mother. (Vol. 6, R. 895) Out of the corner of his eye, while twelve feet away, Way saw Adrienne hit Carol over the head with an unknown object. (Vol. 6, R. 896-97) Way supposedly rushed over to Adrienne, grabbed her and held her back from Carol. (Vol 6, R. 897)

Within minutes of the fire having been extinguished, Hillsborough County Sheriff's Office Fire and Arson Investigator, William Myers arrived at the scene. Investigator Myers observed the heaviest fire damage in the northwest corner of the garage. (Vol. 5, R. 671) Numerous combustible items were found in this corner, including stacked cardboard boxes, books, a television, a dresser and a rollaway bed. (Vol. 5, R. 673) A two and one-half gallon gas can was found on the floor in this corner near a number of books. (Vol. 5, R. 675) One to two inches of fluid remained in the gas can. (Vol. 5, R. 677) FDLE laboratory tests identified this fluid as gasoline. (Vol. 5, R. 672) Investigator Myers found a book with a “very strong concentration of gasoline” at a location eight inches off of the floor in the northwest corner. (Vol. 5, R. 673) The concentration of gasoline and the height of the book from

the floor, in Myers' view, was not consistent with an accidental spill. Myers observed the body of Adrienne Way near the center of the garage, approximately ten to twelve feet from the body of Carol Way. (Vol. 5, R. 662) Myers found “very minimal” fire damage within the immediate area surrounding Adrienne Way. (Vol. 5, R. 667) He observed the teenager to have suffered second and third degree burns over 100% of her body. (Vol. 5, R. 668) The “very minimal” fire damage to the area surrounding Adrienne Way was not consistent with the severity and extent of the burns that she suffered. (Vol. 5, R. 668) In Myers view, there “would have had to be (the) introduction of an accelerant” such as a flammable liquid to explain the severity of Adrienne Ways burns. (Vol. 5, R. 669) Henry Regalado concurred with this opinion.

William Martinez of the State Fire Marshall’s Office also conducted an on-site investigation of the fire. His observations and conclusions on all critical issues were identical to those of Hillsborough County Sheriff's Office Investigator Myers. The gasoline which saturated this book, in Martinez’ opinion, had to have been poured rather than accidentally spilled on the book. (Vol. 5, R. 711)

On July 12, 1983, the day after the fire, Henry Regalado, a fire investigator for Systems Engineering Associates (SEA), investigated the fire scene as a result of an assignment from Kemper Insurance company. (Vol. 5, R. 734-36) His observations and

conclusions on all critical issues thoroughly corroborated those made and reached by Myers and Martinez. Mr. Regalado conducted a "waterflow" test in the garage. This test, which mapped the slope of the garage floor and the direction of a fluid's flow on the floor as a result of its slope, ruled out "an accidental spilling of gasoline" on the book in the northwest corner. (Vol. 5, R. 742-43) The only way that gasoline got on the book, according to Regalado, was as a result of having been poured thereon. (Vol. 5, R. 744) He found indications of a "very hot intense heat at floor level in the vicinity of Adrienne Way's body." Only a flammable liquid could produce such heat under the circumstances of this fire, according to Regalado. (Vol 5, R. 744) After having observed Adrienne Way's body at the morgue, Mr. Regalado concluded that her burns could only have been sustained as a result of flammable liquids in the area. (Vol. 5, R. 745)

The body of Carol Way was found underneath a window on the east wall of the garage. Investigator Myers found very limited fire damage in the area surrounding Carol Way's body. (Vol. 5, R. 669) Neither a wooden end table that abutted her back or a white wooden table near her feet were burned at all. There was no discoloration to the concrete surrounding her body. In Myers' view, Carol Way could not have sustained her fire-related injuries while located near the east wall. (Vol. 5, R. 670) This conclusion was shared by Fire Investigator Regalado. (Vol. 5, R. 647)

Fire Marshall Martinez and Fire Investigator Myers each concluded that no electrical fire had occurred in the garage. (Vol. 5, R. 711, 676) Martinez and Myers each closely examined an electrical breaker panel located on the interior garage wall near the body of Carol Way. Myers found no signs of an electrical shortage as none of the breakers had been tripped and there was no evidence of localized heat on or near the panel. (Vol. 5, R. 679) Fire Marshall Martinez and Fire Investigator Regalado placed the origin of the fire at the northwest corner of the garage where gasoline had been poured on the television, desk and other combustibles. (Vol. 5, R. 723, 750)

The nature and pattern of burn damage to the door leading to the kitchen from the garage established that the door had been closed at the time of the fire. (Vol. 5, R. 674, 747) The physical evidence observed within the garage was consistent with a trail of flammable liquid having burned across the garage floor to the kitchen door. (Vol. 5, R. 676) It was on the other side of this door that Fred Way had failed to respond to the frantic request of Tiffany Way to call the police from a nearby wall-mounted telephone. All three experts in fire examination concluded without reservation that the fire had been set intentionally and that gasoline was the exclusive accelerant. (Vol. 5, R. 681, 714, 719 and 748)

b) evidentiary hearing

The latest evidentiary hearing on Way's Brady claim was held before the Honorable J. Rogers Padgett in July of 1997. The following evidence was produced at the hearing.

Way's first witness was Eleanor Posey, who was employed in the engineering firm of Andrew H. Paine, consultant engineers, forensic engineering. Ms Posey testified that she had reviewed the files and records in this case and her conclusion about the nature of the fire was that there were two separate distinct events. She did not exclude the possibility that other things occurred but two events are more significant. She described the first event as the ignition of a flammable vapor, such as gasoline or other things viewed as flammable. The second event involved the sudden addition of a material which accelerated the fire. (Vol. 8, PCR 649-53) She based this conclusion on evidence of glass in one of the doors in the garage that was blown out of the window and landed some distance away. She testified that the absence of creosote or soot on the glass is a classic sign of an explosion. (Vol. 8, PCR 654) She eliminated fire suppression as the basis for the glass knock out because of the absence of soot. She notes that once the fire was discovered it was a relatively large fire which is characteristic of rapid ignition of vapors. (Vol. 8, PCR 654-655) She also claimed that there is a horizontal white line appearing in the photographs that followed a horizontal mortar joint, the only

thing that makes sense to her is that the wall moved enough to crack the rather brittle mortar and/or paint if it had been painted but just moved it enough so that when you suppress the fire by putting water on it that they can come off and when it comes off it is a clean surface where the soot condensed on it has fallen away. (Vol. 8, PCR 660-61) She testified that because the garage door was open there was not a large accumulation of flammable vapors. Without more damage and more sequence explosions the evidence suggested to her that a small amount poured out which would produce a large amount of vapor. (Vol. 8, PCR 662) She claimed that the initial fire was somewhat widespread by virtue of the fact that this vapor/air mixture ignited combustibles in the room. Due to the abrupt escalation of the fire, the heat intensity and the severity of the fire, she concedes that an accelerant was involved. (Vol. 8, PCR 663)

Ms. Posey speculated that gasoline found on the books which was not in the spill direction as tested by Regalado could have gotten there if the gasoline was stored on a box and if the box burnt, it could have fallen and then spread onto the books. (Vol. 8, PCR 663-5)

Ms. Posey stated that the source of ignition that she found to be the most probable source of ignition of that first event was from the circuit breaker panel, specifically from a spark created by an open breaker. (Vol. 8, PCR 672) She based this opinion the

presence of what she would describe as crow's feet pattern located on the right-hand side of the breaker box. It is a pattern she doesn't recall having seen before on an electrical panel. It says to her that this deposit is being made when the panel metal is cold because the deposit is a condensation process, essentially the products of combustion, carbon and soot and that if they are hot they remain as smoke, if they strike a cold surface then they will condense. In her opinion it is similar to the process of moisture condensing on ice water in a humid atmosphere. (Vol. 8, PCR 674-75) She opined that the overall burn pattern in the room would have exposed the left panel to more heat than the right side as shown by the burn patterns. (Vol. 8, PCR 676) If the damage to the panel was a result of natural progression of the fire, she would expect the damage to the panel to exhibit a similar angle, and the angle of the damage to this panel is a little lower, so she did not think that this heat that you see in a general fire can account for the patterns on the metal circuit breaker. She also claimed that the rust colored areas on the breaker box are rusty because those areas never received enough heat exposure during the fire to oxidize the surface, destroy the paint and allow oxidation processes of the steel to begin. (Vol. 8, PCR 678) In her opinion the the door was initially closed. (Vol. 8, PCR 679) When a circuit breaker is open, it trips when switched. If it's unloaded and there are things that have power fed by that circuit breaker,

it will generate an arc which is sufficient to ignite the flammable vapor air mixtures of almost any hydrocarbon. (Vol 8, PCR 682-83) It was her opinion that the source of the vapors that were ignited was something other than gasoline being poured on the floor. (Vol 8, PCR 684) Ms. Posey noted she understood that Mrs. Way was engaging in refinishing furniture. (Vol 8, PCR 685)

On cross-examination she admits that she would never have the opportunity to go to the fire scene at or near the time of the incident. It was her opinion that the fire that was generated within the garage was very intense in the 15 minutes that it burned, that it generated a lot of heat within the garage. (Vol 8, PCR 686-9) It was also her opinion that there was a lot of smoke and flames generated during the course of this 10 to 15-minute burn. It was her opinion that the fire was initiated by a mild range explosion. The explosion in her opinion was big enough to be heard, that it made a noise, but not a bang. (Vol 8, PCR 690) She admitted that she knew of no sworn testimony from a witness to the events on that day that describes any noise or bang that can be associated with an explosion. (Vol 8, PCR 691).

It was her opinion that the explosion that occurred at the outset of the fire was big enough to blow out the window of the door on the same wall that the electric panel was on. The garage doors face west, the panel box is on the east wall, the door with the window that she described as having blown out glass was also on

that east wall. (Vol 8, PCR 692) The door that went into the house was on the south wall, the area where the gasoline was found eight inches off the ground by fire investigators was in the northwest corner. She reiterated that in her opinion the explosion was big enough to move a concrete block wall a very minor amount. (Vol 8, PCR 693-94)

Ms. Posey admitted that in September of 1995 when she was deposed by the state that she couldn't conclusively express an opinion that the electrical distribution panel was the source of the fire. Nevertheless, without reviewing any additional materials than she had earlier, she could now conclusively opine that the electrical box was the ignition source. Further, she admitted that even after all that preparation, hours and hours of work, knowing the stakes involved back in September 1995 when she was deposed she couldn't even opine conclusively as to what the flammable vapor source was. (Vol 8, PCR 696, 702) She notes the only difference is she now has larger photographs to review. (Vol 8, PCR 703) At that time she pointed to possible ignition sources as the freezer, the water heater, the electrical distribution panel; now, however, she believes that the source of the flammable vapors was the refinishing products that Carol Way was using. (Vol 8, PCR 703) In response to the state's inquiry as to whether the only reason she is excluding gasoline as a source of the flammable vapor was because she had tied herself down to the electrical panel as the

ignition source and since the gasoline vapors would be so low on the ground it could not have been ignited by that, Ms. Posey admitted that someone pouring gasoline on the floor could have been the source of that vapor. She also adds that gasoline having spilled or knocked over for example onto the work bench or under the clothing is a possibility. (Vol 8, PCR 705)

Ms. Posey also agreed that the only reason she excluded the possibility that the ignition was the result of a person scattering gasoline in the garage and manually igniting it is because of the 'crow's feet' pattern in the panel. (Vol 8, PCR 706-07) Nevertheless, she admits that she would have reached this same conclusion without reference to any photographs of the panel box or any knowledge concerning whether the breakers were tripped or whether the door was open or closed. (Vol 8, PCR 707)

According to Ms. Posey this initial explosion although in the mild range would have been sufficient to knock over a person or hurl the person's body down on the ground. She based this conclusion on the fact that a window on the same wall as the breaker box was broken. She opined that because the forces coming from that are not as perpendicular to those glass panes, they're more at an angle, so it had to be substantially enough force to break the glass in the area where people would be standing. This explosion isn't going to be selective in which windows it blows out but it is directional. (Vol 8, PCR 711) She conceded that you

would expect the explosion to be more intense closer to the source of the ignition, yet the window closest to the panel box was not blown out. (Vol 8, PCR 712) She would also expect items near the source of ignition to burn more, but contended that in this case it did not because, "the vapors are not homogenous and you will have areas which are richer and areas that are leaner, so the amount of heat is actually experienced as it passes through materials is going to be a function of how much fuel is there." (Vol 8, PCR 713-14) She did not agree that you would expect the items on the table directly in front or near that breaker panel box to burn. She opined that it depends on how much heat is there and how long that flame front dwells on those particular materials. She agrees that photographs show a piece of newspaper right in that area of the explosion that is not burnt, but she speculates that it was moved there. (Vol 8, PCR 715) Further, although she speculates that the fire was very hot, the plastic breakers did not melt. She contends this is because that the plastic breakers are made of bakolight which chars, but doesn't melt. (Vol 8, PCR 718)

Ms. Posey admits that the fact that breakers are tripped doesn't necessarily mean its the origin of the ignition and she cannot point to anything in any of the photographs that show that any flammable liquid other than gasoline was in the garage or near the ignition sources she stated. (Vol 8, PCR 719) She also admits that it is all speculation on her part because she can't point to

any one piece of evidence that shows that there were flammable vapors on the table by the breaker box. She admits she cannot say what the flammable source was or where it was other than it eventually reached the electrical distribution panel. She cannot state the quantity. Nevertheless, she claims that the gas can that was found near there could not have been it because gasoline vapors are not going to rise above the 18 inches needed to rise to the breaker box. (Vol 8, PCR 722-23) Her opinion is based upon assumptions from observations in the photographs, but not observations about the nature, the location, and the quantity. She concludes that the quantity is small because it didn't blow the building apart. However, she couldn't give any kind of number. She claimed she can exclude the state's theory that it was gasoline poured on the floor because then you would have a burn pattern. (Vol 8, PCR 723-25)

Ms. Posey conceded that she's made a lot of assumptions that aren't supported by the facts. (Vol 8, PCR 729)

She rejects gasoline as the source because if the gas vapor is greater than 7.6 at any location, that vapor is too rich to burn and will survive a fire unless the fire gets it mixed at a lower rate. Once the ignition occurs it creates turbulence, tremendous stirring, tremendous mixing, you got a great deal of burning you might have gotten in the other areas because they become stirred and she cannot imagine a possibility of vapors in a fire surviving

just due to convection occurring. She attributes the gasoline described by the arson investigators as soaking the book 8 inches off the ground as gasoline that arrived there from the water suppression efforts by the fire department. (Vol 8, PCR 735) She also believes that the can as it fell from what she believed to be supported by the cardboard box could have dumped gasoline directly on the books. (Vol 8, PCR 736)

She hypothesizes that there was only one explosion with enough force to knock somebody down but it is possible that the secondary fire if somebody was close to it they could have been knocked down. When asked about Dr. Diggs' autopsy report that shows that there were 12 separate injuries to the head of Carol Way, she states that her opinion does not include the possibility the explosion was sufficient to have knocked Carol Way's body against a fixed object twelve times or even six times. (Vol 8, PCR 739)

In response to the court's inquiry asking if she was saying the fuse box sparked, igniting some unknown vapor which started the fire and in the process of the fire burning the gasoline became involved, Ms. Posey agreed that this was her thesis. (Vol 8, PCR 754)

Way then called John Feegel, a forensic pathologist and attorney. (Vol 8, PCR 755) Dr. Feegel testified that he had reviewed the autopsy reports of Dr. Diggs and the deposition of Dr. Gibson in an earlier phase. In his opinion these bodies were not

doused but were close to a high intensity explosive type flame driven fire such as you would expect with gas or gas vapor rising a short distance away. (Vol 8, PCR 756-7) He opined that if the accelerant grows at a slower rate you would get more of a burn but not as much as the intense char and searing if you actually put the accelerant on the body itself.

With regard to Carol Way's wounds, he noted that there were as many as twelve lacerations reported in the autopsy report, there were in a general sense all inflicted by blunt trauma, probably being struck in the head with something firm. With regard to Adrienne Way, she had two significant wounds, the less severe wound was a blunt trauma, one was a depressed skull fracture. (Vol 8, PCR 760) Dr. Diggs described it as essentially round and the photo shows that it probably has a round edge which could have been inflicted by a hammer. It could have been inflicted both by the object hitting the head as well as the head hitting the object. (Vol 8, PCR 762) It would have had to have been quite a bit of force to inflict a depressed fracture on the skull of an adult. It's more than falling out of a chair and striking your head. If the body was propelled by a rapid gas ignition as it is when people are too close to an explosion they will be forcibly thrown into something like a wall or parts of a vehicle, assuming that the explosion hasn't actually blown the person apart, that would be sufficient force. He points to a photo of the leg extension bar

next to the body of Adrienne Way and says that it is consistent with the type of cylindrical object that could have caused the depressed skull fracture. (Vol 8, PCR 763-64)

He further notes that apparently the leg extension bar has been removed from the weight lifting bench and he says that the amount of force necessary to cause a depressed head injury would be consistent with the amount of force required to detach the bar from the leg extension; it would have to sustain quite a bit of force to do that. (Vol 8, PCR 766)

On cross-examination, Dr. Feegel admitted that he basically relied upon the assumptions and observations of Dr. Diggs as set out in his autopsy report. (Vol 8, PCR 768) He agrees with Dr. Diggs that the injury #2 is more likely than not an injury caused by a blunt instrument and it could have been caused by a hammer. He also agrees that the injury possibly rendered her unconscious. (Vol 8, PCR 771)

On cross-examination he reiterated that Carol Way had twelve wounds and if left untreated Dr. Diggs said that any of those would have been fatal. Eleven of these twelve wounds were most likely caused by a blunt instrument consistent with a hammer. In fact the twelfth wound could have been caused by a blunt instrument consistent with a hammer. (Vol 8, PCR 776-77) It's his opinion any one of them certainly could have been caused by a head in motion, but only one. (Vol 8, PCR 780) He reviewed Dr. Gibson's

report. Dr. Gibson was hired by the defense but did not testify at trial. His opinions were similar to Dr. Diggs and Dr. Feegel now agrees with him. (Vol 8, PCR 781) There are no injuries consistent with Carol Way having fallen and hitting her head on some weights; there is no pattern that suggests the probability of that. Further, a simple fall would not have given enough force to have fractured Adrienne Way's skull; it would have taken a substantial push. (Vol 8, PCR 782 783)

Dr. Feegel testified that he is not enamored of the mutual combat theory between Carol and Adrienne Way, finding it possible, but unlikely. One wound to the head of each victim could have been caused by a head in motion fixed object injury. He agreed that this theory leaves another one to be explained on Adrienne and eleven on Carol. His opinion as to the likelihood that those remaining injuries being the product of mutual combat is unlikely. (Vol 8, PCR 784) He agrees that they are all consistent with having been struck by a third party. So if he was called in 1983 to testify, his opinion would have contrasted with Dr. Gibson who testified to the mutual combat theory because he would not have agreed with it. (Vol 8, PCR 785) He thinks that the burns to the victims are more akin to a sudden heat blast with minor flames. A push which resulted in the person falling over is not sufficient to fracture the skull, so if there was a mild explosion that didn't hurl the body across the garage but just knocked them down it would

not have been sufficient force to cause the injury. (Vol 8, PCR 785-86)

His opinion regarding the burns is that they are not the result of a direct flammable liquid coming into contact with either body because of the absence of charring to the body. Dr. Diggs describes some local charring but the bodies were clothed and if the clothing is burned it may burn for a while and inflict local charring. The lab tests came back with a presence of gasoline on the clothes. He cannot exclude that a flammable liquid was poured on the floor or items with the bodies. That would be consistent with the injuries found. (Vol 8, PCR 787-8) He cannot exclude the possibility that the liquid came into contact with the clothes or that flumes came into contact. He has no idea what ignited the vapor. He never got involved in electrical panel boxes. He doesn't know anything about an electrical panel defect. (Vol 8, PCR 789)

In 1983 he was in Tampa, had just gotten back from Atlanta. He was a consultant in forensic pathology. (Vol 8, PCR 790) If he had been called in 1983 he would have been able to give the same opinion he gave today based on the evidence, the autopsy reports and the photographs in the record. (Vol 8, PCR 794)

After the testimony of Dr. Feegel, the court heard argument about whether portions of Fred Way, Jr.'s, testimony was relevant to the proceeding. Assistant State Attorney Jay Pruner notes that

in addition to Fred Way, Jr. testifying at trial that he saw his father throw a hammer over the back fence, that the defendant, himself, testified at his trial that he threw the hammer over the fence. Accordingly, the state objected to CCR presenting Fred Way, Jr. to say that he recants his testimony that he saw his father throw the hammer as it is not relevant to the Brady claim and is refuted by the defendant's own testimony. (Vol 8, PCR 799-800)

Collateral counsel then responded that their new theory was that Adrienne Way inflicted the wounds to her mother's head and that after she murdered her mother she herself was thrown against the weight bench inflicting the major incapacitating ultimately fatal wound to her head. (Vol 8, PCR 801) On that basis the court sustained the objection to Fred Way, Jr.'s recantation testimony, but allowed his testimony with regard to the weight bench. (Vol 8, PCR 802)

Fred Way, Jr. then testified that he is Fred Way's son. He is familiar with events surrounding the deaths of his mother and sister, he was living at home at the time, he owned a weight bench with leg extension attachment, he used it regularly, it worked fine, it wasn't detached and it wasn't broken. (Vol 8, PCR 802-03) His mother stripped furniture and refinished furniture. She would use gasoline and Formby's mineral spirits. She would mix the two together to get the stains off her hands. She used rags and paper to put it on with and rags to strip it off with as well. He points

to a photo that shows the location her refinishing material. The record reflects that he's indicating the area on the work bench directly beneath the circuit breaker box. (Vol 8, PCR 806)

Next the court hears argument concerning the testimony of Sean Rooker. Rooker testified at the prior evidentiary hearing before the Honorable Judge Mitcham regarding his claim that he saw smoke coming from the Way garage and heard a swishing or popping sound. The state objected because this evidence was not relevant to the Brady claim and was known to defense counsel at the time of trial. The court sustains the objection. (Vol 8, PCR 811-15)

Both sides agree to introduce the prior evidentiary testimony of Billy Nolas and Michael Benito. (Vol 8, PCR 817)

The next witness is David Rankin who represented Way at trial. (Vol 9, PCR 824) Rankin testifies that he has no specific recall on any certain day receiving any certain specific documentation. (Vol 9, PCR 825) He testified that if he retained an expert he would simply in some way, shape or form get copies of those photographs and pass them on to the expert. In this case it was an arson expert and he had no training. He was relying to a great extent on the arson expert, so he simply took what was given to him as far as photographs and had them copied and delivered to the expert. Whenever they were received, he would maintain them in a file. (Vol 9, PCR 826)

The photo of the breaker box is not contained in his file. He has no specific recollection of any certain dates or any certain testimony or any events during the course of the depositions. His practice was to ask a witness if there were any photographs. (Vol 9, PCR 828) If there were he would get copies of them and they would be placed in the file. If he'd had evidence that it was set off by the fuse box he would have presented it.

In 1983 he made a formal discovery request of Benito, he has no specific recall, but he would agree that Mr. Benito responded to that request. (Vol 9, PCR 829-31) He testified that his was a fairly busy firm with a large staff. He received a number of photographs and 14 years later he can't recall specifically how many photographs but there were quite a number. (Vol 9, PCR 832) He admits that he shared these photographs with other people, he has a vague recollection of retaining Dr. Gibson. (Vol 9, PCR 833) He also retained Raymond Pomeroy. He would have shared those photographs with Dr. Gibson and Mr. Pomeroy. When he passed these photographs on, he has no memory whether he sent them or whether they came into the office. (Vol 9, PCR 834-35) He cannot exclude the possibility the photographs left his custody. He had a secretary who was active in doing the type of things secretaries did but he had no paralegal assisting. There was no one who tracked any and all items to and from the file, there is no written record. He would have shared his file with Mr. Unteburger who

represented Way on appeal. He has no recollection of whether Mr. Unteburger took the photographs or not. (Vol 9, PCR 836 -38) He cannot tell the court that he knows for a fact that the photograph wasn't provided during discovery. (Vol 9, PCR 840)

He identifies a discovery deposition conducted by him of an individual named Henry Regalado on 10/18/83. (Vol 9, PCR 843) In the deposition, Regalado refers to the report with the photographs attached. Rankin claims it would have been his standard practice to ask them for any reports upon which their opinion was based. (Vol 9, PCR 845). He agrees that the deposition reflects that a person appearing by the name of David Rankin asked Mr. Regalado, "Your report, you have a schematic diagram and I've got a copy. Answer: I've got mine so you can keep it." In response to ASA Pruner's question, "So assuming that you conducted this deposition and assuming that it was accurately transcribed does that appear to indicate that you had a copy of the report of Henry Regalado at the time you conducted the deposition, Rankin replied, "yes." The report indicated photographs were also taken by Regalado and that some were included in the report with the remainder being on file at the SEA-Tampa facility. (Vol 9, PCR 847)

The next witness was Way's resentencing attorney, Craig Alldredge. He is supervising attorney of the Tampa office of the Federal Public Defender. When he represented Way, he reviewed all the evidence from the trial. He recalls the photographs being

introduced and contacting Rankin. He doesn't recall whether he had any photographs. He recalls going to Rankin's office and although he expected to see a great volume of materials, there was only one box partially filled with material. Rankin didn't have a lot of stuff because it had been sent to CCR. They did not get any of the photographs from CCR. Alldredge then contacted Mr. Benito, asked him whether he had any photographs. (Vol 9, PCR 852, 872) He said yes. Alldredge testified that Benito has always been very forthcoming, whatever they wanted, Benito essentially said, "whatever I've got is yours." In the course of their meeting, Benito went over to a box in the corner, which was a box of evidence from the Way case, pulled out an envelope of photographs. He claimed that Benito then essentially said, "wait a minute," then he reached in the bottom left-hand corner of his desk drawer, pulled out a Kodak film container and said, "Here are some other photographs that essentially we never used, we never showed them to anybody, if you want them take a look at them." This was a box which contained about another 80 or so photographs, including 7 contact sheets. Alldredge identified the breaker box photo as one coming from the Kodak box. (Vol 9, PCR 853 -54)

Alldredge does not believe that Rankin was in custody of any of the photographs, those had been turned over to yet another agency. Alldredge has no knowledge of how many people had their hands on that file once it left Mr. Rankin's office. (Vol 9, PCR

858) He does not know if it was in the file when it was turned over to CCR. (Vol 9, PCR 859)

Alldredge said that he showed the photo to Craig Tanner. Tanner's opinion was that it was an accidental fire, that the switches could not have been tripped manually, that it had to come as a result of an electrical problem, they would not have gotten in those positions as a result of an electrical problem caused by fire and this photo could provide a source of ignition for the fire. (Vol 9, PCR 861) Tanner did not testify at the evidentiary hearing.

Next the court heard argument about the testimony of Betty Slaton. She was going to be presented to rebut the state's argument that Mr. Way was calm and cool during the fire. The state argued that Ms. Slaton's testimony was not relevant to the matter at hand and the court sustained the objection. (Vol 9, PCR 872-77)

The state also objects to the admission for the truth of the matter asserted of the evidence contained in police reports and refuses to stipulate to the material contained therein. (Vol 9, PCR 879) Court agrees that they are not substantive evidence, they are just part of the record, no more, no less. (Vol 9, PCR 880)

In rebuttal to the defense's case, the state presented Henry Regalado. He is a fire investigator with SEA and has been for 15 years. Prior to his involvement in this case, he was with Hillsborough County Sheriff's Office. (Vol 9, PCR 881) Regalado

testified that he went to the Way residence the day after the fire on July 14, 1983. His on-scene investigation of the house showed that the fire was in the garage and limited to that area. During the course of the investigation he took photographs and he formed an opinion as to the nature and origin of the fire, that the fire was intentionally set and that the origin of the fire was approximately in the center of the garage and an accelerant identified as gasoline had been used. (Vol 9, PCR 885) The greatest amount of damage to the garage was on the floor itself which left the mark of the accelerant. The damage to the ceiling was caused by the mushroom effect of the flammable liquid rising to the ceiling traveling across the ceiling itself. (Vol 9, PCR 885-6)

Regalado testified that he was able to determine that the breaker box had nothing to do with the fire. The door to the box was already open when he arrived the day following the incident. (Vol 9, PCR 885-6) He noted that the breaker box was only damaged on the top and this was consistent with the fire coming across the ceiling and coming down the back wall to the breaker box. He notes that there is no heat damage on the interior of the box which means the door was closed at the time of the fire. (Vol 9, PCR 886) If the panel door was open during the fire, the metal inside would have been heat stressed and the knobs would be mostly charred off or destroyed. The breakers only had a little bit of heat on them which is consistent with the door being closed. On the bottom of

the panel box there is a decal for the particular breaker box, that label would have been burnt if the box was open during the fire. (Vol 9, PCR 888) He notes that there is no charring on the paper, that the wires that supply the panel box and the supply circuit to the house, all still had insulation on them indicating that there was no severe fire of any type coming from the box at all. Normally from a fire that originates in a breaker box these wires would be completely bare of insulation. He further notes that although some of the wires to the top and the left appear to have their insulation removed, it is immaterial because all the rest of them still have insulation on them. (Vol 9, PCR 889) If there was any fire near or around the box including an explosion he would expect to see all of those wires burned as well as the breakers themselves.

Regalado testified that it is very common during a fire for the breakers to trip. A breaker is a mechanical heat sensitive device which means it will trip under an electrical load or heat under a fire. It senses a heat which is abnormal and it will trip on its own. The breaker box itself had nothing to do with the ignition of the fire. In his opinion the fact that the breakers are tripped does not lead to the conclusion that the breakers were tripped at the outset of the fire as the igniting act. (Vol 9, PCR 890)

In his opinion the fire damage that he viewed is not consistent with having been caused by the ignition of a flammable vapor at a location at, underneath or within a few feet of the breaker box. The origin of the fire was more to the left and center of the garage, whereas the breaker box and white table are more toward the back. (Vol 9, PCR 891) The fire pattern here is consistent with a mushrooming effect of a fire caused by a flammable liquid. If the box ignited he would have expected to see damage to the white table and to the objects on top of that table. If the vapors from a flammable liquid had increased enough to reach this breaker box, this fire would not look like it did. It would have been all over the neighborhood, it would have blown the walls down and possibly blown the roof off. (Vol 9, PCR 892)

Regaldao disputed Ms. Posey's conclsion that the damage to the window was a result of an explosion. He testified that the broken glass was consistent with a physical break and not from a shock. His observation of the break in the glass was symmetrical. The edges were very defined. An explosion shatters everything into small pieces and leaves jagged edges, if anything remains at all around the frame itself. (Vol 9, PCR 893)

Regalado also testified that it is not unusual to not have found evidence of a trailor (a form of or means to spread the fire from one point to another) in this case because it is a concrete floor. When a trailer is poured it does not require much fuel, so

it may or may not leave a trail. In this case there is an outline of fuel that burned in the origin area. (Vol 9, PCR 894)

He doesn't know what caused the white linear mark on the north wall, all he can say for sure is that there was not evidence of an explosion, that is one of the things he looked for. He saw no evidence of wall movement in the concrete block home. Normally it will separate it enough that you know that the wall has been moved. There was no such thing here. He theorizes the white line is a result of the smoke rising to the ceiling and then coming down to about 3 or 4 feet above the floor and the smoke is the hottest part of the fire. (Vol 9, PCR 904) Regalado also notes that they have these same white lines on the vertical joints and that the line may be a result of during the fire the mortar joint may have cracked and it got washed off but there is no evidence of an explosion. (Vol 9, PCR 895, 906)

Regalado testified that he participated in the deposition with Rankin, which he reviewed within the last few months. State's exhibit 7 is a copy of the report that he offered concerning this fire and his involvement in the investigation. During his deposition he had the report with him. (Vol 9, PCR 896) Rankin referred to the report in the questions he asked. He says that he took photographs of the scene of the fire on the day and that he had those photographs with him that were not used in the report plus the negatives. (Vol 9, PCR 897) Section 2.3 of his report

states that photographs were also taken by Mr. Regalado, some of which are included in this report, with the remainder being on file at SEA. Mr. Rankin did not during the course of this deposition or at any time request copies of the photographs he took and maintained at SEA offices. (Vol 9, PCR 901)

On cross-examination he reiterates that when he got into the area just north of the origin area where there was some furniture he could smell gasoline. It is not uncommon to go to a fire scene, find flammable liquid there and identify it days later. (Vol 9, PCR 901-02) He also notes that the electrical box is not burnt on the bottom because the fire came down from the top and the evidence shows that it was closed during the fire. (Vol 9, PCR 912) Oxidation happens immediately after a fire. (Vol 9, PCR 913) The clean glass found near the back door could have been caused by the suppression effort because the mode of attack would have been from the front of the garage when they got there and they could have come in with a straight stream and knocked the glass out. Other than that, he has no explanation for it. (Vol 9, PCR 914)

It considered that refinishing materials were a potential fuel source but it was his opinion that it was started by gasoline on the floor. His explanation for why there was a sudden dramatic increase in the amount of smoke is that when a flammable liquid begins in its initial stage it burns, it will burn really rapidly and then it becomes starved for air. Then as more air is

introduced it begins to re-ignite itself and that's when it started to produce heavy black smoke. The heat will also increase and that's when it gets more oxygen into it. This could have been caused by there being an existing fire and an accelerant being added to that fire. (Vol 9, PCR 918-19)

The next state witness called to testify is Michael Benito. (Vol 9, PCR 921) In 1983 he was employed as an Assistant State Attorney for Hillsborough County and he prosecuted Fred Way. He had an open case file policy. He gave defense lawyers everything. He has no specific recollection about the photographs in question. (Vol 9, PCR 922) He has no reason to believe he deviated from his common open file practice. (Vol 9, PCR 923) With regard to the resentencing, he doesn't recall any specific conversations, but he's sure when he got the case he brought them up to speed as best he could, gave them everything he had.

Benito noted that since this was a first degree murder case, he didn't want to risk anything for appeal. He limited his objections during trial and he gave them everything. (Vol 9, PCR 924)

He has no recollection of having a conversation with Mr. Alldredge where he said, "Hey, look, here are some photographs pertaining to Mr. Way's case that no one has ever seen before." (Vol 9, PCR 925) He has no reason to believe he deviated from his standard practice. He has no idea where the photographs in the

yellow box came from, he would only assume from law enforcement. (Vol 9, PCR 926)

The state's next witness was Bill Ivan Myers, Jr., an expert in the field of fire and arson investigation. (Vol 9, PCR 927- 30) On July 11, 1983, he went to the family home on Jackson Springs Road around 1:00 p.m. The call went out at 12:15 and he responded within an hour of receiving the call. The bodies of Carol and Adrienne were still in the garage. He conducted an on-site investigation. His opinion as to the nature and origin of the fire was that it was an incendiary fire that was accelerated by gasoline. It was intentionally set. (Vol 9, PCR 931) He recalls seeing the breaker box. He inspected it during the investigation, as he does in every investigation. He went to the panel, opened the panel door, examined the breakers inside and found nothing unusual, out of the ordinary and continued with his investigation. At the time he inspected the panel box the door was closed. The greatest area of damage was in the northwest portion, where there was a console TV, chest of drawers, numerous combustible cardboard boxes. (Vol 9, PCR 932) He smelled gasoline and saw it in an unburned condition. There was no explosion in the garage. There was no indication whatsoever of any type of vapor explosion. The window was near the center of that east wall, the glass in the window frame was cracked which is a normal condition caused by heat, had there been a vapor explosion that window would have been

blown out in its entirety. The level of the breaker panel is about 4 to 5 feet above the floor. By the time vapors would have got to this level there would have been a very intense explosion that would have probably done major structural damage. The photographs show some damage to the lower pane. He thinks it may have been the screen and that the window was intact. (Vol 9, PCR 933-34) Even if it was broken this is not the same type of damage you would expect from a vapor explosion. If the window had been damaged as a result of an explosion it would have been blown out completely and the window would not have had soot on it. The newspaper that was on the table was there during the fire, there is soot on it and the area underneath was protected. He concludes that it was on the table at the time of the fire. If there had been a vapor fire he would have expected a lot more damage on the east side of the garage than what was there. (Vol 9, PCR 935-37) He found the glass 18 feet away. Because they were small instead of long slivered pieces consistent with an explosion, he assumed it was knocked out prior to the fire.

The white line would be caused by heat and the fact that other lines weren't created is based on the variation of factors, specifically, it is not an explosion. (Vol 9, PCR 954) Even if the source of gasoline wasn't on the floor, the gasoline is heavier than air so it would seek its lowest level. (Vol 9, PCR 955)

Michael Germuska also testified for the state as an expert in electrical engineering. (Vol 9, PCR 956) He is an electrical engineer for SEA. He reviewed Eleanor Posey's testimony elicited at the first hearing. His opinion based on his expertise as to whether the breaker switch is tripped in the course of the fire as a result of the heat is that it is routine for circuit breakers to be tripped during the course of the fire by heat. (Vol 9, PCR 957-60) His opinion is the door to the circuit breaker panel was closed during the fire, predominately because of the heat patterns that exist on the exterior and interior of the panel. (Vol 9, PCR 961) The circuit breaker enclosures are made out of bakolight, a plastic material and while it doesn't burn easily it does become damaged during fires, the edges become round. There isn't any evidence of that in these circuit breakers. (Vol 9, PCR 962) It appears to him that the heat was stratifying down from the ceiling. As the fire burned in other areas of the garage the heat rose to the ceiling level and tumbled down along the walls. The heat pattern strongly suggests that the damage to the top of the panel was caused by the heat coming from the ceiling.

In Mr. Germuska's opinion the crow's feet patterns that rose from edges of the circuit breakers and the panel is a result of smoke emanating from the seams between those devices. (Vol 9, PCR 963) Fire or at least a decomposition of combustibles occurred inside the box. The insulation on the wires began degrading as a

result of the combustion, smoke and soot. The pressurizing of the interior caused the soot and smoke to exit the panel through these openings. In his opinion the decomposition of materials on the inside was caused during the course of the fire. The fire attacked the circuit breaker panel and began to degrade the materials on the inside. The existence of the crow's feet does not mean the panel door was open. (Vol 9, PCR 964) As it is heated, it is going to relieve itself through the openings, the heat is attacking the panel from the top down. (Vol 9, PCR 965) He is familiar with the construction of breaker boxes, they are not air tight. (Vol 9, PCR 967) He cannot tell by looking at the photo when the breakers were tripped. They may have been tripped prior to the fire. (Vol 9, PCR 969)

SUMMARY OF THE ARGUMENT

Appellant’s first claim is that the trial court erred in denying his Motion to Vacate. He contends the factual findings of the trial court are not supported by the record and that the court erred in rejecting the opinion of the defense expert. It is the state’s postion that the findings of the trial court are entitled to a presumption of correctness. Moreover, as the trial court's findings are supported by competent substantial evidence, this Court should decline appellant’s invitation to substitute its judgment for that of the trial court on questions of fact (including the credibility of witnesses and the weight given to evidence by the trial court).

Appellant’s next claim is that the trial court erred in refusing to consider portions of the testimony of Fred Way, Jr., Sean Rooker and Betty Slaton. Appellant suggests that he should have been able to retry the guilt phase of his trial in order to establish that the discovery of the photographs and the resulting “unidentified vapor explosion theory” would have affected the outcome of his trial. Toward this end, Way attempted to present the testimony of Fred Way, Jr., Sean Rooker and Betty Slaton. It is the state’s position that the testimony was properly excluded, as it was beyond the scope of the remand and was not relevant to the matters before the lower court.

Way's final claim was not presented to this Court prior to the remand. Appellant now, for the first time, asserts that the combined effect of all alleged errors in this case warrants a new trial and/or penalty phase. It is the state's position that this claim is not only meritless, but, also that it is not appropriately before this Court.

ARGUMENT

ISSUE I

APPELLANT HAS FAILED TO ESTABLISH THAT THE TRIAL COURT'S FACTUAL FINDINGS WERE CLEARLY ERRONEOUS OR THAT THE COURT ERRED IN DETERMINING THAT APPELLANT IS NOT ENTITLED TO A NEW TRIAL.

Appellant's first claim is that the trial court erred in denying his Motion to Vacate. He contends the factual findings of the trial court are not supported by the record and that the court erred in rejecting the opinion of the defense expert. It is the state's postion that the motion was properly denied and that the findings of the trial court are entitled to a presumption of correctness. Moreover, as the trial court's findings are supported by competent substantial evidence, this Court should decline appellant's invitation to substitute its judgment for that of the trial court on questions of fact (including the credibility of witnesses and the weight given to evidence by the trial court).

Upon review of Way's appeal from the summary denial of his second Motion to Vacate, this Court, in remanding for an evidentiary hearing, summarized Way's argument and set forth the parameters of the evidentiary hearing as follows:

> Way's motion for postconviction relief is based on facts which he alleges were unknown to him or his attorney and which could not be discovered by reasonable diligence. Fla.R.Crim.P. 3.850(b)(1). According to Way, certain photographs relating to the arson investigation undertaken by the State provide

> evidence that his wife and daughter were killed in an accidental propane gas explosion rather than, as the State has argued throughout, in a gasoline fire intentionally started by Way. ***Way contends that the photographs show an electrical breaker box in the garage, with four or five tripped circuits, in close proximity to a propane gas tank. His theory, which he supports with an affidavit of an arson investigator, is that the circuit breakers tripped because of an electrical malfunction, thereby causing a spark that ignited the propane gas.*** Way contends that the photographs were in the State's possession before trial but were never disclosed to the defense and that no other photographs showed the tripped circuit breakers. While arguing against the motion, the state attorney who had tried the case contended that the disputed photographs had been made available to the defense. The circuit court denied relief without an evidentiary hearing, finding that the record conclusively refuted Way's claim.
>
> On appeal, Way argues that an evidentiary hearing is warranted to clear up disputed issues of fact surrounding the photographs and to allow Way to try to substantiate his claims. We agree. ***There has been no evidentiary determination of whether there was an improper withholding of the photographs and whether, even if there was, it would have affected the outcome of Way's trial***. We are unable to conclusively determine from the record that this "new" evidence could not support an alternative theory of the deaths of his wife and daughter and provide a basis on which a jury could find him innocent.
>
> Way v. State, 630 So.2d 177, 178-79 (Fla. 1993) (emphasis added)

The ordered evidentiary hearing was held. (Vol 2, PCR 330) After hearing the witnesses and reviewing the facts, ***the trial court below made a specific finding that the photographs in***

question were disclosed. (Vol 2, PCR 330) The court further noted that Way's newest theory of defense was incredible, that the opinion of fire expert Eleanor Posey defied logic, and that even if presented at a new trial as exculpatory in support of an alternative theory of defense, the likelihood of a different outcome was nil. Based on the foregoing, the trial court denied relief. Appellant now urges this Court to set aside those findings and vacate his judgment and sentence.

This Court has long held that it will not substitute its judgment for that of the trial court on questions of fact (including the credibility of witnesses and the weight given to evidence by the trial court) as long as the trial court's findings are supported by competent substantial evidence. Melendez v. State, 23 Fla. L. Weekly S350 (Fla. 1998); Jones v. State, 591 So.2d 911, 915, 916 (Fla. 1991); Demps v. State, 462 So.2d 1074, 1075 (Fla. 1984). The findings by Judge Padgett are supported by competent substantial evidence.

Additionally, it should be noted that although the remand from this Court was based on Way's argument that "certain photographs relating to the arson investigation undertaken by the State provide evidence that his wife and daughter were killed in an accidental propane gas explosion rather than, as the State has argued throughout, in a gasoline fire intentionally started by Way," Way

v. State, 630 So.2d 177, 178-179 (Fla. 1993), the "propane explosion theory" like the "mutual combat theory" which Way testified to at his original trial, was not presented at the latest evidentiary hearing.[3]

The newest theory urged by Way at the last evidentiary hearing, is that within minutes of being called to the garage by appellant, Adrienne Way bludgeoned her mother, Carol Way, with a hammer twelve times, thereby resulting in her death. Then, by mere happenstance and totally unrelated to the homicidal moment, several breakers tripped, resulting in an electrical arc which found some *unidentified* vapor in the garage causing a mid-range explosion. (Vol 8, PCR 653, 683, 684, 711) This explosion knocked Adrienne Way down with such force that she fractured her skull on the leg extension bar of the weight bench. A second wound to her head resulting from a blunt trauma was unexplained. (Vol 8, PCR 759-66) The explosion also knocked over a gasoline can causing a second incendiary event which resulted in the gasoline fire. (Vol 8, PCR 653) Further, as luck would have it, although this explosion was strong enough to flex a concrete wall and hurl Adrienne Way across

[3] Nevertheless, having declined the opportunity given to him by this Court to present evidence on the propane explosion theory, Way now urges that although no evidence was presented at the evidentiary hearing on the propane theory that it is not inconsistent with the unidentified vapor theory. As no evidence was presented on this theory during the evidentiary hearing, the state was not in a position to rebut the claim and it should now be deemed waived.

the garage with such force that it caused a skull fracture, it did not damage the white table and papers underneath the breaker box or blow the glass out of the other windows in the garage. (Vol 8, PCR 712-18)[4]

Clearly, when viewed in the context of the overwhelming evidence of Way's guilt presented by the state in this case and in light of the fact that Way's newest theory was refuted by the state's experts who actually investigated the crime scene at the time of the murder, Judge Padgett's determination that even if presented at a new trial as exculpatory in support of an alternative theory of defense, the likelihood of a different outcome was nil is well supported and should be affirmed.

Nevertheless, appellant points to the court's findings with regard to Eleanor Posey's theory concerning the origin of the fire and whether the prosecutor claimed to have produced heretofore unproduced photographs and urges that since a contrary conclusion could have been reached, this Court should reject the lower court's determinations of credibility and findings of fact. As previously noted, this Court will not substitute its judgment for that of the trial court on questions of fact (including the credibility of witnesses and the weight given to evidence by the trial court) as

[4] This argument was summarized by counsel during the argument concerning the admission of Fred Way, Jr.'s testimony. (Vol 8, PCR. 800-02)

long as the trial court's findings are supported by competent substantial evidence. Melendez v. State, 23 Fla. L. Weekly S350 (Fla. 1998) A review of the challenged findings shows that the court's order was based on competent substantial evidence.

First, with regard to Eleanor Posey, contrary to appellant's contention that no witness from the state was able to contradict her theory that the fire was caused by an accidental vapor explosion originating at the breaker box, Ms. Posey's "theory" was rejected by all of the state's experts, Henry Regalado, Bill Myers and Michael Germuska. Ms Posey testified that the fire was the result of two separate events. She described the first event as the ignition of a flammable vapor, probably from the breaker box and the second event was an explosion causing an abrupt escalation of the fire. (Vol. 8, PCR 649-53, 672) She based this conclusion on the presence of a "crow's feet" pattern located on the right-hand side of the breaker box emanating from the middle portion of that row and on evidence of glass from the east garage utility door being broken and found some distance away. She testified that the absence of creosote or soot on the glass is a classic sign of an explosion. (Vol. 8, PCR 654, 679) She eliminated fire suppression as the basis for the glass knock out because of the absence of soot. (Vol. 8, PCR 654-655) She also claimed that a horizontal white line appearing in the photographs that followed a horizontal

mortar joint, is evidence that the wall moved during the explosion. (Vol. 8, PCR 660-61) Both arson experts, Regalado and Myers who had examined the garage and the breaker box at the time of the crime, testified that they had examined the breaker box immediately after the fire and determined that it had nothing to do with the fire. (Vol 9, PCR 881, 886, 890, 895, 904, 931, 932, 933-37, 954) State electrical expert, Michael Germuska, also rejected Posey's theory and explained to the court that breakers routinely trip during the course of a fire because they are designed to trip when they get hot. (Vol 9, PCR 959-69) He also explained that the "crow's feet" pattern upon which Ms. Posey rested her "explosion" theory was caused by smoke emanating from the seams between the breakers. (Vol 9, PCR 963-64)

As for Ms. Posey's reliance on the broken glass as evidence of an explosion, Myers testified that the damage to the window is consistent with a physical break and not from a shock. His observation of the break in the glass was symmetrical. The edges were very defined. An explosion shatters everything into small pieces and leaves jagged edges, if anything remains around the frame. (Vol 9, PCR 893) He found the glass 18 feet away and he figured it had nothing to do with the fire because it was small and it would have been long slivered pieces instead if it had been from the explosion so he assumed it was knocked prior to the fire. (Vol

9, PCR 954) Contrary to Ms. Posey's opinion, Myers hypothesized that the clean glass found near the back door could have been caused by the suppression effort because the mode of attack would have been from the front of the garage when they got there and they could have come in with a straight stream and knocked the glass out. (Vol 9, PCR 914) There was no explosion in the garage.

Myers, who unlike Ms. Posey, had actually examined the site of the fire, testified that there was no indication whatsoever of any type of vapor explosion. He noted that since the level of the breaker panel is about 4 to 5 feet above the floor, by the time vapors would have got to this level there would have had a very intense explosion that would have probably done major structural damage. As both Myers and Regalado noted, the damage to the exterior of the house was limited to the garage doors. There is simply no credible evidence that an explosion of sufficient magnitude to cause the injury to Adrienne Way but, yet, not cause any significant structural damage to the garage, the windows, the breaker box or the table with papers in front of it ever happened. The only "evidence" presented in support of this theory was the factually unsupported hypothesis of Ms. Posey. These theories were clearly rejected by the state's experts. (Vol 9, PCR 933-37)

Thus, having conflicting expert testimony, the determination which experts to rely upon is clearly a matter within the court's

discretion. Durocher v. State, 604 So.2d 810, 812 (Fla. 1992); Sireci v. State, 587 So.2d 450 (Fla. 1991), cert. denied, --- U.S. ----, 112 S.Ct. 1500, 117 L.Ed.2d 639 (1992). That appellant disagrees with the court's finding does not mean that the court's opinion is unsupported.

With regard to the trial court's finding that there was conflicting evidence concerning whether former prosecutor Mike Benito had ever told defense counsel that the disputed photographs had ever been shown to the defense, Way contends that since Mr. Benito testified that he did not recall the event that there was no conflicting evidence. The trial court's finding, however, is supported by the record. Since 1991 Mr. Benito has been questioned three times concerning the statement alleged to have been made by him in 1991. At the latest hearing Benito testified that he had no recollection of a conversation with Mr. Alldredge where he said, "Hey, look here are some photographs pertaining to Way's case that no one has ever seen before." (Vol 9, PCR 925) He also testified that his policy was to give defense attorneys everything, that he had an open file policy and that he had no reason to think that he had deviated from his common practice in this case. (Vol 9, PCR 922-23)

In 1991, when Alldredge originally urged that such a statement had been made, Benito denied making the statement and represented

to the court that the small yellow box containing the photographs in question were in the same box as the rest of Fred Way records. (Vol 9, R2 1118) This position was noted by this Court in Way v. State, 630 So.2d 177, 178 (Fla. 1993) (state attorney who tried case contended disputed photographs had been made available to the defense). In 1996 Benito testified that he did not recall making this statement and that he could not imagine making such a statement. (Vol 7, SPCR 596) Given these facts, the trial judge did not abuse his discretion in finding that the evidence was in conflict and in trying to reconcile the evidence before him. Accordingly, he found:

> 3. Additionally, 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. In an effort to reconcile this conflict the court believes that the thrust of what was said was that the defense has neither looked at the photos nor asked for copies. This was true.
>
> 4. The evidence does not show precisely when the prosecution came into possession of the disputed photos. Perhaps Mr. Regalado left them after deposition. At any rate, the court finds that the prosecution was no more aware of their existence than was the defense.

(Vol 2, PCR 331)

Despite the court's finding that the existence of these photographs was disclosed and that there was no improper withholding of exculpatory material, Way still urges that a Brady

violation has occurred. It is the state's position that when this claim is evaluated in the context of Brady, Way is not entitled to relief.

Recently, in Melendez v. State, 23 Fla. L. Weekly S350 (Fla. 1998) this Court reiterated that to establish a Brady violation, a defendant must show:

> (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence ***nor could he obtain it himself with any reasonable diligence***; (3) that the prosecution suppressed the favorable evidence; ***and*** (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

(emphasis added)

Accord, Cherry v. State, 659 So.2d 1069, 1073-74 (Fla. 1995) and Hegwood v. State, 575 So.2d 170, 172 (Fla. 1991). Appellant has failed to establish *any* of the foregoing prongs, let alone *all* of them which he must do in order to obtain relief.

First, Way has not established that the evidence was favorable to him or that it was in the possession of the government. The testimony at the evidentiary hearing merely established that an independent arson expert had taken these photographs and that they were in his possession at the time of the trial. As the trial court found there has been no showing that the prosecution was any more aware of the photograph's existence than was the defense.

Under the second prong of Brady there is no Brady violation where the information is equally accessible to the defense and the prosecution, or where the defense either had the information or could have obtained it through the exercise of reasonable diligence. Provenzano v. State, 616 So.2d 428, 430-33 (Fla. 1993); Hegwood v. State, *supra*; James v. State, 453 So.2d 786, 790 (Fla.), cert. denied, 469 U.S. 1098, 105 S.Ct. 608, 83 L.Ed.2d 717 (1984). Thus, even assuming these photographs were favorable and that the state possessed them and failed to provide them to defense counsel, the fact that they were attached to the report of the state arson expert Henry Regalado and offered to defense counsel during the deposition of Regalado, established that the photos *could have been obtained by the exercise of reasonable diligence*.

Furthermore, as Way abandoned the propane explosion theory below, the discovery of the photograph showing the proximity of the breaker box to a propane tank is now irrelevant. As Judge Lazzara noted at the original hearing on the motion to vacate, a photograph of the breaker box was introduced at trial. (Vol. R1 1122) Therefore, the theory now being advanced by Way could have been presented at trial. Furthermore, Ms. Posey testified that she was able to reach her conclusions as to the unidentified vapor explosion theory without review of the enlarged photograph showing the "crow's feet" pattern. Thus, as this information was equally

accessible to the defense, appellant has failed to establish the second prong of Brady.

Way has also failed to establish the third prong of Brady, i.e., that the prosecution suppressed evidence that was favorable to the defense. Benito specifically testified that he had an open file policy and that he always gave counsel everything he had in a case. Defense attorney Alldredge agreed that Benito was always very forthcoming with evidence. (Vol 8, PCR 853) Furthermore, Alldredge testified at the evidentiary hearing that when they got the defense file from defense counsel Rankin there was only one box partially filled with material because the rest of the file had been sent to CCR. He further noted that they did not get any photographs from CCR. (Vol 9, PCR 872) Since defense counsel Rankin could not recall what photographs he had received, Way has not established that counsel did not receive the photographs in question or that its absence was in any way attributable to the state. (Vol 9, PCR 824-26)

Finally, the trial court also found that Way had not established the fourth prong of Brady, i.e., had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. After hearing the live testimony of the state's experts versus those of the defense, the trial court specifically found that the

overwhelming circumstantial evidence admitted at trial supported the conclusion that *no reasonable probability exists that possession of the photographs by appellant prior to trial would have resulted in a different outcome*. The court found that these photographs and the expert opinions drawn therefrom are not of such a nature that they would probably produce an acquittal on retrial. Judge Padgett found that the opinion of fire expert Eleanor Posey defies logic, was inconsistent with the physical evidence at the fire scene and was refuted by the testimony of on-scene fire investigators and an electrical engineer. The court also noted that the testimony of Way's expert in forensic pathology, Dr. Feegel, merely reiterated expert testimony presented by defense expert Dr. William Gibson during trial. The court then concluded that even when viewed in the light most favorable to Way, the defense theory that an accidental fire occurred simultaneous with the victim's mutual combat was implausible and that no rational juror could have found a reasonable doubt based upon the testimony adduced by Way at the evidentiary hearing. (Vol. 2, PCR. 331-332)

As the trial court applied the right rule of law governing the withholding of evidence under Brady, and as competent substantial evidence supports the trial court's findings, this Court should affirm the lower court's ruling. Melendez v. State, 23 Fla. L. Weekly S350 (Fla. 1998).

ISSUE II

WHETHER THE TRIAL COURT ERRED IN REFUSING TO CONSIDER PORTIONS OF THE TESTIMONY OF FRED WAY, JR., SEAN ROOKER AND BETTY SLATON.

Appellant's next claim is that the trial court erred in refusing to consider portions of the testimony of Fred Way, Jr., Sean Rooker and Betty Slaton. Appellant suggests that he should have been able to retry the guilt phase of his trial in order to establish that the discovery of the photographs and the resulting "unidentified vapor explosion theory" would have affected the outcome of his trial. Toward this end, Way attempted to present the testimony of Fred Way, Jr., Sean Rooker and Betty Slaton. It is the state's position that the testimony was properly excluded, as it was beyond the scope of the remand and was not relevant to the matters before the lower court.

As previously noted, the parameters of the evidentiary hearing were set forth by this Court as follows:

> On appeal, Way argues that an evidentiary hearing is warranted to clear up disputed issues of fact surrounding the photographs and to allow Way to try to substantiate his claims. We agree. ***There has been no evidentiary determination of whether there was an improper withholding of the photographs and whether, even if there was, it would have affected the outcome of Way's trial***. We are unable to conclusively determine from the record that this "new" evidence could not support an alternative theory of the deaths of

> his wife and daughter and provide a basis on which a jury could find him innocent.
>
> Way v. State, 630 So.2d 177, 178-79 (Fla. 1993) (emphasis added)

Accordingly, as the hearing was limited to ***whether there was an improper withholding of the photographs and whether, even if there was, it would have affected the outcome of Way's trial***, the trial court properly excluded the following testimony.

Fred Way, Jr. testified at Way's original trial that he had seen his mother and father having violent arguments, that his father was excited and enthusiastic about a job offer he had received in South America and that his mother had threatened to leave his father. (R. 1071-73) Fred also testified that he had previously seen his father open the garage burglar gate, despite his denial of ever having had a key. (R. 1072) He stated that on the morning of the fire, his father had told him it might be a good idea to go play basketball. (R. 1078) After the fire, his father was mumbling that the mother and sister had been in a fight. (R. 1081-1082) Later that day when he, his father and his grandfather went to clean up at the house, he saw his father with the hammer, and saw his father throw the hammer over the fence (R. 1083-1084).

At the hearing below, counsel argued to the court that Fred Way, Jr. was now going to recant his trial testimony that he saw his father throw a hammer over the back fence. (Vol 8, PCR 800) The state objected to the admission of this testimony as outside

the scope of the remand. The state further questioned its relevancy in light of the fact that when appellant testified at his trial he admitted throwing a hammer over the fence. (Vol 8, PCR 800)

Counsel for Way then argued that the son's testimony was relevant to causation of the injury, that the theory of defense now was that Adrienne Way inflicted the wounds to her mother's head and that following the murder of her mother, Adrienne was thrown against the bench by an explosion. (Vol 8, PCR 800-02) Based on this representation, the court allowed Fred Way, Jr. to testify only as to matters that were relevant to the newest theory of defense. Fred Way, Jr. then testified at the evidentiary hearing that he was living at home at the time of the deaths of his mother and sister. He claimed that he had a weight bench with leg extension attachment in the garage, that he used the bench regularly and that the leg extension worked fine, it wasn't detached and it wasn't broken. (Vol 8, PCR 803) He also testified that his mother stripped furniture and refinished furniture, that she would use gasoline and Formby's mineral spirits, mixing the two together to get the stains off her hands, that she used rags to put it on with and rags and paper to strip it off with as well and that his sister would help her mother. (Vol 8, PCR 804-06)

Next the court addressed the question of whether Sean Rooker's testimony would be considered. (Vol 8, PCR 811) The essence of

Rooker's testimony was alleged to be that he observed an argument between Adrienne and Carol Way and that he heard a swishing or popping sound coming from the garage. (Vol 8, PCR 811) These statements were known to defense counsel at the time of trial but were apparently not presented because a police report reflected that a few minutes after he made this statement to law enforcement Rooker came back and said that he had made it up. (Vol 8, PCR 813-14) There was simply no allegation that this information was not available to trial counsel or previous collateral counsel or that it added anything to the controversy surrounding the photographs of the breaker box. As such, it was within the trial court's discretion to exclude the testimony and appellant has failed to show an abuse of that discretion. Griffin v. State, 639 So.2d 966 (Fla. 1994); Jent v. State, 408 So.2d 1024 (Fla.), cert. denied, 457 U.S. 1111 (1982).

Similarly, the testimony of Betty Slaton that Way was not calm and cool during the fire was not relevant to the instant proceeding. Nor does it constitute newly discovered evidence as it was available to trial counsel and prior collateral counsel. (Vol 8, PCR 872-77) Accordingly, it is the state's position that the trial court properly found that the proposed testimony was outside the scope of the remand and, therefore, would not be considered. Mendyk v. State, 707 So.2d 320 (Fla. 1997) (jury instruction and ineffective assistance of counsel claims barred where claims were

beyond the scope of remand, which was limited to claims arising from the public records disclosure.)

Finally, in response to appellant's assertion that the trial court's ruling compels him to resort to piecemeal litigation, the state would point out that the murders in this case happened in 1983. During the last sixteen years Way has had ample opportunity to find and present any evidence to support his claim of innocence. As none of the foregoing witnesses were undiscoverable at trial or at the time of the initial motion to vacate where a complete evidentiary hearing was held on Way's claims of ineffective assistance of counsel, Brady and newly discovered evidence, Way's lament that he is being forced to resort to piecemeal litigation is without substance. These claims are clearly barred and are not an appropriate vehicle for any subsequent successive motion to vacate. Mendyk v. State, 707 So.2d 320 (Fla. 1997).

ISSUE III

WHETHER WAY SHOULD BE GRANTED A NEW TRIAL BASED ON HIS CLAIM CUMULATIVE ERROR.

Although this argument was not presented to this Court prior to the remand, appellant now asserts that the combined effect of all alleged errors in this case warrants a new trial and/or penalty phase. It is the state position that this claim is not only meritless, but, also that it is not appropriately before this Court.

This cumulative error claim is not an independent claim, but is contingent upon the appellant demonstrating error in at least two of the other claims presented. For the reasons previously discussed, he has not done so in the instant brief. Relying on Swafford v. State, 679 So.2d 736, 739 (Fla. 1996), appellant, however, is also resurging all of his prior claims of error. This case is readily distinguishable from Swafford.

In Swafford this Court remanded for an evidentiary hearing after Swafford produced an affidavit from Michael Lestz that placed suspect Walsh at the Shingle Shack with a .38 caliber handgun at or near the time that the murder weapon was discovered in that locale. Because Swafford had never had an evidentiary hearing on his claim that evidence existed that another known suspect had committed the crime, this Court found that this evidence, when viewed in conjunction with the evidence alleged in Swafford's prior 3.850 motion and the conflicting evidence presented in Swafford's

original trial with regard to exactly where within the bar the gun was found, was sufficient to warrant an evidentiary hearing on the issue of whether the statement is of such a nature that it would probably produce an acquittal on retrial. Swafford v. State, 679 So.2d 736, 739 (Fla. 1996).

Way, on the other hand, has had a trial and (at least) two evidentiary hearings where his claims of innocence have been considered and rejected. Way v. State, 496 So.2d 126 (Fla. 1986); Way v. Dugger, 568 So.2d 1263 (Fla. 1990). This Court has also rejected this claim in similar cases. Melendez v. State, 23 Fla. L. Weekly S350, (Fla. 1998); Johnson v. Singletary, 695 So.2d 263 (Fla. 1996) (where claims were either meritless or procedurally barred there was no cumulative effect to consider.)

Accordingly, although this may be a legitimate claim on the facts of a particular case, such facts are not present herein. Thus, because none of the allegations demonstrate any error, individually or collectively, no relief is warranted and this claim should be rejected.

CONCLUSION

Based on the foregoing arguments and authorities, the denial of the Motion to Vacate and the Sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Heidi E. Brewer, Assistant CCC - Northern Region, Office of the Capital Collateral Regional Counsel, Post Office Drawer 5498, Tallahassee, Florida 32314-5498, this _____ day of February, 1999.

COUNSEL FOR APPELLEE