

IN THE SUPREME COURT, OF FLORIDA

CASE NO. 78,640

FRED LEWIS WAY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This case exemplifies how an overzealous State can pose a nearly indomitable threat to the life and liberty of an innocent citizen--a threat that would be clearly indomitable but for a judicial system which imbues this court with the authority to review and the power to redress the unjust domination of an innocent citizen by police and prosecutors who have "crossed the line of zealous advocacy by a wide margin and compromised the integrity of [our judicial system]." See Ruiz v. State, Per Curiam Opinion of this Court in Case Number 89,201 (April 1, 1999) (not yet released for publication). The judicial process was compromised in Ruiz; in Fred Way's case, it has been mutilated.

This case began with a horrific injustice: an accidental fire that took the lives of Mr. Way's wife, Carol, and daughter, Adrienne. Had the injustice ended there, Fred Way would have been left with the task of rebuilding his charred and broken life. Had the injustice ended there, Fred Way could have helped his two remaining children, Tiffany and Fred, Jr., to rebuild their own. Had the injustice ended there, an innocent man would not have spent the last sixteen years in a six-by-nine box on Florida's death row. But there has been no end to the injustice

in this case. From prosecutorial and police witness tampering¹ and report falsification², to the prosecutor's pretrial suppression of exculpatory evidence³, to perjury at trial by State witnesses⁴, to judicial bias on the postconviction bench⁵, to the misrepresentation of facts in the State's Answer Brief in this very appeal⁶, injustice has engulfed Mr. Way like the flames of the accidental garage fire that stole his wife and first-born daughter from him. There was nothing that anyone could do to save Carol and Adrienne from the injustice Fate handed them down. But this Court now has the opportunity to quench the flames of injustice that now threaten to rob an innocent man of his life.

¹ See Initial Brief at 34-36.

² See Initial Brief at 37-38.

³ See Initial Brief at 21-24.

⁴ See Initial Brief at 59-60.

⁵ See Initial Brief at 3 n.1.

⁶ See fn. 7, infra.

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REPLY TO STATE'S STATEMENT OF THE CASE AND FACTS

Rather than wasting this Court's time by rehashing the facts recited in his Initial Brief, Mr. Way relies upon that Statement of Facts and the record on appeal in this case to support his contention that he is innocent and should be granted a new trial. Based upon the many exculpatory omissions⁷ and substantive misstatements of fact in its Answer⁸, the State appears to be

⁷ E.g., Ruth Rice's trial testimony that when Fred Way discovered that his garage was on fire, he shouted "'Please, somebody help me!' and he sounded rather, that he was really--he really meant it"; Record on Direct Appeal at 1121; Tiffany Way's testimony at trial that her mother, not her father, kept the key to the rear-garage-door burglar bars; Record on Direct Appeal at 849; 1988 postconviction attorney Billy Nolas's testimony that Mike Benito, the Hillsborough Assistant State Attorney, failed to send the breaker-box photo to him when he made his 1988 public records request (establishing the State's continuing pattern of suppressing the exculpatory photos); Initial Brief at 11; Trial testimony of Carlos Santizo that Fred Way had never been given a job offer with Santizo's Central American company, directly refuting the State's assertion to the contrary; Record on Direct Appeal at 1215.

⁸ Given the page limit imposed upon this Reply Brief, it would be impossible to catalog the litany of misrepresentations (e.g., the statement on page 28 of the Answer Brief that "Ms. Posey [the defense fire expert] conceded that she's made a lot of assumptions that aren't supported by the facts"--a statement that is in direct conflict with the portion of the record cited by the state), "factual" misstatements (e.g., the consistent insistence by the State throughout its answer that the source of the vapors which ignited beginning the accidental fire was "unknown" when, in fact, unrebutted evidence was introduced to prove the existence of flammable refinishing materials (including gasoline) in the area immediately below the malfunctioning circuit breaker box), and "scientific" conclusions that are offered *ipse dixit* by the State, without an iota of record support (e.g., the statement on page 33 of the state's Answer that "lab tests came back with a presence of gasoline on the clothes [of Adrienne and Carol Way]" when the record conclusively shows that only *components* of

relying on the all-too-prevalent and disturbing myth that this Court reads only the briefs in reviewing a given case.

Notwithstanding the sixteen years he has been incarcerated after his wrongful conviction, Mr. Way will have no truck with such cynical, wrongheaded notions of judicial shortcutting and is confident that, upon its routine consultation of the record in his case, this Court will unravel the veil of inaccuracies spun by the State and see that the facts as recited in Mr. Way's Initial Brief i) fully comport with the record on appeal, ii) reveal the State's version of the "facts" as an attempt to mislead this Court, and iii) fully support his contention that he is innocent and deserves to be granted a new trial.

gasoline (which could be found in substances other than gasoline) were detected), in its forty-nine page Statement of the Case and "Facts" in its Answer Brief.

SUMMARY OF ARGUMENT

Notwithstanding the State's unfounded assertions to the contrary, the trial court in this case, Judge Padgett, clearly erred i) in denying Mr. Way's claim for postconviction relief, ii) in excluding evidence of both rampant State misconduct and the accidental nature of the fire that ravaged Mr. Way's home, and iii) in failing to apply a cumulative analysis to the spate of error in Mr. Way's case.

ARGUMENT

REPLY TO STATE'S ISSUE I

IN HIS INITIAL BRIEF, MR. WAY ESTABLISHED THAT JUDGE PADGETT'S FINDINGS WERE CLEARLY ERRONEOUS AND THAT HE ERRED IN NOT GRANTING MR. WAY A NEW TRIAL.

A. Non-Disclosure of the Photographs at Issue:

In its answer, the State has taken issue with Mr. Way's contention that there was **no** conflicting evidence presented at the evidentiary hearing regarding the disclosure *vel non* of the photographs at issue. See, e.g., Initial Brief at 21-22. However, simply because the State takes issue with this **fact**-- without any semblance of legal support--does not make their position correct.

In their answer, the only "evidence" pointed to by the State to support a finding of disclosure are comments made by the prosecutor (Mike Benito) in 1991, at a Huff hearing **at which he was not under oath and at which he was acting in his capacity as a prosecutor.** Answer Brief at 60. The rules of evidence are clear: if the State had wished to introduce such evidence before the trial court in the instant proceeding, they would have been unable to do so. See, e.g., Fla. Stat. s. 90.803. They could have chosen to attempt to refresh Mr. Benito's recollection by showing him a transcript of comments he made at the 1991 Huff hearing, but they chose not to. See Fla. Stat. s. 90.613. To try to introduce such inadmissible comments at this stage of the

proceedings is disingenuous, improper, and without any legal support. Perhaps that is why the State makes this argument--like so many others in its Answer--without citing any authority whatsoever.

The State, at page 38 in its Answer, appears to intimate to this Court that Mr. Way failed to introduce evidence at his evidentiary hearing to support his claim that the breaker-box photo had never been produced. In fact the testimony of Billy Nolas, Mr. Way's 1988 postconviction counsel, (in addition to other evidence cited at pages 21 through 25 of the Initial Brief) unrefutedly established that the photo was never disclosed to Mr. Way before its discovery by Mr. Way's resentencing attorneys in 1991.

Moreover, if this Court agrees with the State's position and Judge Padgett's unsupported "finding" that the photographs at issue were disclosed, this Court should then find Mr. Way's trial counsel ineffective for failing to present the photographs (or any explanation whatsoever for the fire) at trial.

Mr. Way made this argument in his Initial Brief (at pages 24-25 (citing Strickland v. Washington, 466 U.S. 668 (1984) (adopted by this Court in Downs v. State, 453 So. 2d 1102 (Fla. 1984))) and the State failed to address it in its answer--presumably because there was no valid argument with which they could have addressed it. Therefore, this Court should hold that

the State has conceded this point and, in conjunction with the high likelihood⁹ of a different outcome at trial, grant Mr. Way a new trial based upon his trial counsel's ineffective assistance. See Initial Brief 27-29, 39-64 (analyzing the facts that i) Mr. Way's guilt/innocence jury was deadlocked after two days of deliberation and required an Allen charge; and ii) both sentencing juries recommended death by only seven-to-five votes; and applying to these facts the defense theory based upon the undisclosed photographs).

⁹ Mr. Way is not required to prove his innocence or even a high likelihood of a different outcome. He is only required to demonstrate a reasonable probability that the outcome of his trial is unreliable. He has, however, done all of these things.

B. The Court's Unsupported Dismissal of Eleanor Posey's Theory:

Despite the unfounded assertions to the contrary that have been advanced by the State in its Answer, **no** witness to date has been able to rebut the testimony of defense fire expert Ms. Eleanor Posey. Black's Law Dictionary defines rebuttal evidence as:

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

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

Nowhere in the record does the State offer evidence to "explain," "repel," "counteract," "contradict," or "disprove" Ms. Posey's well thought-out and carefully explained theory that the fire in Fred Way's garage was an accidental, albeit tragic, occurrence.

In its answer, the State has urged this Court that it must accept Judge Padgett's unsupported statement that Ms. Posey's theory is "incredible," by likening this pronouncement to a judicial determination of the credibility of a witness. However, this argument is without merit. The State is correct that case law is clear that deference is lent to trial courts' findings of witness credibility. This is so because the trial court is in a unique position to observe the demeanor, etc., of a witness during his or her live testimony. The same cannot be said of a

scientific theory.¹⁰ Cf., e.g., Berry v. CSX Transportation, Inc., 709 So. 2d 552, 577 (Fla. 1st DCA 1998) (holding that the appropriate standard under which appellate courts are to review trial courts' rulings on expert testimony based upon scientific principles is de novo: "as a matter of law rather than under an abuse of discretion standard").

De novo review is the appropriate standard for this Court to apply as this Court is in no worse a position than a trial court to evaluate the merit of a theory; unlike a live witness, a theory does not have a "demeanor"--it does not equivocate, grimace, shake, or shudder. A scientific theory neither loses nor gains validity in the translation to paper; a transcript is all that is required. Hence, this Court is in no way precluded from reviewing Judge Padgett's assessment of a scientific theory. Upon review of Ms. Posey's theory, this Court should find that there is **at the very least** a reasonable probability of a different outcome and grant Mr. Way a new trial.¹¹

¹⁰ It should be noted that Judge Padgett made absolutely no determination that Ms. Posey, as a person or a witness, lacked credibility; he simply offered his opinion as a matter of law regarding her theory.

¹¹ This is particularly true in light of the totality of the evidence adduced during postconviction in this case and the facts that i) the jury at trial was deadlocked after two days of deliberations (requiring an Allen charge to reach a verdict) and ii) both sentencing juries recommended death by the slimmest possible margin.

C. Failure of the State in Their Answer to Accurately Recount the Defense Theory:

Throughout its Answer, the State has repeatedly misstated the theory advanced by Mr. Way at his evidentiary hearing.¹² In an effort to clarify the theory actually advanced at the evidentiary hearing, it seems prudent to address two of the more glaring misstatements advanced by the State.

Most often, the State harkens back to the theory advanced at trial by Mr. Way's ineffective counsel--mutual combat between Carol and Adrienne Way--presenting it as if it were still endorsed by Mr. Way. This theory was advanced by counsel who advanced no theory whatsoever of how the fire started because the evidence thereof--the suppressed photographs--was never turned over to him. By no means does Mr. Way now advocate--nor did he advocate at his evidentiary hearing--such a theory.

Throughout its Answer, the State refers to an "unknown" or "unidentified" vapor explosion theory. However, in addition to Ms. Posey's unrebutted scientific conclusions, evidence was introduced supporting Mr. Way's theory that vapors *from his wife's refinishing chemicals*--which included gasoline and which were stored *immediately beneath the faulty circuit breaker box*--

¹² These repeated misstatements may simply be due to a careless reading of the transcript (in which the theory is *clearly* and repeatedly enunciated). Regardless of the reason for this inaccuracy, its ubiquitousness throughout the State's Answer dictates that it be herein addressed.

ignited to start the fire that occurred in his garage. See Initial Brief at 10-11. Furthermore, from the several statements given by Tiffany Way (including the statement she gave to Detective Nykanen *at the scene of the fire before she was ever left alone with her father*), to the statement of the Ways' neighbor, Sean Rooker (*before it was altered by the police*), witnesses have testified to hearing the sound of an explosion immediately preceding the fire.

Many other, more minor aspects of the theory advanced by Mr. Way at his hearing before Judge Padgett have, likewise, been confused and inaccurately recounted in the State's Answer Brief-- the net result being that what appears in the record as a well-reasoned, scientific theory is made to seem frivolous. However, as with the State's Statement of the "Facts," Mr. Way relies upon his Initial Brief to accurately communicate his theory to this Court and he is confident that upon inspection of the record this Court will see beyond the State's confusion and come to the inescapable conclusion that he is an innocent man wrongly convicted.

REPLY TO STATE'S ISSUE II

JUDGE PADGETT ERRED IN EXCLUDING EVIDENCE SUPPORTING MR. WAY'S THEORY OF HOW THE FIRE AT HIS HOME BEGAN ACCIDENTALLY--INCLUDING EVIDENCE OF RAMPANT PROSECUTORIAL AND POLICE MISCONDUCT--BY REFUSING TO CONSIDER THE TESTIMONY OF SEAN ROOKER AND BETTY SLATON AND IN IMPERMISSIBLY LIMITING THE SCOPE OF FRED WAY, JR.'S TESTIMONY.

A. Relevance:

In its Answer, the State argues that the testimony of Fred Way, Jr., Sean Rooker, and Betty Slaton was irrelevant to the issues raised in Mr. Way's motion for postconviction relief and were, thus, properly excluded by Judge Padgett. However, the relevance of this evidence of an explosion in Mr. Way's garage and attempts by the prosecutor and police to hide and fabricate evidence (via a false police report and the unconscionable manipulation of child witnesses) is clear--and clearly discussed in Mr. Way's Initial Brief at pages 33 through 39.

B. Newly-Discovered Evidence v. Ineffective Assistance of Counsel:

The State also argues that this evidence--evidence that without question would have changed the outcome of Mr. Way's trial had it not been artfully concealed--should have been discovered by Mr. Way's trial counsel and, as such, was properly excluded by Judge Padgett. Mr. Way finds this proposition patently absurd. However, if this Court agrees that Mr. Way's trial counsel should have discovered this evidence, but failed to

do so, then there is no other option than for this Court to find Mr. Way's trial counsel ineffective and to grant Mr. Way the new trial he deserves. To conclude otherwise--i.e., that this powerful evidence cannot be considered "newly discovered" because trial counsel should have found it, yet this error on the part of trial counsel does not rise to the level of ineffective assistance--is to conclude that an innocent man must die or spend his life imprisoned because there exists a lethally inequitable gap between the legal standards for "newly discovered evidence" and "ineffective assistance of counsel."

REPLY TO STATE'S ISSUE III

THE STATE'S ANSWER FAILS TO ADEQUATELY ADDRESS, MUCH LESS REBUT, MR. WAY'S CONTENTION THAT A CUMULATIVE ANALYSIS OF THE EVIDENCE ADDUCED DURING HIS POSTCONVICTION PROCEEDINGS REQUIRES THAT HE BE GRANTED A NEW TRIAL.

In its Answer to Mr. Way's claim that a cumulative analysis is required under the governing case law to evaluate his claim for postconviction relief based upon his innocence, the State erroneously contends that Mr. Way was required to bring this legal standard of review to the Court's attention at an earlier time in these proceedings and that his failure to do so has resulted in a waiver of his right to have the governing law properly applied to his case. The preposterousness of the State's argument is clear: it is not the defendant's duty to instruct a Court as to the legal standard it is to apply in rendering a decision.

Further evidence of the indefensibility of the State's position is seen in the fact that the State's Answer ignores all but **one** case¹³ cited by Mr. Way in support of his claim that a cumulative analysis is the proper legal standard to apply to the analysis of his case. By failing even to address the governing

¹³ In its attempt to undermine Mr. Way's claim that a cumulative analysis should be applied to his claim for relief, the State attempts to distinguish only Swafford v. State, 679 So.2d 736 (Fla. 1996), doing so in an irrelevant way, while ignoring other, strong governing precedent cited by Mr. Way in his Initial Brief.

case law¹⁴ dictating that a cumulative analysis be applied to Mr. Way's claims, Mr. Way contends that the State has conceded this point. However, even if this Court disagrees that the State's failure to address Mr. Way's argument is an implicit endorsement thereof, the case law cited by Mr. Way is clear that a cumulative analysis **must** be applied in his case.¹⁵

Furthermore, in the petition for postconviction relief Mr. Way filed in 1988, the Circuit Court found that Mr. Way should be denied relief "given the totality of the evidence." December 9, 1988, Order of Judge Lazarra at page 5. The Circuit Court made its ruling based upon "the totality of the evidence" and the law it had before it **at that time--i.e., evidence that did not include i) the breaker box photo; ii) the expert conclusions arrived at therefrom; iii) the evidence of perjury by State trial experts who claimed to have inspected the breaker box and found no tripped breakers** (evidence unavailable to the Court as it could be proven only by the suppressed photograph); **iv) the recantation of Fred Way, Jr.; v) the evidence Fred, Jr., had to offer of prosecutorial witness tampering and police misconduct relating to himself and his younger sister, Tiffany; vi) the evidence that the police report of Sean Rooker's statement given**

¹⁴ E.g., Kyles v. Whitley, 115 S.Ct 1555 (1995); State v. Gunsby, 670 So. 2d 920 (Fla. 1996); U.S. v. Acurs, 427 U.S. 97 (1976).

¹⁵ Id.

to police at the fire scene by Mr. Rooker was falsified before it was provided to Mr. Way's trial counsel; and vii) case law holding inadmissible hypnotically refreshed testimony like that of Tiffany Way, the State's key witness at trial; e.g., Sims v. State, 602 So.2d 1253, 1256 (exclusion of hypnotically refreshed testimony is premised on the unreliability of the testimony); see also Charles W. Ehrhardt, Florida Evidence, s. 613.2 (1996 Edition) ("Because of the dangers of unreliable testimony, the Florida Supreme Court has rejected the admissibility of **any** testimony that has been hypnotically refreshed.") (citing Sims) (emphasis added).

To dismiss the cumulative effect of the evidence considered by the 1988 court without viewing it in light of the evidence and law that has surfaced only **after** its ruling--when it was professed by that court that its conclusion was based upon "the totality of the evidence"--is as unjust as allowing a jury verdict to stand notwithstanding newly discovered evidence of innocence.

In its Answer Brief, the State repeatedly contends that there existed "overwhelming evidence" of Mr. Way's guilt at trial. If this were true, his sentencing jury would never have been deadlocked. If, in addition to the evidence they heard at trial, Mr. Way's jury had been privy to the evidence adduced at the 1988 evidentiary hearing; the previously undisclosed

photographs showing the malfunctioning circuit breaker box; the expert opinions drawn therefrom; the testimony of Fred Way, Jr., detailing how he and his sister, Tiffany, were unconscionably manipulated into falsifying their trial testimony by the prosecutor, police, and their maternal grandparents; the testimony of Sean Rooker, who saw Carol and Adrienne Way fighting in their garage immediately before he heard the explosion and saw the fire break out; and the testimony of Betty Slaton, who saw a heartbroken Fred Way weeping after discovering that his wife and daughter had been killed, there is no question that Fred Way would have been justly acquitted.

In this case, where **no** judge **nor** jury has ever considered the true totality of the evidence and where an innocent man's life hangs in the balance, it would be unconscionable to depart from the established case law requiring a cumulative analysis of the wealth of evidence adduced during Mr. Way's postconviction proceedings.

CONCLUSION

Fred Way is an innocent man wrongly convicted. The evidence that has come to light since his trial--in large part because previously undetected prosecutorial and police misconduct has finally been exposed--demands that he be granted a new trial at which a jury, for the first time, will be able to consider **all** of the evidence of his innocence and come to the ineluctable conclusion that he should be set free and allowed to rebuild his life.

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by United States Mail, first class postage prepaid, to counsel of record on April ____, 1999.

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