IN THE SUPREME COURT OF FLORIDA

FRED LEWIS WAY, :

Appellant, :

vs. : Case No. 78,640

STATE OF FLORIDA, :

Appellee. :

_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR APPELLANT

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PRELIMINARY STATEMENT

This case involves consolidated appeals from (1) a death sentence imposed following a penalty trial before a newly impaneled jury, and (2) the denial of a motion for post-conviction relief pursuant to Fla.R.Crim.P. 3.850 (See R1244,1494-96,1502). Appellant, Fred Way, was the defendant in the trial court, and will be referred to in this brief as appellant or by name. Appellee, the State of Florida, was the prosecution and will be referred to as the state. The record on appeal will be referred to by use of the symbol "R". The record on appeal for appellant's original trial in December 1983 (which was adopted by reference and made part of the trial court's order in denying the Rule 3.850 motion, see R1139, 1386) will be referred to by use of the symbol "OR." All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

Fred Way was charged by indictment filed August 3, 1983 in Hillsborough County with two counts of first degree murder in the deaths of his wife Carol and his daughter Adrienne, and one count of arson (R1254-55,OR13-14). Prior to trial, appellant's attorney, David Rankin, filed a motion to compel disclosure of all evidence favorable to the defendant and material to the issues of guilt or punishment (OR27), and a motion to require the state to furnish him with copies of all photographs taken in the investigation of this case (OR24). At a hearing on December 9, 1983 before Judge Peter Taylor, the following discussion occurred:

> MR. RANKIN: Also the Motion for Production of photographing, Mr. Benito has assured me -- He can make the same representation here on the record -- That he has produced for me all those photographs which are available which relate in any manner to this investigation.
>
> THE COURT: All right.
>
> MR. RANKIN: Is that correct, Mr. Benito?
>
> MR. BENITO [prosecutor]: That is correct. That motion should have been rendered moot as long as -- as well as the Motion for the Detective's Notes. I did provide him with a copy of Detective Staunko's notes, I believe, Mr. Rankin; is that correct.
>
> MR. RANKIN: That is correct. As to the Motion to Compel Disclosure of All Evidence Favorable to the Defendant, Mr. Benito has also assured me that such production has occurred. And if he will represent that on the record, then that would take care of that motion.
>
> MR. BENITO: That's correct, Judge.

THE COURT: That is Brady vs. Maryland motion?

MR. RANKIN: That is correct.

MR. BENITO: Yes, sir.

THE COURT: All right.

(OR1687-88)

Appellant's trial took place on December 12-20, 1983 before Judge Taylor and a jury, and he was found guilty of first degree murder of Adrienne, second degree murder of Carol, and arson (OR98-100,111). The jury, by a 7-5 vote, recommended the death penalty (OR191,1679), and on January 27, 1984 the trial court imposed a sentence of death (OR115,137-44)[1] This Court affirmed the convictions and death sentence on September 19, 1986. Way v. State, 496 So. 2d 126 (Fla. 1986).

In April 1988, appellant filed a motion for post-conviction relief pursuant to Fla. R. Crim. P. 3.850, which was denied after an evidentiary hearing held June 13-15, 1988 before Judge Richard Lazzara. Appellant then petitioned this Court for a writ of habeas corpus, and appealed the denial of his Rule 3.850 motion. In an opinion issued September 6, 1990, this Court affirmed the denial of the motion for post-conviction relief, but granted the writ of habeas corpus to the extent of vacating the death sentence and remanding for a new penalty hearing before a newly impaneled jury. Way v. Dugger, 568 So. 2d 1263 (Fla. 1990). This relief was granted because of the trial court's failure to instruct the ori-

[1] Sentences of 99 years and 30 years were imposed for the convictions of second degree murder and arson (OR113,116).

ginal jury that it could consider in mitigation any other aspect of appellant's character or record or any other circumstance of the offense. 568 So. 2d at 1266 [citing Hitchcock v. Dugger, 481 U.S. 393 (1987)].

The Public Defender for the Thirteenth Circuit was appointed to represent appellant in the new penalty proceedings. During a hearing on May 24, 1991, the defense attorneys told Judge Lazzara that information had come to their attention which would necessitate the filing of another motion for post-conviction relief, based on the alternative grounds of a Brady violation,[2] newly discovered evidence, and ineffective assistance of counsel (R1054-60). The motion was filed on June 4, 1991 (R1344-78), and summarily denied the next day (R1137-46,1148,1385-86). Judge Lazzara made it clear that he did not rule that the allegations were legally insufficient; rather, the basis of his denial of the motion without an evidentiary hearing was his determination that the record conclusively refuted the allegations, citing Young v. State, 569 So. 2d 785 (Fla. 2d DCA 1990)(R1138,1163).

Due to trial scheduling conflicts, appellant's penalty re-trial was transferred to Judge Susan Bucklew (R1169,1175-76,1200-02), while Judge Lazzara reserved ruling on the defense's motion for rehearing on the 3.850 motion until the completion of the resentencing proceeding (R1381-82,1162-63,914-15,1214-15,1239). The penalty re-trial was held on July 22, 1991, and it resulted in a recommendation of death, again by a 7-5 vote (R910-11,1414).

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

On August 22, 1991, Judge Bucklew resentenced appellant to death (R1231-38,1491,1497-1501). She found as aggravating circumstances that (1) appellant was previously convicted of a violent felony (the contemporaneous second degree murder of Carol Way); (2) the capital felony was committed while appellant was engaged in the commission of arson, and (3) the capital felony was especially heinous, atrocious, or cruel (R1233-35,1498-99).[3] She found as mitigating circumstances that appellant was 38 years of age at the time of the crime and had no significant history of criminal activity, and the following non-statutory mitigators:

> a. The Defendant's childhood - the Defendant's father died when the Defendant was eleven years old. The Defendant's family was poor and he worked at an early age to help his family.
>
> b. The Defendant served four years in the Air Force and nearly twelve years in the Air Force Reserves.
>
> c. The Defendant was successful in his employment with the Federal Aviation Administration and was well though of by his fellow workers.
>
> d. The Defendant's friends and relatives testified that he enjoyed a reputation for peacefulness and hard work.
>
> e. The Defendant suffered from a hearing impairment and possibly a mental impairment.
>
> f. The Defendant has behaved well in prison, having received no disciplinary reports during the past eight years of incarceration.
>
> g. All other mitigating circumstances asserted by the Defendant.
>
> h. There was testimony regarding the Defendant's happy family life and his emotional

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[3] The trial court expressly stated that she did not rely on the "cold, calculated, and premeditated" aggravating factor because it was not asserted by the state in the July 1991 penalty proceeding, but commented that the record in the 1983 guilt/innocence trial supported a finding of this aggravator (R1235-36,1499-1500).

> response to the death of his wife and daughter. However, the Court notes that the Defendant was convicted of the murder of both his wife and daughter.

(R1500-02,1236-37)

On the same day the death sentence was reimposed, Judge Lazzara denied the motion for rehearing on the 3.850 motion (R1493). Judge Bucklew, upon appellant's motion, consolidated for appellate purposes the denial of the 3.850 motion with the death sentence imposed after penalty re-trial (R1244,1494-96,1502). Notice of appeal was filed on September 5, 1991 (R1502).

STATEMENT OF THE FACTS

A. The Rule 3.850 Motion

The critical facts alleged in appellant's motion for post-conviction relief are as follows[4]:

Allegations that Facts Upon Which Claims are Predicated Were Previously Unknown to the Defense and Could Not Have Been Ascertained by the Exercise of Due Diligence: The motion asserts that the facts upon which his claims relating to (1) Brady violation, (2) newly discovered evidence, and (3) ineffective assistance of counsel (and experts) occasioned by the non-disclosure:

> were unknown to Mr. Way, his trial counsel and his post-conviction counsel due to the withholding of exculpatory evidence by the State of Florida at the pre-trial, trial, appellate and post-conviction stages of this case. (R1347-48)

The motion further asserts that the critical facts were not known, nor could they have been known, "when the initial 3.850 motion was filed due to the continuing failure on the part of the State to respond fully to the demands of post-conviction counsel under Florida's public records law". (R1348)

Claim I (Brady Violation): Numerous photographs were taken at the scene of the fire by FDLE and Hillsborough County sheriff's technicians on July 11, 1983 (the day of the fire) and on July 20, 1983 (when a search warrant was obtained, and after the scene had been altered during clean-up efforts)(R1349-50). Only 32 of the

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[4] The complete factual and legal basis of the Rule 3.850 motion is set forth at R1344-78.

photographs taken by law enforcement were introduced in the 1983 trial (R1350). "Other photographs not introduced at trial remained in the possession of the State Attorney. Some had been initialled by the State Attorney handling the case and may have been disclosed to defense counsel. Others bear no initials and it is unknown whether these photographs were disclosed." (R1350)

> On or about May 20, 1991, the undersigned [Assistant Public Defender Craig Alldredge, see R1062-63] went to Assistant State Attorney Michael Benito's office with the state[d] objective to retrieve any photographs which were in his possession. Mr. Benito handed the undersigned a large packet containing eighty-four photos, most of which were initialed on the back. In addition to this packet, Mr. Benito retrieved a yellow box containing an additional forty-six photographs and seven contact sheets of other photographs taken but never enlarged. Mr. Benito indicated that these photographs and contact sheets had been in his possession and never shown to anyone. This box of photographs was never shown to trial counsel before or after the trial, and the contents were never produced in the investigation conducted by the Defendant's post conviction counsel in 1988.

(R1350)

The prosecution's theory of the fire in the 1983 trial was that it was an incendiary fire (set by someone), and that the accelerant used was gasoline. The state's hypothesis was that the gasoline was poured on the women's clothing, and that the Defendant made a trail of flammable liquid to the back door and ignited it. According to state witnesses, there was no electrical fire or explosion (R1351).

> Among the hithertofore unseen photographs was an eight by eleven inch photograph of the electrical breaker box which graphically show

> a potential source of the fire: at least four and possibly five circuits have been tripped, a position in which they could not be placed manually. Other photographs show the circuit box is less than two feet above a propane tank resting on a work bench. State fire investigators testified there was no indication of an electrical problem, an opinion which is completely contradicted by the tripped circuits of the breaker box.
>
> On May 29 the defense attorneys examined hithertofore unseen contact sheets. One photograph shows a propane tank on a workbench directly below the breaker box. No fire investigator examined the tank, nor is it mentioned in any report. The tank was not among the evidence seized by law enforcement and it is assumed that it, along with other exculpatory evidence, was destroyed.

(R1351)

After obtaining the photographs, the defense attorneys consulted with an arson expert, who advised them that this evidence indicated that the faulty electrical switch box may have ignited leaking propane gas, and "[t]hat the resulting explosion was of such force that the glass in the back door was blown approximately eighteen feet into the yard, that the intense heat from the explosion burned the women and their clothes, and caused gasoline to spew forth from the gasoline can resulting in a secondary fire. The explosion would have been of sufficient force to blow the two women off their feet and hurl them across the garage." (R1352)

In paragraphs 10-16, defense counsel sets forth various aspects of the evidence which are consistent with a propane gas explosion, and/or inconsistent with the state's hypothesis of gasoline being poured on or around the women's bodies (R1352-54). In paragraph 17, coun-sel notes that preliminary discussions with

a forensic pathologist suggest that the women's head injuries "are not inconsistent with those resulting from an explosion where the bodies are hurled against objects" (R1354).

Claim II (Ineffective Assistance of Arson Expert)[5]: Defense counsel in the 1983 trial retained an "investigator and fire safety consultant", Raymond Pomeroy, to assist in the preparation of the defense:

> Pomeroy testified at trial that he examined the scene of the fire on August 18, 1983, more than a month after the fire and after the scene had been completely altered. Pomeroy stated that he did not come to any conclusion with regard to how the fire originated or any other conclusions about the fire. In response to the question why he did not come to any conclusions he gave the following response:
>
> > "Well, there is a lapse of time since the fire, between the time the fire occurred and the time I arrived at the scene. The scene had been disturbed in that all of the debris from the interior of the garage had been moved outside and then back in. A part of the evidence was no longer at the scene."

This concluded Pomeroy's direct examination.

> On cross examination Pomeroy stated that he knew and had worked with the state fire investigators in the past and he could not dispute their findings:
>
> > Q. (Mr. Benito). "If Mr. Regalado testified in this courtroom that the day after the fire he did, in fact, conduct a fire and arson investigation in that garage area, could you dispute --"
> >
> > A. "No, sir."

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[5] The claim is based on State v. Sireci, 502 So. 2d 1221 (Fla. 1987).

(R1357)

In paragraphs 5 and 6, defense counsel asserts that Pomeroy did nothing but visit the scene, see that it was altered, and leave. "He never examined any photographs (particularly those never disclosed by the state), reviewed any reports, sought any additional photographs or negatives, examined any electrical connections, wiring, the breaker box, or the concrete floor of the garage and he never conducted any professionally recognized tests. Nor did Pomeroy examine any physical evidence admitted at trial" (R1357-58). The motion asserts that Pomeroy merely rubber-stamped the state fire investigators' conclusions, and "was unable and unwilling to exercise any independent judgment as to the nature and cause of the fire -- the exact purpose of his employment" (R1358).

Claim III (Prosecution's Knowing Use of False Evidence and Deceptive Arguments): The State's theory at trial was that Way "bludgeoned his wife to death with a hammer, called his daughter to the garage and bludgeoned her to death with a hammer in order to blame the death of his wife on the daughter. The State contended that the Defendant then poured gasoline on the bodies to destroy the evidence, made a trail with gasoline or charcoal lighter to the door leading to the house, then set the trail on fire which ignited the bodies" (R1361).

> The State postulated that some person killed the two women, then ignited their bodies, and then the State showed that the only person in the area was the Defendant. The State was able to so postulate because that evidence which pointed to an accidental propane gas explosion, perhaps triggered by a faulty circuit box, was never revealed to the

> trial attorney. That evidence was also not revealed to the attorneys seeking post conviction relief despite repeated demands.

(R1362)

In paragraphs 8-12, defense counsel asserts that the prosecutor was able to argue to the jury that "somebody" had to have poured gasoline on the women's clothing and set them on fire; and to hypothesize that Way made a trail of charcoal lighter fluid out to the kitchen door and lit it, using it as a wick to start the fire (R1362).

> The State based its theory of the "trail" of flammable liquid on a hypothetical question put to Det. William Myers: "As a hypothetical, assume that a trail of flammable liquid was poured in this area toward the kitchen doorway, flammable is poured, a trail of it in this area toward the kitchen doorway and then ignited. Would the fire damage you observed to the handle of the weedeater be consistent with that happening" (p. 257). Although there was no evidence to support the "facts" contained in the hypothetical, the State was allowed to argue the evidence did exist and was presented to the jury.
>
> The State argued at trial that the weedeater was melted in the "trail" of flammable liquid despite Det. Myers' report that the weedeater was not in that location at the time of the fire: "The location of this weedeater was right in the walk path and appeared to be in an unusual type position and also with the melting on the weedeater, it did not appear that it was in this location at the time of the fire as there was no fire found in this area." (Report, HCSO Det. Myers, July 22, 1983, p. 3 of 5.) Thus the State relied in its hypothetical upon information which he knew to be totally false and utterly unsubstantiated. <u>Again, the evidence of the propane gas explosion and fire, known only to the State, was solely in the State's possession and never disclosed to trial defense counsel</u>.

> It was the State's unrebutted theory that some person set the fire and that the accelerant used was gasoline. The State was able to argue this theory with impunity because the evidence of an accidental propane gas explosion and fire were securely in the State's possession and not shown to defense counsel. The photograph of the breaker box with several circuits tripped, and the contact sheet with the photo of the nearby gas tank, evidence which would have shown an alternative cause of the fire and injuries to the women, never left the possession of the State. Without this invaluable exculpatory evidence, the Defendant was left as the only possible agency for both the fire and the injuries to the women.

(R1362-64)

Claim IV (Newly Discovered Evidence, and Constitutionally Unreliable Imposition of the Death Penalty): In preparing for the penalty retrial, the defense attorneys, who were not involved in the 1983 trial and penalty proceedings, discovered that photographs existed which were never introduced into evidence:

> When the undersigned sought to obtain those photographs, the State also produced a box of photographs and proof sheets which had admittedly "never been seen by anyone" other than the State. It is the last group of photographs that provided the newly discovered evidence that mandates a new trial -- evidence that has been in the State's possession for 8 years and has only recently surfaced despite demand by trial and post conviction counsel.

(R1368)

This newly discovered evidence enabled defense counsel to consult with an arson expert and develop a viable alternative theory of what happened in the garage of the Way home on July 11, 1983. The undisclosed photographs showing an electrical breaker box with four or five tripped circuits, in close proximity to a

propane gas tank, strongly suggested that an accidental propane explosion occurred which mortally wounded both women in the garage and set off a secondary gasoline fire (R1368-69).

Defense counsel asserts in paragraphs 9 and 10 that the newly discovered evidence "supports what Mr. Way has contended for 8 years -- that he did not kill his wife and daughter", and that "had the physical evidence in the garage not been destroyed and had the photographs not been hidden there is no question that the State's entire circumstantial case would have been refuted and the result of the Defendant's trial would have been different" (R1369). In paragraph 15, counsel asserts that the newly discovered evidence, when viewed in conjunction with the Brady violation and the deficient performance of trial counsel, undermines the reliability of Way's conviction and death sentence; therefore, the conviction and sentence cannot withstand the requirements of due process under the 8th and 14th amendments (R1372).

Claim V (Ineffective Assistance of Counsel): The undisclosed photographs, and the newly discovered evidence obtained after the photographs were belatedly furnished, demonstrated a strong likelihood that the fire occurred as a result of an accidental propane explosion triggered by an electrical failure, and thus establish an additional ground for the claim that Way did not receive effective assistance of counsel in his 1983 trial (R1373-74). This claim of ineffectiveness, occasioned by the suppression of exculpatory evidence, "[was] not known to Mr. Way or to his post-conviction counsel nor could [it] have been known when the initial 3.850 motion

was filed due to the continuing failure on the part of the State to respond fully to the demands of post-conviction counsel under Florida's public records law" (R1348).

In paragraphs 3 and 6 of the motion, defense counsel asserts:

> No attempt was ever made [by trial counsel] to challenge the opinions of Fire Marshall Martinez and Detective Myers as to the incendiary nature of the fire. Their opinions were apparently accepted at face value by everyone involved in this case and were, at no time, questioned. Because everyone assumed the fire was a gasoline fire, they also assumed that Dr. Diggs' opinion relating to injuries caused by blunt trauma from hammers or other instruments was likewise unassailable. If those two premises are accepted without question, then it appears to be impossible that Carol and Adrienne Way died accidental deaths or at the hands of each other. That leaves only one logical possibility --- the only adult in the house must have done it. The only adult present of course was Fred Way. The newly discovered evidence, however, clearly rebuts all of the State's theories and makes it appear probable that no murder or arson was committed by Fred Way or anyone else. Trial counsel, by failing to insist that the scene be maintained as it was at the time of the fire, by failing to retain an experienced expert, by failing to insist that the expert follow all recognized steps in conducting a thorough arson investigation, by failing to insist that all physical evidence, including the propane tank, be retained for examination and testing, and by failing to thoroughly explore and question the foundation of the State's theory was ineffective. . . .
>
> In this entirely circumstantial case it was essential to effectively rebut the State's theory of prosecution. The closeness of the case, based as it was upon factual inaccuracies and false premises, was demonstrated by the fact that the jury was out for over 12 hours and was, at one point, deadlocked. The jury's recommendation of death was by the narrowest of margins --- 7 to 5. Under the circumstances, the prejudice to Defendant occasioned by ineffective assistance of counsel is

> clear: But for **any one** of the instances of ineffectiveness cited above there is substantial probability that the outcome of the guilt-innocence phase of Mr. Way's capital trial would have been different.

(R1376)

B. The Summary Denial of the 3.850 Motion

At the conclusion of the May 24, 1991 hearing, when defense counsel advised Judge Lazzara that information had come to his attention which would necessitate the filing of a post-conviction motion, and discussed with him in camera what the factual basis of the motion would be (R1060-70), the judge initially indicated that unless he found that the motion was time-barred, the allegations appeared to be sufficient to warrant an evidentiary hearing (R1071, 1074,1091,1095-96). Judge Lazzara stated, "The issue is whether or not it is procedurally barred" (R1071); and "Because I don't know, based on my knowledge of the record in this case, how I could deny it, number one, on the basis that its factually insufficient and, number two, that the record conclusively refutes the allegations" (R1091).

The day after the motion was filed, a hearing was held to determine whether the judge would grant an evidentiary hearing (R1110). The prosecutor, Mr. Benito, disputed the claim that he had withheld exculpatory evidence (R1114-16). He contended that the photographs depicting the electrical breaker box and the propane gas tank were taken by an insurance investigator, Henry Regalado, who went to the scene of the fire the day after it occur-

red, accompanied by William Martinez of the Fire Marshall's office (R1116). The prosecutor argued:

> I believe those are his [Regalado's] photographs because he was working for the insurance company. He then did a confidential report. All right, and in this report are some of the photographs that should be in that box mimeographed in his report. Okay?
>
> This report was given to Mr. Rankin [Way's trial counsel] at the time he was investigating this case. He took Regalado's deposition. CCR had the deposition, they should have had the report because it's in Rankin's file and it's clear in the deposition he's asking Regalado questions regarding his report, which would indicate he would have seen those photographs. My recollection is Rankin had those photographs.
>
> When these two guys O'Connor and Alldredge come into my office two weeks ago asking for the rest of the photographs, my recollection is I got that box and all the other photographs out of a big box from Fred Way's case, which I had given to CCR initially. All right, they're claiming that I told them, in this motion, that these have been in my possession and no one else has seen them.
>
> MS. McKINLEY [Defense counsel]: Your Honor --
>
> MR. BENITO: That's on page eight of the motion. That is a clear lie, Judge.
>
> Can you imagine that scenario? These two guys walk into my office, I get a box of photographs and tell Mr. Alldredge, "Here, I've been saving these for years, just for you, Mr. Alldredge, they've been intentionally been hidden by me in my office."
>
> So my recollection is that box was in the box of Fred Way stuff. Those photographs were in the box of Fred Way stuff. (R1116-18)

(R1116-18)

Defense counsel countered that this was a factual dispute which needed to be resolved at an evidentiary hearing (R1128-29). She characterized the prosecutor's denial that he withheld evidence

as "testimony" on the disputed issue; and asserted that both Mr. Rankin and the people at CCR had stated that they had never seen these photographs (R1128-29).

The deposition of Henry Regalado taken October 18, 1983, and Regalado's fire analysis report made for Systems Engineering Associates and the Kemper Group, were introduced as Court's Exhibits 4 and 5 (R1135-37,1386). [The deposition contains no mention of an electrical breaker box or a propane gas tank. The report contains a number of photographs, but none depicting an electrical box or propane tank. The report states, at p.2, "Photographs were also taken by Mr. Regalado, some of which are included in this report, with the remainder being on file at the SEA - Tampa, Florida, facility"].

Judge Lazzara then announced that he would summarily deny the motion for post-conviction relief without an evidentiary hearing (R1137-46,1148,1385-86). Citing Young v. State, 569 So. 2d 785 (Fla. 2d DCA 1990), the judge found that the record conclusively refuted appellant's claims (R1138). Relying on the transcripts of the original 1983 trial,[6] and the photographs introduced at the trial, Judge Lazzara essentially concluded that (notwithstanding the allegation in the motion that "preliminary discussions with a forensic pathologist suggest that the [women's head] injuries are not inconsistent with those resulting from an explosion where the

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[6] Judge Lazzara relied specifically on the testimony of the state's pathologist, Dr. Diggs, and its bloodstain pattern analyst Larry Bedore, as well as that of a pathologist called by the defense, Dr. Gibson (R1440-44).

bodies are hurled against objects", R1138-39,1354), the injuries could not possibly have occurred as a result of a propane gas explosion as alleged (R1138-44).

Defense counsel moved for rehearing of the denial of the motion, contending that the court erred in allowing Assistant State Attorney Benito to testify and deny the facts alleged in the motion, while at the same time denying appellant "a full evidentiary hearing where testimony could be presented by both sides on the factual dispute" regarding the disclosure or non-disclosure of the photographs (R1381-82). The defense also contended that the court erred in relying on the evidence at the original trial to conclude that the claim of innocence -- based on the belatedly disclosed and newly discovered evidence -- was unfounded, "when the only issue before [the] court was whether Defendant's motion, on its face, was legally sufficient to raise factual disputes requiring an evidentiary hearing"(R1382). On June 7, 1991, the trial court reserved ruling on the motion for rehearing, and stated that he had not considered any representations of counsel, nor did he rule that the motion was legally insufficient.' "[M]y position was that under the Young opinion, that was cited out of the Second District, the record conclusively refuted the allegations" (R1163). After Judge Bucklew sentenced appellant to death on August 22, 1991, Judge Lazzara denied rehearing on the 3.850 motion (R1493).

C. Penalty Phase - Pre-trial

During a hearing on March 4, 1991, Assistant State Attorney Benito stated:

> This may turn out to be a long case on my side. The State's argument was he killed his wife in anger and then he called his daughter out to the garage and beat her to death and set her on fire to cover up the murder of his wife.
>
> I can't bring that up to the jury and argue to the jury in second phase if I just put on the medical examiner. I'm talking about having to call these witnesses again who are much older and may get to a full blown out trial to establish to the jury what I think happened during the case.

(R926)

When defense counsel thereupon indicated that she too would need to be prepared to re-try the case, Mr. Benito replied, "We can't because that's totally irrelevant" (R927). Defense counsel replied:

> Well, the State is saying we can't retry it, but they are going to be able to retry this and we're not going to be able to rebut it which violates every constitutional right this man has as far as a fair trial.

(R927)

During a subsequent hearing on May 6, 1991, the prosecutor expressed the opinion that he could -- if he wanted to -- read the entire transcript of the 1983 guilt/innocence trial to the resentencing jury (R959). [See R925-29,938-40,978-88; discussion regarding the scope of the evidence which could be presented in the de novo penalty trial].

D. Penalty Phase - State's Case

Randall Hierlmeier was driving on Jackson Springs Road on the morning of July 11, 1983, when he saw smoke coming from the eaves around the garage of a residence (R314-315). He pulled into the

driveway. A man, whom Hierlmeier identified as appellant, was holding a garden hose, spraying water on a car inside the garage (R315-16). The left garage door was closed, while the door on the right was open 5 or 6 feet, and smoke was coming out (R316-17). Hierlmeier asked appellant if the house was on fire, and he said yes (R317). He asked if there was anyone inside the house, and appellant did not respond. The third time Hierlmeier asked, appellant answered that there was no one inside the house (R318-19). Hierlmeier, who was getting a little aggravated at this point, asked twice if there was anyone inside the garage, and got no response (R319). Next he heard a loud scream coming from the garage (R319). He said, "Who the hell is inside the garage?", and appellant said "My daughter is in the garage" (R320). Hierlmeier grabbed the hose from appellant and began spraying him off (R320). While spraying, he kept repeating the question "Where is she located in the garage?", and never got a response (R320-21). During this time, Hierlmeier heard three of four more screams (R321). He told appellant to go in the garage and get her. Appellant ran inside to near the back door of the car; then turned around and came out (R321).

The intensity of the fire was increasing at that point, so that you couldn't even stand near the garage door (R322,329). Hierlmeier got low to the ground, and below the thick smoke, could see a person next to the vehicle, who was "totally engulfed in flames and was trying to get up, seemed to me on all fours, to

crawl out" (R322-23). The fire department eventually arrived and put out the fire. (R323,331).

On cross, Hierlmeier testified that he did not know appellant. If appellant is deaf or partially deaf, Hierlmeier did not know that (R327).

Detective William Davis of the Hillsborough County Sheriff's office went to the Way residence on July 20, 1983 to execute a search warrant (R341-42). He found a claw hammer on the other side of the backyard fence (R343-45). According to Davis, a crime scene technician named Larry Bedore swabbed the hammer and did a presumptive test for blood (R346). There were positive results for blood (R346).

Dr. Charles Diggs, Deputy Associate Medical Examiner for Hillsborough County went to the residence on the day of the fire (R372). Both bodies had been burned (R373). In an autopsy conducted the same day, Dr. Diggs determined that the deaths of both Carol Way and Adrienne Way were caused by blunt trauma of the head and total body burns (R377-78). Carol had sustained twelve head wounds, causing a skull fracture (R377-78). The injuries were consistent with having been inflicted by a hammer (R378). There were two injuries, one above the other, on the left side of Adrienne's head (R378-79). The top wound was a laceration about 1 1/2 inches in length; the other wound was a depressed skull fracture (R379). This injury was also consistent with a hammer blow, or a blow from any protruding blunt object (R380,386,392).

From the presence of soot carbon particles in the trachea, Dr. Diggs concluded that both women were alive at the time of the fire (R380). On cross, he stated that the depressed skull fracture sustained by Adrienne would have been, in itself, a fatal wound, and would have incapacitated her and caused her to lose consciousness almost immediately (R384-85). Involuntary activity, such as shallow breathing, could have continued for a short period of time (R385-86). On re-direct, when the prosecutor asked whether Adrienne could have "moved a little bit" after sustaining the skull fracture, Dr. Diggs replied that generally that type of injury will drop you pretty much where you are, but it was possible she could have moved her arms up in reaction to the heat (R401). Not all of the burns on Adrienne's body were third degree burns; some were first degree (superficial reddening similar to a sunburn) and some were second degree (R381-82).

Dr. Diggs testified that the two head injuries to Adrienne could possibly have occurred simultaneously, but were more consistent with two separate blows (R390-92). Similarly, he acknowledged that there was no way to tell, strictly from an autopsy standpoint, whether Carol Way's injuries occurred all at the same time or sequentially (R397). He stated that it was possible, though not probable, that they occurred from a single impact, but were more consistent with separate blows (R398). The trial court sustained the prosecutor's objection to defense counsel's cross-examination as to whether Dr. Diggs had ever examined anyone who died as a result of a propane explosion (R399-400).

Detective Roslyn Croll of the Hillsborough County Sheriff's office went to the Way residence after the fire was extinguished (R407-08). She observed the bodies of Adrienne closest to the vehicle, and Carol toward the wall (R408). She testified that an arson investigation was conducted by Detective Bill Meyers and State Fire Marshall Bill Martinez, and they reached the conclusions "that the fire was intentionally set, and gasoline was used to start the fire" (R409). Detective Croll also became aware that an FDLE chemist, Ismail Mami, tested the clothing of the women and found components of gasoline (R410). The Sheriff's office began a homicide investigation (R410). Appellant's son told the detectives that during the clean-up of the garage he observed his father pick up a hammer, walk to the back of the residence, and throw it over the fence into a swampy area (R410-11). Appellant was arrested on July 13, 1983, and was subsequently convicted by a jury of second degree murder of his wife, first degree murder of his daughter, and arson (R411-12).

The trial judge sustained the prosecutor's objection to defense counsel's attempt to cross-examine Detective Croll regarding what was done in the arson investigation (R420, see R414-29). Defense counsel contended that Fla. Stat. § 921.141 allows hearsay evidence to be introduced in a death penalty proceeding only if the defendant is afforded a fair opportunity to rebut it (R415, 422); that the state opened the door to the proffered cross-examination by putting on hearsay testimony concerning the results of the arson investigation (R419,423); that the cross-examination was relevant

to challenge the aggravating circumstance that the capital crime was committed in the course of an arson (R425-26); and that the refusal to allow the proffered cross-examination violated appellant's constitutional right of confrontation (R417, 423). The trial judge, however, agreed with the prosecutor that the proffered questions were irrelevant to the penalty decision because they went to the issue of guilt or innocence (R417,419,426-30).

E. Penalty Phase - The Proffered Defense Testimony of of Craig Tanner and Dr. John Feegel

The defense sought to present to the jury the testimony of Craig Tanner, a fire and arson investigator, and Dr. John Feegel, a forensic pathologist and former medical examiner of Hillsborough County, for the purpose of rebutting the state's evidence and challenging the arson and HAC aggravating circumstances (R430,448-49,506-07,669-70). The trial court ruled their testimony inadmissible "based on my belief that it goes to the guilt or innocence of Mr. Way as to the arson, rather than to any mitigating circumstances" (R449, see R431,507,601-02,663,670). Defense counsel argued that the exclusion of the proffered testimony violated appellant's right to a fair trial under the state and federal constitutions (R507).

Defense counsel proffered that Dr. Feegel would testify that in his opinion the burn injuries suffered by both Adrienne and Carol Way were consistent with burns from a gas vapor explosion, and inconsistent with gasoline being poured on the bodies (R448). Dr. Feegel would also testify that the injuries to both women were consistent with those which could have occurred in a propane gas

explosion (R448). [Both the trial judge and the prosecutor agreed that this was a sufficient proffer to preserve the record (R448-49)].

In the jury's absence, Craig Tanner testified that for the last five years he has been employed as a fire and arson investigator for National Casualty and Fire Adjustors. His job "is to determine the cause and origin of fires and to determine whether they are accidents or incendiary in nature" (R450-51). He has thoroughly investigated 300-350 fires, he is a member of several professional associations, and he has been qualified as an expert witness in state and federal courts (R451-52).

In the spring of 1991, Tanner was asked to examine the property at 8030 Jackson Springs Road (the former Way residence), and was supplied with approximately 200 photographs, as well as the testimony, depositions, and reports of both investigators who examined the fire scene in 1983 (R452-53). Tanner conducted some tests at the scene and in the laboratory (R453). Based on his research, it was Tanner's opinion that a propane gas explosion took place in the Way garage (R453-54,484), and that the gasoline fire was of secondary origin (R454,456-57,460-62,472-73).

Tanner reviewed photographs showing a propane tank near the east wall of the garage, just beneath the electrical service entrance box (R455,469,478). The propane tank had aerosol cans on both sides; these had ruptured and expelled their contents (R455). This, and the fact that the tank showed discoloration of the metal and deterioration of the paint, indicated that there was extreme

heat at the propane tank (R456). Defense Exhibit 13 was a photo of the electrical breaker box (R458). Tanner had reviewed the testimony of the prosecution's fire investigators Meyers and Martinez, who had concluded that none of the breakers had been tripped and that there was no electrical fire (R458)(see OR679-80,711). Tanner testified that, to the contrary, the photo showed "at least four single pole breakers that have been tripped" (R458, see R487). They could not have been placed in this position manually (R458-9), nor could they have been in this position as a result of heat in the garage (R488-89). Defense counsel asked:

> Is it your opinion that those switches were placed in the position where they were [because] of a electrical malfunction?
>
> MR. TANNER: That's the only way. There's a second way, by removing the breaker, drilling a hole in the sides, and physically tripping the lever that goes up.
>
> But the breaker cannot be placed in this position even if someone would have touched this panel prior to the time this was taken.
>
> There's no way the breakers could have been put in that position. It's physically impossible. It has to be done by over currents.

(R459)

Tanner vehemently disagreed with the prosecutor's suggestion on cross that these electrical boxes are designed to automatically short when confronted with heat (R488-489). This, Tanner explained was "totally erroneous" (R488); because the circuit breakers are "current sensitive," not "temperature sensitive," and they had to have been overheated by the current running through them in order to be in the position shown in the photograph (R488-89).

In investigating the cause of the fire in the Way garage, Tanner performed tests demonstrating how propane gas can be ignited by an electrical spark from typical household equipment (R457,467-68). This is also well documented in fire reference manuals (R457, 468). According to Tanner, every one of the tripped circuit breakers was capable of sparking (R478).

One of the main reasons why Tanner determined that the fire in the Way garage was a propane fire was the fact that it was a "high fire"; the photographs consistently show a great deal of burn damage to objects waist high or above throughout the entire garage, and little or no damage to objects lower down (R454-55,460,466,469-84). A high fire is more consistent with a propane fire than a gasoline fire (R466,470,477479,484); "[i]f it was gasoline it would be low" (R477). Gasoline vapors are three times heavier than propane, which is why propane vapors are more likely to be found high than low (R470).

Moreover, according to Tanner, the photographs showed a pattern inconsistent with the theory that gasoline was poured either directly on the women, or on the concrete floor of the garage (R460,476,480,501). He testified that the prosecutor's hypothesis that appellant made a trail of charcoal lighter fluid and used it as a wick to ignite the fire was an impossibility (R464,466). Kerosene, the major component of charcoal lighter, is a combustible material but not a flammable material (R464). Tanner performed tests in that area of the garage in which he attempted to ignite the kerosene with matches, and confirmed that "[i]t cannot be done"

(R464). "In the [fire investigation] manual they suggested it cannot even be done with a blowtorch" (R464)

A weedeater with a metal handle was found after the fire on the floor of the garage (R465). Tanner testified that the prosecutor's hypothesis that the weedeater was burned because it was in the path or trail of charcoal lighter was impossible (R466):

> First of all, you can't ignite the charcoal lighter, okay? So, therefore, it can't be used to trail across the handle of the weedeater.
>
> Secondly, it would have left markings on the concrete.
>
> Thirdly, the weedeater is approximately at this height at floor level and you see everything else in the garage melting.

(R466)

Tanner's opinion was that the weedeater was in an upright position at the time of the fire; that the handle sustained burn damage (at about the same level of height as the other objects in the garage which were burned) from the heat from the propane gases; and sometime during the extinguishment of the fire the weedeater fell (R466-67,476,483). That would be consistent with the pattern of burning found in the rest of the garage (R476,483). "There's no reason to believe that the weedeater was not standing up. We know it wasn't trailed across, because the concrete below is clean" (R476, see R465).

Tanner testified that the gasoline fire was of secondary origin (R454,459). He explained that propane produces an extremely high temperature and will ignite any flammable or combustible materials which it comes across (R459-60). When you have an over-

rich mixture (beyond the 9.6 upper limit of propane) the propane itself will tend to ignite these materials (R460). "The photographs show that. . .that has happened" (R460).

There were about two inches of gasoline left in the bottom of the can (R460,473). Tanner explained:

> [T]he gasoline can, when heated, would reach a boiling temperature and it would spew from it.
>
> A good analogy would be a car fire. When a car is set on fire and the tank is not ruptured, it will, within the collision let's say or if there's not a collision, it's very unlikely, by design, that the gas tank itself will explode.
>
> While the cap will blow off and will spew the gasoline out for some distance, and that gasoline will burn, the gasoline inside the tank will not burn because it's too rich, okay?
>
> It's not within it's flammable limits. . .

(R460)

This, Tanner stated, would account for the gas fumes which were detected in the garage, and for the components of gasoline found by the FDLE chemist on the women's clothing (R461,463).

The only part of the garage where low burning was evident was the exact location where the gas can itself was stored (R455,473). The photograph of that area "depicts certainly a gasoline spewing-type effect from the can that was sitting there" (R473). Conversely, the various photographs show a pattern "very much inconsistent with any type of liquid pour pattern you would find with gasoline" (R460).

There was glass missing from the back garage door, and glass was found 14 to 18 feet from the rear of the door (R457,484-85). The state's fire investigator, Martinez, in his 1983 report, had "ruled out an explosion, because he stated that the glass pieces were too large to be involved in an explosion" (R485). Tanner testified that, in his opinion, the glass fragments were consistent with a propane explosion (R457), and that he has seen samples of glass fragments documented in explosions which were much larger than those found behind the Way garage (R485). As further support for his conclusion, Tanner noted that the pieces of glass found at a distance from the door were clear, while the pieces closer to the door were visibly smoke-sooted (R457,485). This indicates that the nearby (smoke-sooted) glass was in place during the fire, while the farther away pieces of glass were not (R485). Asked whether a propane explosion could be of sufficient force to topple over a human being, Tanner replied that it could; "About the same amount of force that it would take to blow out a window" (R461-62).

F. Penalty Phase - Defense Witnesses

After the trial court refused to allow the jury to hear the testimony of Craig Tanner and Dr. Feegel (R502,506-07), the defense called seven of appellant's colleagues at the Federal Aviation Administration, and nine members of his family.[7] Dr. Sidney

[7] The FAA witnesses were engineers Raymond Shipley, William Batte, Freddie Massey, Joseph Dunville, Charles Spresser, William Frank Duggan, and electronics technician Hans Schellenberg. The family members were his sisters Sarah Magrath, Lois Hackle, and Evelyn Way; his brother James Way; his brother-in-law Lavon Hackle, his stepsister Juanita Denmar; his nieces Sherry Wilson and Sandra Hunter; and his nephew Leeland Powell.

Merin, a clinical psychologist and neuropsychologist, and Francis Scott Smith, an audiologist and speech/language pathologist, also testified for the defense. In addition, appellant described his life and background to the jury. He also testified that he did not kill his wife or his daughter, and did not start a fire (R705). He has maintained his innocence from the first day, and throughout his eight years of imprisonment, and "I'll say it until the day I die, I did not commit this crime" (R705). "And I believe some day all the information will come out and all the evidence will come out and it will be proven" (R705).

The uncontradicted evidence established that appellant was the last born child of a close but not very prosperous family in Savannah, Georgia in 1945 (R674-75,721,749,752). His father, then employed as a milkman, died suddenly on appellant's eleventh birthday (R675-76,721,739,749,752). The family's financial situation worsened, and appellant had to work after school, on weekends, and in the summers to help his mother out (R677,721-24,730,738-39,744, 749,757,764). He was always a hard worker (R730), but still found time to play high school football and other sports (R676,764). Family members described him as a youth as respectful, dependable, helpful, well-mannered, even-tempered, gentle, and honest (R723, 730,744,749,757,764,767). His slightly younger nieces and nephew considered him a big brother and protector, who took care of them, helped them in emergencies, and taught them to drive (R728-30,734, 765).

Upon his high school graduation, appellant joined the U.S. Air Force. He completed four years of active duty, followed by six years in the reserves, and received an honorable discharge (R678-84,1581-85). He married Carol while in the Air Force; three children -- Adrienne, Fred Jr., and Tiffany -- were born in 1968, 1969, and 1971 (R684).

While in the Air Force and consistently thereafter, appellant furthered his education in the fields of electronics and engineering. By attending school at night, and later through work study programs (when he was with the FAA), he was able after many years of study to complete all but a few of the requirements for a college degree in engineering. He passed an equivalency examination, and was licensed as an electrical engineer in Georgia and by the federal government (R548,551,582,587-88,682,685-92).

After several jobs, appellant was able to secure a position as an engineer with the Federal Aviation Administration. Starting as a technician, he rapidly won the respect and admiration of his colleagues and superiors. Through hard work he was able to steadily advance in a demanding career until he had become one of the premier experts in the agency in the field of air traffic control systems.[8] His duties included the installation, maintenance, and

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[8] The head of the Tampa regional office characterized appellant as an outstanding employee, very well qualified technically and worked well with other people (Duggan, R589-90,593). Appellant's colleagues in the Atlanta and Tampa offices described him as an expert in his field, "skilled, hard worker, thorough, complete" (Shipley, R536); a very hard worker, conscientious and very knowledgeable, with exceptional ratings from supervisors (Batte, R543,546); an excellent worker with a human approach, and (continued...)

repair of complicated air traffic control and instrument landing systems in airports and FAA facilities throughout the Southeast. Appellant's efforts in this high pressure occupation ensured the safety of thousands of airline passengers daily; as one witness bluntly put it, if the instrument landing systems malfunction, "the aircraft crashes" (R542). Appellant's expertise was such that he was made a member and an organizer of an elite team of trouble-shooters known as the "Tiger Team", which was responsible for assisting local technicians throughout the region with their installation or maintenance problems. Appellant was also frequently sent to Central America, especially Honduras, to provide requested expert assistance. (See R533-38,541-45,552-54,563-66,572-76,578-83, 586-93,692-93,697-700).

While appellant worked hard and traveled often, evidence showed that he spent whatever spare time he had with his family -- vacationing together, taking his son on business trips, attending family reunions and sporting events (R566,695-96,725,731-32,735-36,746,760,767).

Dr. Sidney Merin, a clinical psychologist and neuropsychologist, testified that appellant suffers from brain damage or impairment on the right side, a condition most likely congenital or the result of an injury at an early age (R632-43). This affects his ability to express emotion (R634-36). He is not mentally or psy-

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[8](...continued)
an expert in his field (Dunville, R563,565); an expert, who was pleasant, factual, and easy to work with (Schellenberg, R572-73,575). Appellant was someone others would turn to to solve problems, and he was always willing to help (R538-39,565-66,583).

chologically ill (R627). His intelligence is average or slightly higher (R629,633). Dr. Merin described his personality traits as restrained and serious; shy but basically friendly and agreeable; a person who prefers cooperativeness, as opposed to being critical or intolerant (R630). Appellant was able to overcome his dual handicaps of brain and hearing impairment, and to succeed in the field of engineering (which primarily involves left side brain functions such as logic) only through extreme diligence and struggle (R632, 636,638-41). In effect, he has had to "overlearn" everything he has done (R639). Appellant's educational and professional achievements required "an enormous amount of motivation, a drive to learn something"; a great expenditure of time, effort, and energy (R639-40).

Audiologist and speech/language pathologist Francis Scott Smith testified that appellant has long suffered from a severe hearing impairment. [According to appellant, the problem was detected when he was in the Air Force, and worsened after several operations while in the service (R680-82)]. By 1983 (when the fire and the events described by Randall Hierlmeier occurred), he was totally deaf in his left ear and also had significant hearing loss in his right ear. This would interfere with his hearing certain speech sounds. His ability to understand speech would decrease markedly in stressful situations (R789-97,see R642-45).

Finally, the evidence showed that appellant, during his more than seven years of imprisonment after his 1983 conviction, has not

received a single disciplinary report, and has consistently received the highest daily rating of his behavior (R594-96,1578-79).

SUMMARY OF THE ARGUMENT

The trial court erred in summarily denying appellant's motion for post-conviction relief, because the allegations were not conclusively refuted by the record. Young v. State, 569 So. 2d 785 (Fla. 2d DCA 1990), relied on by the trial court, is completely distinguishable because (1) the instant case, unlike Young, involves a Brady violation which impeded cross-examination of the state's arson experts and pathologist, and prevented the development of a viable theory of defense; (2) the new evidence offered by Young was inconsistent with the trial testimony of his own expert witness; and (3) Young had repeatedly admitted his guilt (while appellant has consistently maintained his innocence). Appellant's claims are legally sufficient to require an evidentiary hearing, and they are not procedurally barred [Issue I].

The exclusion of the proffered testimony of Craig Tanner and Dr. John Feegel (along with the limitation of cross-examination of state witnesses Diggs and Croll) was reversible error of constitutional dimension because (1) the evidence was relevant to the nature and circumstances of the offense; (2) it was relevant to challenge the aggravating circumstances that the capital felony occurred in the commission of an arson, and that it was especially heinous, atrocious, or cruel; (3) the state opened the door by introducing hearsay testimony concerning the findings of its fire and arson investigators, and (4) a death penalty proceeding violates the defendant's state and federal constitutional rights to due process of law, to a fair trial, of confrontation of adverse

witnesses, to present a defense, and to reliability in capital sentencing, when a penalty jury, different from the one which heard the guilt phase evidence, is allowed to hear only the state's version of the circumstances of the offense. [Issue II].

The trial court's instruction on, and finding of, the aggravating factor that the capital felony occurred in the commission of an arson cannot constitutionally be upheld, because appellant was unfairly precluded from refuting it [Issue IV]. The instruction and finding on the prior violent felony aggravator, based solely on the contemporaneous conviction of second degree murder, was improper because the legislature never intended this factor to apply to crimes which occurred during the same episode as the capital felony [Issue V]. The "especially heinous, atrocious, or cruel" aggravating factor was not proven beyond a reasonable doubt, where there was no evidence of intent to torture, and where (according to the prosecutor's hypothesis) appellant thought the victims were dead when he set fire to the garage [Issue VI]. The "cold, calculated, and premeditated" aggravator (which the trial court did not rely on, but which she concluded was supported by the evidence) cannot be considered on proportionality review, because (again, taking the evidence in the light most favorable to the state) this was a domestic confrontation situation, where the first killing was unpremeditated (as evidenced by the second degree murder conviction) and the premeditation in the second killing, which occurred moments later, was of very short duration and under extreme stress. There was no "careful plan or prearranged design" as required by

Rogers v. State, 511 So. 2d 526 (Fla. 1987) [Issue VII]. For these reasons, and because appellant has no prior history of violence or criminal activity, and because there are substantial nonstatutory mitigating circumstances, the death penalty is not proportionally warranted and his sentence should be reduced to life imprisonment [Issue IX].

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR POST-CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING.

A. Introduction

The state's evidence in appellant's 1983 trial was entirely circumstantial. The jury was out for over twelve hours and was, at one point, deadlocked (OR1585). The jury recommended the death penalty by the narrowest margin, 7-5. In the 1991 penalty trial (on resentencing) the vote for death was again 7-5. As a consequence of (1) the prosecutor's failure to provide all photographs in his possession relating to the fire investigation (despite his having assured defense counsel that he had done so); (2) Judge Lazzara's summary denial of appellant's motion for post-conviction relief; and (3) Judge Bucklew's refusal to allow Craig Tanner and Dr. Feegel to testify in the 1991 penalty trial [see Issue II], no jury has ever heard the evidence which strongly suggests that Adrienne and Carol Way died in an accidental propane gas explosion and fire. Whether this evidence is characterized as newly discovered evidence, or evidence belatedly obtained due to a Brady violation[9], or evidence which the trial attorney should have obtained but didn't due to his ineffective preparation, or a hybrid of these claims, the stark fact remains that if the evidence of a

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[9] Brady v. Maryland, 373 U.S. 83 (1963).

propane explosion is correct, then appellant faces execution -- blamed for killing his wife and daughter -- for a crime he didn't commit, and which in fact nobody committed. The interests of justice require that he be given an opportunity to present this critical evidence to a jury. At the very least, he should be afforded an evidentiary hearing on his claims.

Prior to the 1983 trial, defense counsel moved, pursuant to Brady, to compel disclosure of all evidence favorable to the defendant and material to the issues of guilt or punishment (OR27), and to require the state to furnish him with copies of all photographs taken in the investigation of this case (OR24). At a hearing before trial, the prosecutor, Mr. Benito, acknowledged on the record that he had assured defense counsel that he had produced all available photographs which related in any manner to this investigation. Mr. Benito stated that, since the requested photographs had been provided, "[t]hat motion should have been rendered moot." He also acknowledged that he had assured defense counsel that the requested disclosure of evidence under Brady had occurred; thereby rendering that motion moot as well (OR1687-88).

Taking as true the allegations in appellant's motion for post-conviction relief[10], the prosecutor's representation that he had provided all available photographs of the fire scene and all favorable and material evidence was false and misleading. See United

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[10] See Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989)(appellate court, in determining whether claims in Rule 3.850 motion are sufficient to require an evidentiary hearing with respect to whether there was a Brady violation, must take allegations at face value).

States v. Bagley, 473 U.S. 667, 682-83 (1985)(incomplete response to a specific request not only deprives the defense of evidence, but also has the misleading effect of representing that the evidence does not exist; failure to respond completely to a Brady request may impair the adversary process, since the defense -- in reliance on the misleading representation -- may abandon lines of investigation, defenses, or trial strategies it would otherwise have pursued). See also United States v. Spagnuolo, 960 F.2d 990, 995 (11th Cir. 1992)(undisclosed report was "material" under Brady analysis, because it could have fundamentally altered the defense strategy and made an insanity defense a viable option). Appellant's motion alleges that on or about May 20, 1991, his newly appointed attorneys went to Mr. Benito's office with the stated purpose of retrieving any photographs which were in his possession. Mr. Benito handed over a large packet containing photos which were used at trial, or which were disclosed to Mr. Rankin, appellant's 1983 trial attorney. In addition, he retrieved a yellow box containing 46 more photos, as well as seven contact sheets of other photographs taken but never enlarged. Mr. Benito indicated that these photos and contact sheets had been in his possession and never shown to anyone. Neither appellant's 1983 attorney, nor his 1988 post-conviction counsel, ever saw these photographs (R1350). Among the previously undisclosed photographs was the "eight by eleven inch photograph of the electrical breaker box which graphically shows a potential source of the fire: at least four and possibly five circuits have been tripped, a position in which they

could not be placed manually" (R1351). Among the previously unseen contact sheets was a photograph showing a propane tank directly below the electrical box (R1351). "No fire investigator examined the tank, nor is it mentioned in any report. The tank was not among the evidence seized by law enforcement and it is assumed that it, along with other exculpatory evidence, was destroyed" (R1351).

Until the belated disclosure of the photographs, neither appellant, his trial counsel, nor his post-conviction counsel could have been aware that the electrical circuits had been tripped. Appellant may or may not have known that there was a propane tank in his garage (the house was newly rented), but he would not have understood the significance of its proximity to the electrical box without knowing that the circuits had been tripped. The state's fire investigators had concluded in their reports, and testified at trial, that there was no indication of an electrical fire (OR679-80,711); an opinion which could have been strongly challenged on cross and/or contradicted in the defense's case if the critical photographs had not been withheld. That alone might well have been enough to change the outcome of the trial, in light of the circumstantial nature of the evidence and the fact that the jury was once deadlocked. See Jacobs v. Singletary, 952 F. 2d 1282 (11th Cir. 1992)(undisclosed report, if accepted as true, would have impeached witness' trial testimony on several issues which centrally concern defendant's guilt or innocence; appellate court finds it "reasonably probable" that disclosure of report would have altered the outcome of the trial). Even more importantly, if the critical

photographs had been furnished to defense counsel, it would have enabled him to present a coherent, plausible alternative to the scenario hypothesized by the state. The defense could have shown that the evidence was more consistent, or at least as consistent, with an accidental propane explosion and fire than with an incendiary gasoline fire. If the jury found that the fire, and the deaths of Carol and Adrienne Way, were caused by a propane explosion, it necessarily would have found appellant not guilty on all three counts. If the jury, after hearing all the evidence, remained unsure whether it was an incendiary fire or a propane explosion, there would have been a reasonable doubt as to guilt, and appellant would have been acquitted. See United States v. Agurs, 427 U.S. 97, 112 (1976)(". . . [I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed").

B. The Allegations Were Not Conclusively Refuted by the Record

When the facts underlying appellant's motion for post-conviction relief were first brought to his attention, Judge Lazzara indicated that unless he found that the motion was time-barred, the allegations appeared to be sufficient to require an evidentiary hearing (R1071,1074,1091,1095-96). However, he ultimately denied the motion without an evidentiary hearing, finding under Young v. State, 569 So. 2d 785 (Fla. 2d DCA 1990) that the record conclusively refuted appellant's claims (R1138, 1144,1163). Judge Lazzara made it clear that he did not consider any represen-

tations made by either counsel regarding the truth or falsity of the allegations, nor did he say that the motion was legally insufficient; ". . . [M]y position was that under the Young opinion, that was cited out of the Second District, the record conclusively refuted the allegations" (R1163).

In denying appellant an evidentiary hearing and a fair opportunity to substantiate his claims -- on an issue so central to guilt or innocence of a capital offense -- Judge Lazzara committed reversible and constitutional error. Contrary to his ruling, appellant's claims involve disputed issues of fact which cannot be conclusively resolved by the record, and denial of an evidentiary hearing in such circumstances is a denial of due process. See Holland v. State, 503 So. 2d 1250, 1252-53 (Fla. 1987).

"The law is clear that under rule 3.850 procedure, a movant is entitled to an evidentiary hearing unless the motion or files and records in the case conclusively show that the movant is entitled to no relief."[11] O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984); see Demps v. State, 416 So. 2d 808 (Fla. 1982). The rule does not contemplate the resolution of disputed factual mat-

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[11] "Conclusive" is defined in Black's Law Dictionary (5th Ed.) as:

> Shutting up a matter; shutting out all further evidence; not admitting of explanation or contradiction; putting an end to inquiry; final; irrefutable; decisive. Beyond question or beyond dispute; manifest; plain; clear; obvious; visible; apparent; indubitable; palpable.

ters without an evidentiary hearing. Morgan v. State, 475 So. 2d 681 (Fla. 1985). The Second DCA's decision in Young, relied on by Judge Lazzara in summarily denying appellant's motion, is completely distinguishable from the situation involved here. In Young, a defendant convicted of the murder of his wife alleged that new evidence had been discovered that someone else committed the crime. The new evidence consisted of the affidavit of another prison inmate named Bass, claiming to have executed a "contract" on Young's wife. The Second DCA affirmed the trial court's summary denial of Young's post-conviction motion, finding that the record conclusively refuted the allegations. The Bass affidavit stated that "Bass made Mrs. Young lie down on a bed and shot her once through the right breast with a .38 caliber handgun. He then lifted Mrs. Young's T-shirt and observed that the bullet had exited 'on her left side down low.'" 569 So. 2d at 787. The Second DCA noted that in Young's trial all of the expert witnesses, including the pathologist called by the defense, had testified that Mrs. Young was shot in the back; that the four wounds resulted from a single gunshot which entered on the left side of her back and exited from the underside of her left breast. The appellate court wrote:

> . . . Young should be bound by the testimony of his own expert witness, which is physically inconsistent with that of the new evidence. Viewing this inconsistency in conjunction with the other evidence presented at trial, particularly that concerning Young's repeated admissions of guilt, we conclude that the trial court made the correct decision in denying Young's motion without an evidentiary hearing.

569 So. 2d at 787.

In the instant case, in sharp contrast to Young, appellant has consistently maintained his innocence; before, during, and after trial. The newly obtained evidence supports his claim of innocence. In the instant case, unlike Young, a Brady violation is alleged. If the allegations are taken as true,[12] then the state's failure to furnish the defense with all of the photographs of the fire scene (despite the prosecutor's assurance to defense counsel that he had done so) impaired the adversary process in the original trial, impeded cross-examination of the state's arson experts and pathologist, and prevented the development of a viable theory of defense. See Bagley, 473 U.S. at 682-83; Spagnuolo, 960 F. 2d at 995; Jacobs, 952 F. 2d at 1289. Since the original trial was fundamentally flawed by the Brady violation [see Neely v. State, 565 So. 2d 337, 345-46 (Fla. 4th DCA 1990)], Judge Lazzara's primary reliance on the trial testimony of the state's experts to "conclusively refute" appellant's allegations (see R1138-44) was clearly erroneous. If the photographic evidence suggesting a propane explosion triggered by an electrical failure had been furnished in 1983, the state's experts might have changed or modified their conclusions; or, if not, they could have been effectively impeached on cross or in the defense's case. Appellant's post-conviction motion includes the following allegation:

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[12] As they must be, for purposes of appeal of the summary denial of a post-conviction motion alleging a Brady violation. Lightbourne, 549 So. 2d at 1365.

> 17 [Brady claim]. Dr. Charles Diggs, associate medical examiner for Hillsborough County, testified at trial that the injuries to the two women could have been inflicted with a hammer. Neither the State Attorney nor the defense attorney ever asked Dr. Diggs or the doctor called by the defense, whether the injuries could have been inflicted by another object, nor were the doctors asked whether the injuries could have been inflicted as a result of an explosion. Nor were the doctors asked whether the injuries could have been inflicted simultaneously on each woman, rather than sequentially as the State argued. Presumably they were not asked because the photographic evidence of the explosion was kept from them and from the defense attorney by the State. Preliminary discussions with a forensic pathologist suggest that the injuries are not inconsistent with those resulting from an explosion where the bodies are hurled against objects, but time constraints have not permitted further investigation.

(R1354)

For Judge Lazzara to conclude that appellant's allegations concerning the likelihood of a propane explosion were "conclusively refuted by the record" because they were inconsistent with Dr. Diggs' trial testimony -- or that of other prosecution expert witnesses -- is circular reasoning. In every trial which results in a conviction there is going to be some inculpatory evidence; the problem here is the suppression of exculpatory evidence which would have allowed appellant to present a viable defense -- a reasonable alternative hypothesis -- and to challenge or contradict the state's witnesses. Moreover, even assuming arguendo the dubious proposition that a defendant's allegations could ever be deemed "conclusively refuted" by the contrary opinion of a prosecution expert witness, the fact remain that (1) Dr. Diggs' testimony was

not conclusively inconsistent with appellant's claims, and (2) as a consequence of the Brady violation, nobody ever asked Dr. Diggs to offer an opinion as to whether the women's injuries could have resulted from an explosion, or whether they could have been inflicted simultaneously rather than sequentially.[13] Dr. Diggs, in the 1983 trial, simply gave the opinion that the head injuries sustained by Carol and Adrienne were caused by a blunt object, and were consistent with having been inflicted with a hammer (OR769-75,779-83,793-94,800). He specifically stated that he could not rule out any other type of blunt object (OR769), and he was never asked whether there was any way to determine whether the head collided with the object or the object collided with the head. Dr. Diggs opined that the instrument which caused Carol's injuries and that which caused Adrienne's "could have been one and the same" (OR798), and that it was highly improbable that their wounds were inflicted in mutual combat (OR804-05). He testified on direct and cross that the four inch longitudinal wound on the back of Carol's

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[13] In the later penalty proceeding before Judge Bucklew, when Dr. Diggs was asked these questions, his answers were not conclusively inconsistent with the allegations in appellant's motion. He testified that the two head injuries to Adrienne could possibly have occurred simultaneously, but were more consistent with two separate blows (R390-92). Similarly, he acknowledged that there was no way to tell, strictly from an autopsy standpoint, whether Carol Way's injuries occurred all at the same time or sequentially (R397). He stated that it was possible, though not probable, that they occurred from a single impact, but were more consistent with separate blows (R398). The trial court sustained the prosecutor's objection to defense counsel's cross-examination as to whether Dr. Diggs had ever examined anyone who died as a result of a propane explosion (R399-400), and refused to admit the testimony of the defense's pathologist, Dr. Feegel, who would have stated that the injuries to both women were consistent with those which could have occurred in a propane gas explosion (R448).

head -- the largest of her injuries, and the one which resulted in a multiple eggshell-type fracture -- was consistent with a hammer blow if the hammer was swung from a particular angle (the angle depending on the victim's position) (OR781-82,809), but the wound was also consistent with a fall (OR782). Dr. Diggs stated that a wound of this type could be produced if the individual fell backwards and impacted her head against a protruding object (OR810). The fracture itself, apart from the lacerations, was, according to Dr. Diggs, more frequently associated with falling back, as opposed to being struck with a hammer (OR811-12).

As can be seen, nothing in Dr. Diggs' 1983 trial testimony conclusively refutes the allegations in appellant's post-conviction motion. The most that can be said is that his testimony was circumstantially consistent with the state's hypothesis of appellant's guilt. Appellant's motion alleges that, as a result of the prosecutor's non-disclosure of exculpatory evidence, and/or defense counsel's ineffective investigation and preparation, the jury was never informed of the evidence indicating an electrical failure and propane gas explosion, which caused both the fire and the victims' head injuries. Since the record does not conclusively refute his allegations, and since the evidence, if true, establishes his innocence, appellant is at least entitled to an evidentiary hearing to prove his claims.

As previously discussed, the Young opinion, relied on by Judge Lazzara, emphasizes (in addition to Young's repeated admissions of guilt) the fact that the new evidence was physically inconsistent

with Young's own expert witness at trial. In summarily denying appellant's motion, Judge Lazzara noted that the defense in the 1983 trial had called a pathologist, Dr. Gibson, whose opinion (contrary to that of Dr. Diggs) was that the women's injuries could have occurred as a result of mutual combat (R1141-42).

If Dr. Gibson's trial testimony had been physically inconsistent with the allegations in appellant's motion, then the Young decision might arguably apply. However, as with Dr. Diggs' trial testimony, none of the opinions offered by Dr. Gibson are conclusively inconsistent with the possibility that the victims' head injuries resulted from an explosion in the garage. Dr. Gibson was of the opinion that the women could have inflicted the injuries on each other (OR1175,1177-78). He believed this was possible, because he concluded that the lacerations of Adrienne's scalp and the lacerations of Carol's skull were caused by two different instruments (R1175,1178). He testified that the larger of Adrienne's wounds, the depressed skull fracture, was consistent with a hammer blow (OR1175,1189-90), but he never said it could not have been caused by another blunt object. At least one of Carol's lacerations was, in Gibson's opinion, inconsistent with the use of a hammer (OR1171-72). In addition, regarding the horizontal injury at the base of Carol's skull, Dr. Gibson was of the opinion (based on the fact that there was hemorrhaging in the frontal lobes of the brain, with no corresponding wounds on the front of the head which would be consistent with the hemorrhaging) that it could only have occurred as a "contraqueue" injury (OR1172,1175-76). This normally

occurs when the head is in motion and strikes something solid, "rather than something in motion hitting the head" (OR1176-77). The injury, according to Dr. Gibson, was consistent with Carol having fallen back, striking her head (OR1177).

Thus, in contrast to the Young case, there was no expert testimony put on by the defense (or even by the state) which was conclusively inconsistent with the allegations in the post-conviction motion. Appellant has consistently maintained his innocence, while Young had repeatedly admitted his guilt. The adversary process in appellant's trial, unlike Young's, was compromised and distorted by a Brady violation; the prosecutor's failure to furnish the critical photographs (despite having assured defense counsel that all photographs in his possession relating to the fire investigation had been produced) which would have enabled appellant to mount a viable defense and to impeach the state's circumstantial hypothesis of guilt.

Appellant's motion alleges facts which have been disputed by the state (see R1114-37), and which cannot be conclusively resolved by the record. See Holland, 503 So. 2d at 1252-53; Morgan, 475 So. 2d at 682. The allegations, if proven, would show that the state violated appellant's right to a fair trial by failing to disclose exculpatory evidence; and could ultimately establish his innocence of a capital offense. Judge Lazzara's conclusion, based on Young, that the "record conclusively demonstrates that the defendant is entitled to no relief", and his consequent denial of appellant's

motion without affording him an evidentiary hearing, was error amounting to a denial of due process. Holland.

C. The Motion is Legally Sufficient to Warrant an Evidentiary Hearing, and it is Not Procedurally Barred

In summarily denying appellant's motion, Judge Lazzara ruled on the merits; he did not find that the allegations were legally insufficient to warrant an evidentiary hearing, nor did he find that the motion was procedurally barred (R1137-48,1163,1385-86). Any argument by the state on appeal that the summary denial was "right for the wrong reasons" -- i.e., that the claims were legally insufficient or that they were procedurally barred -- should not be persuasive.

In order to obtain relief for a Brady violation, a defendant must establish:

> (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.

United States v. Meros, 866 F. 2d 1304, 1308 (11th Cir.), cert. den., 493 U.S. 932 (1989).

See e.g. Hegwood v. State, 575 So. 2d 170, 172 (Fla. 1991); United States v. Spagnuolo, supra, 960 F. 2d at 994; Jacobs v. Singletary, supra, 952 F. 2d at 1288.

In United States v. Agurs, 427 U.S. 97, 110 and n.17 (1976), the U.S. Supreme Court reaffirmed its holding in Brady that the

good faith or bad faith of the prosecutor is not a controlling consideration, and stated "If evidence highly probative of innocence is in [the prosecutor's] file, he should be presumed to recognize its significance even if he has actually overlooked it." See also Spagnuolo, 960 F. 2d at 995. In the instant case, appellant's motion alleges that the critical photographs and contact sheets were in the prosecutor's possession, but were never disclosed to defense counsel (and never produced in the investigation conducted by appellant's post-conviction counsel in 1988) (R1350). The materiality and exculpatory value of the photographs and contact sheets, and the probability that their disclosure would have changed the outcome of the trial, is alleged in thorough detail (R1351-56).

In order to obtain a new trial based on newly discovered evidence, a defendant must show (1) that the critical facts were unknown at the time of trial by the trial court, by the party, and by counsel, (2) that the defendant or counsel could not have known them by the use of diligence, and (3) that the evidence would probably produce an acquittal on retrial. Jones v. State, 591 So. 2d 911 (Fla. 1991); Scott v. Dugger, 604 So. 2d 465 (Fla. 1992); see Richardson v. State, 546 So. 2d 1037 (Fla. 1989). Factual disputes (if they cannot be conclusively resolved by the record) as to whether the defendant or his attorney knew or should have known of the evidence must be determined after an evidentiary hearing. See Jones, 591 So. 2d at 916. Similarly, the question of whether the newly discovered evidence, had it been introduced at trial, would

probably have resulted in an acquittal, must be determined by the trial judge after an evidentiary hearing. Jones, at 916. See also Cammarano v. State, 602 So. 2d 1369 (Fla. 5th DCA 1992).

Moreover, the "due diligence" requirement is not inflexible, and where, as here, the newly discovered evidence is highly probative of innocence, "achievement of the ends of justice -- which is the paramount, indeed the exclusive interest which concerns us -- requires that a jury hear the witnesses in question before the defendant may be convicted and imprisoned for the crime with which he is charged" Jackson v. State, 416 So. 2d 10 (Fla. 3d DCA 1982); McCallum v. State, 559 So. 2d 233, 235 (Fla. 5th DCA 1990). Here, as in Jones v. State, 233 So. 2d 432, 433 (Fla. 3d DCA 1970), the newly discovered evidence, if true, would provide an absolute defense to the crime for which appellant was convicted. If the fire and the deaths of his wife and daughter occurred as a result of a propane explosion triggered by an electrical failure, then no crime was committed at all. As recognized in Hanson v. State, 187 So. 2d 54, 55 (Fla. 3d DCA 1966) (quoted in Jones) and in Malcolm v. State, 605 So. 2d 945, 948-49 (Fla. 3d DCA 1992), "it is better to bend a rule of procedure than to use the rule to convict an innocent person." This basic principle of justice is even more compelling when the possibly innocent person faces execution. In view of the U.S. Supreme Court's recent decision in Herrera v. Collins, __U.S.__ (1993) (52 CrL 2087) (in which, over the outraged dissent of three Justices, the majority of the Court held that "actual innocence" is not an independent federal constitutional

claim, and does not provide a basis for federal habeas corpus relief from a death sentence)[14], the responsibility of ensuring that innocent people are not put to death falls even more squarely on the shoulders of the state courts, and especially on the state's highest appellate court. Appellant was convicted on circumstantial evidence by a jury which was once deadlocked, and sentenced to death after two 7-5 jury death recommendations; while no jury has ever heard any of the evidence strongly tending to show that the fire and the deaths were accidental, and that they could not have occurred in the manner hypothesized by the state. In fact, no jury has ever heard the opinions of the state's fire and arson investigators challenged. (See appellant's post-conviction motion, R1353-54,1357-58,1374).

Appellant is entitled to an evidentiary hearing to prove the existence of a Brady violation, and to prove that he could not have obtained the evidence by the use of diligence. Lightbourne; Jones, 591 So. 2d at 916; Cammarano. In resolving any factual dispute regarding the diligence requirement, it should be considered whether the prosecutor's representation that he had furnished all available photographs which related in any manner to this investigation may have misled defense counsel to believe just that, and to believe that any further effort to obtain more fire scene photos would

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[14] However, the majority opinion in Herrera recognized that where a habeas petitioner raises an independent constitutional issue (such as a Brady violation or ineffective assistance of counsel), a claim of "actual innocence" may still serve to excuse a procedural default which would otherwise bar consideration of the issue. 52 CrL 2094. See Sawyer v. Whitley, 505 U.S. ___ (1992)(51 CrL 2213).

yield only copies of what he already had. See Bagley. Moreover, if it is found that defense counsel failed to use reasonable diligence, it should be considered whether that omission amounted to ineffective assistance of counsel (see R1373-76,1356-58), and also whether the interests of justice require excusal of the due diligence requirement. Jackson; McCallum.

Appellant's motion alleges (1) independent constitutional violations (Brady, ineffective counsel, ineffective fire and arson expert) which deprived him of a fair trial, and (2) facts which, if true, would establish his innocence. These considerations alone would be sufficient to overcome any procedural bar to a second or successive post-conviction motion. Herrera v. Collins, supra, 52 CrL at 2094; see Sawyer v. Whitley, supra, 51 CrL at 2214; Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (successive or procedurally defaulted claims may be heard if petitioner "establish[es] that under the probative evidence he has a colorable claim of factual innocence").

Additionally, under Florida law the procedural bar to a second or successive post-conviction motion is inapplicable if the facts upon which the claims are predicated were unknown to the movant or his attorney and could not have been ascertained by the exercise of due diligence. Lightbourne v. Dugger, 549 So. 2d at 1365; see Harich v. State, 542 So. 2d 980, 981 (Fla. 1989); Quince v. State, 592 So. 2d 669, 671 n.1 (1992). A successive motion may be summarily denied "unless the movant alleges that the asserted grounds were not known and could not have been known to the movant at the

time the initial motion was filed." Christopher v. State, 489 So.2d 22, 24 (Fla. 1986); Sireci v. State, 502 So. 2d 1221, 1224 (Fla. 1987). When the proper allegations are made, an evidentiary hearing is required. Lightbourne; Sireci; Harich; Quince; Cammarano v. State, 602 So. 2d at 1371.

In his motion, appellant alleged:

> . . . [t]he facts upon which his claim is predicated were unknown to Mr. Way, his trial counsel and his post-conviction counsel due to the withholding of exculpatory evidence by the State of Florida at the pre-trial, trial, appellate and post-conviction stages of this case.

(R1347)

. . .

> [T]he grounds raised herein relating to newly discovered evidence, Brady violations and ineffective assistance of experts and counsel, which ineffectiveness was occasioned by the suppression of exculpatory evidence, were not known to Mr. Way or to his post-conviction counsel nor could they have been known when the initial 3.850 motion was filed due to the continuing failure on the part of the State to respond fully to the demands of post-conviction counsel under Florida's public records law.

(R1348)

(Other similar allegations are made regarding the specific claims at R1350,1355,1362,1367-68,1370).

Because appellant's motion was legally sufficient to require an evidentiary hearing, and because it was neither procedurally barred nor conclusively refuted by the record, Judge Lazzara erred in summarily denying it.

ISSUE II

THE TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF CRAIG TANNER AND DR. JOHN FEEGEL, AND IN RESTRICTING CROSS-EXAMINATION OF STATE WITNESSES.

The exclusion of the proffered testimony of Tanner and Dr. Feegel (along with the limitation of cross-examination of state witnesses Diggs and Croll) was reversible error of constitutional dimension because (1) the evidence was relevant to the nature and circumstances of the offense; (2) it was relevant to challenge the aggravating circumstances that the capital felony occurred in the commission of an arson, and that it was especially heinous, atrocious, or cruel; (3) the state opened the door by introducing hearsay testimony concerning the findings of its fire and arson investigators, and (4) a death penalty proceeding violates the defendant's state and constitutional rights to due process of law, to a fair trial, of confrontation of adverse witnesses[15], to present a defense[16], and to reliability in capital sentencing[17], when a penalty jury, different from the one which heard the guilt phase evidence, is allowed to hear only the state's version of the circumstances of the offense.

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[15] See Engle v. State, 438 So. 2d 803, 813-14 (Fla. 1983); Walton v. State, 481 So. 2d 1197, 1200 (Fla. 1985).

[16] See Chambers v. Mississippi, 410 U.S. 284 (1973); Crane v. Kentucky, 476 U.S. 683, 690 (1986).

[17] See Lockett v. Ohio, 438 U.S. 586, 604-05 (1978); Caldwell v. Mississippi, 472 U.S. 320, 329-30 (1985).

In Preston v. State, 607 So. 2d 404, 409 (Fla. 1992), this Court stated, "The basic premise of the [capital] sentencing procedure is that the sentencer[18] consider all relevant evidence regarding the nature of the crime and the character of the defendant to determine the appropriate punishment. See § 921.141(1), Fla. Stat. (1989). This is only accomplished by allowing a resentencing to proceed in every respect as an entirely new proceeding." See also Teffeteller v. State, 495 So. 2d 744, 745 (Fla. 1986) (resentencing "should proceed de novo on all issues bearing on the proper sentence which the jury recommends be imposed"); Hall v. State, __ So. 2d __ (Fla. 1993) [18 FLW S 63, 65] (resentencing is "a totally new proceeding").

A resentencing jury, unlike the ordinary capital-case jury which hears both the guilt and penalty phases, has not had the benefit of hearing the trial evidence. See Richardson v. State, 437 So. 2d 1091 (Fla. 1983). Florida's standard jury instructions tell jurors who have heard both phases, "Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the defendant and evidence that has been presented to you in these proceedings." [Needless to say, they are not told to consider only the prosecution's guilt-phase evidence and disregard that of the defense]. Resentencing jurors are simply

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[18] The penalty phase jury is, under Florida law, a "co-sentencer." Johnson v. Singletary, __ So. 2d __ (Fla. 1993) [18 FLW S 90]; see Espinosa v. Florida, 112 S. Ct. 2926, 2928, 120 L. Ed. 2d 854 (1992).

instructed that their advisory verdict should be based on the evidence "that has been presented to you in these proceedings."

In Valle v. State, 581 So. 2d 40, 45 (Fla. 1991), this Court held that the state was properly allowed, on resentencing, to retry its entire case as to guilt, because (1) "[w]e cannot expect jurors impaneled for capital sentencing proceedings to make wise and reasonable decisions in a vacuum" [See Teffeteller, 495 So. 2d at 745], and (2) during resentencing the state must prove the aggravating circumstances beyond a reasonable doubt. Appellant submits that, in order for a resentencing proceeding to satisfy the requirements of due process, if the state is allowed to introduce evidence bearing on guilt or innocence to acquaint the jury with its view of the circumstances of the offense and to prove aggravating circumstances, then the defense must also be allowed to introduce evidence bearing on guilt or innocence to acquaint the jury with its view of the circumstances of the offense, to rebut the aggravating circumstances, or to show mitigating circumstances. In addition to basic fairness, this view is supported by Downs v. State, 572 So. 2d 895, 899 (Fla. 1990) which holds (in the context of a resentencing) that "[a] defendant has the right in the penalty phase of a capital trial to present any evidence that is relevant to, among other things, the nature and circumstances of the offense," and further recognized that where evidence relevant to the circumstances of the offense is "inextricably intertwined" with evidence pertaining to the issue of guilt, it is admissible. See, generally, Breedlove v. State, 413 So. 2d 1, 6 (Fla. 1982); McCrae

v. State, 549 So. 2d 1122, 1124 (Fla. 3d DCA 1989) (evidence inadmissible for one purpose may, however, be admissible for another).

In Richardson v. State, 437 So. 2d 1091 (Fla. 1983), the guilt phase jury was discharged prior to the penalty phase because two of the jurors had gone to the scene of the crime after the verdict was returned. A new jury was impaneled to hear the penalty phase. The penalty jury recommended life imprisonment, but the trial judge overrode the recommendation and imposed the death penalty, saying:

> The Penalty Phase jury did not have the benefit of all the evidence due to the unusual developments in the trial process. The convicting jury was disqualified due to unforeseen circumstances not attributed to the Defendant or the State. Due to these unusual circumstances this Court is of the view that the Penalty Phase jury's recommendation was not based on all available facts and evidence.

On appeal, this Court reversed, and ordered Richardson's sentence reduced to life in accordance with the jury's recommendation:

> Even though we recognize the unusual procedural history of this case, we cannot countenance the denigration of the jury's role implicit in [the trial judge's] comments. It is well-settled that a jury's advisory opinion is entitled to great weight, reflecting as it does the conscience of the community, and should not be overruled unless no reasonable basis exists for the opinion. [Citations omitted]. Because of the unusual circumstances (the penalty phase jury had not heard the evidence of guilt), counsel for both parties argued, and the trial court ruled, that the jury should be given a full presentation of the evidence. So far as the record and the briefs show, neither party was constrained in its presentation. It is a defendant's right to have a jury advisory opinion, and absent a voluntary and intelligent waiver of that right, a judge may not frustrate this important jury function. [Citation omitted]. We cannot condone a proceeding which, even sub-

> tly, detracts from comprehensive consideration of the aggravating and mitigating factors after all parties have agreed on the appropriate evidence to be considered.

437 So. 2d at 1095.

The instant case differs from Richardson in that here the prosecutor persuaded the trial court that only the state's side of the guilt phase evidence should be heard by the resentencing jury. The prosecutor's position, in essence, was that he could put on as much (R925,929,959) or as little (R964,982,427) of the evidence relating to guilt as he chose, either through witnesses (R925,981) or through hearsay (R981), in order to "establish to the jury what I think happened during the case" (R926), and to prove the aggravating circumstances that the killings occurred in the commission of an arson (R926,415-16,418,427-28), and that they were especially heinous, atrocious, or cruel (R926,981-82,357,362-63). Meanwhile, the defense would be barred from introducing any evidence or going into any line of cross-examination which might suggest a different view of the circumstances of the case or rebut the arson aggravator, because that -- in the prosecutor's reasoning -- would be "totally irrelevant" and would go to guilt or innocence (R927,929, 982, see R387-88, 394-96,399-400,415-18,421-22,426-28).

The prosecutor asserted prior to the resentencing trial, "I could, I think, read the entire trial transcripts to the jury, if I wanted to . . . ,"(R959). [See Valle; Richardson]. Later in that same hearing, he indicated that he would put on testimony concerning the arson, "not [for the purpose of showing] that it really was an arson, but the gas had to be poured on their clothing, because

the area around them was not badly burned but they were badly burned, and that goes to heinous, atrocious, and cruel, and also cold, calculating and premeditated" (R981-82). However, if defense counsel were to attempt on cross or in the defense's case to impeach or contradict any of the conclusions reached in the state's arson investigation, that, in the prosecutor's view, would merely go to "lingering doubts, and I don't want to try the case over again, because I don't have to . . ." (R982).

The prosecutor's position on the "commission of an arson" aggravator is especially interesting. He argued repeatedly that there was no dispute about the arson, "[t]he [guilt phase] jury has said it was an arson, and as the Court told me earlier, all I needed to do was put on the judgment convicting him of arson. I totally agree with this Court. It's got nothing to do with aggravating and mitigating circumstances," (R427, see R415-16,418,428). The prosecutor's assumption that the arson aggravating circumstance was automatically transferable to resentencing was incorrect. See Preston ("clean slate" rule applies to resentencing proceedings); Teffeteller (resentencing should proceed de novo on all issues bearing on the proper sentence); Hall. In any event, the prosecutor obviously believed he could more effectively convince the jury to find the arson aggravator, and to accord it greater weight in its penalty deliberations [see prosecutor's closing argument, and defense objection thereto, R856-59], by putting on hearsay evidence (through Detective Croll) that Detective Meyers and State Fire Marshal Martinez conducted an arson investigation and reached the

conclusions "that the fire was intentionally set and gasoline was used to start the fire" (R409); and that FDLE chemist Ismail Mami tested the women's clothing and found components of gasoline (R410).

When defense counsel attempted to cross-examine Detective Croll regarding what was done in the arson investigation, the trial court sustained the prosecutor's objection; notwithstanding defense counsel's arguments that (1) Fla. Stat. § 921.141 allows hearsay evidence only if the defendant is afforded a fair opportunity to rebut it [see Dragovich v. State, 492 So. 2d 350, 355 (Fla. 1986); Rhodes v. State, 547 So. 2d 1201, 1204 (Fla. 1989)]; (2) the state opened the door to cross-examination by putting on testimony concerning the results of the arson investigation [see e.g. Blair v. State, 406 So.2d 1103, 1106 (Fla. 1981); Valle v. State, supra, 581 So. 2d at 45, re "opening the door"; Coxwell v. State, 361 So. 2d 148 (Fla. 1978); Zerguera v. State, 549 So. 2d 189, 192 (Fla. 1989), re scope of cross]; (3) the cross-examination was relevant to challenge the aggravating circumstance that the capital offense was committed in the course of an arson; and (4) the introduction of the hearsay coupled with the restriction of cross-examination violated appellant's constitutional right of confrontation (R414-30). Next the trial court excluded the proffered defense testimony of fire and arson expert Tanner and pathologist Dr. John Feegel[19], offered to rebut the state's evidence that the deaths

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[19] The proffered testimony is summarized at p. 25-31 of the Statement of the Facts.

occurred in the commission of an arson, and to challenge the prosecutor's contention (which he claimed was relevant to the HAC aggravator) that gasoline was poured on the victims (R430-31,448-49, see R507, 601-02,663, 670). The judge ruled their testimony inadmissible, "based on my belief that it goes to the guilt or innocence of Mr. Way as to the arson, rather than to any mitigating circumstances" (R449, see R431), and overruled defense counsel's objection that the exclusion of the testimony violated appellant's right to a fair trial under the state and federal constitutions (R507).

The trial court's rulings completely hamstrung appellant from challenging the arson aggravator, and from showing any of the circumstances of the offense which might differ from the state's version. They also severely limited his ability to challenge the HAC aggravator, by keeping from the jury any testimony contrary to the state's hypothesis that gasoline was poured on the victims. In allowing the state to introduce hearsay testimony as to the results of its arson investigation, while completely blocking the defense from impeaching those results on cross or presenting contrary evidence on the same subject matter in its case, the trial court effectively made the arson aggravator irrebuttable, and the jury was given what was purportedly a complete picture of the circumstances of the offense, but which in reality was not. Cf. Coxwell v. State, 361 So. 1d 148, 152 (Fla. 1978). See also Francois v. State, 407 So. 2d 885, 890 (Fla. 1981) (no error in allowing state to bring out details of defendant's prior violent felony convic-

tion, where defense was not prevented from presenting evidence of its own relating to the gravity of his prior criminal activity; "it would be a different case if the court had excluded evidence proffered by the defendant rebutting the state's evidence of aggravation or relative to any matter in mitigation. See Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); Miller v. State, 332 So. 2d 65 (Fla. 1976)").

King v. State, 514 So. 2d 354 (Fla. 1987) and Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992) are completely distinguishable, since in neither of those cases was the defendant barred from introducing evidence to rebut an aggravating circumstance. In King, the defense attorney moved to present exculpatory evidence for the purpose of creating in the minds of the jurors a lingering doubt as to guilt. This Court, on appeal, held that residual or lingering doubt is not an appropriate nonstatutory mitigating circumstance. 514 So. 2d at 357-58. In the instant case, in contrast, the defense sought to cross-examine Diggs and Croll and to introduce the testimony of Tanner and Feegel, not to establish residual doubt as a mitigator, but rather to rebut aggravators (arson, HAC) urged by the state [see Francois, Lockett]; to challenge the prosecutor's inference that gasoline was poured on the victims; and to rebut hearsay introduced by the state [see Dragovich; Rhodes]. Where evidence is relevant to rebut aggravating factors, or relevant to the nature and circumstances of the offense, it is error to exclude it [Lockett; see Jones v. State, 569 So. 2d 1234, 1239-40 (Fla. 1990)], even if it is "inextricably

intertwined" with evidence pertaining to the issue of guilt. Downs.

The distinction between a pure "residual doubt" case like King, and a case like the present one where evidence relevant to rebut aggravating factors and to the nature and circumstances of the crime is inseparable from evidence pertaining to guilt, is also illustrated by Waterhouse, 596 So. 2d at 1015. In that case, Waterhouse contended on appeal that he was improperly prevented form challenging the state's claim that the murder occurred during the commission of a sexual battery. This Court held that it was not error for the trial court to preclude him from presenting evidence questioning his guilt of the murder, because he was not precluded "from challenging the State's evidence that a sexual battery occurred or from presenting evidence that a sexual battery did not occur."

In the instant case, on the other hand, appellant was absolutely barred from challenging the state's evidence that an arson occurred, and from presenting evidence that an arson did not occur. The state was allowed to introduce hearsay evidence to establish the arson aggravator and to persuade the jury to give it great weight (see R856-59), while appellant, in blatant contravention of his statutory[20] and constitutional[21] rights, was denied any

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[20] See Fla. Stat. § 921.141(1); Dragovich; Rhodes.

[21] See Engle v. State, 438 So. 2d 803, 813 (Fla. 1983); Walton v. State, 481 So. 2d 1197, 1200 (Fla. 1985) (requirements of due process, and sixth and fourteenth amendment right of confrontation, apply to penalty phase of capital trial). See also Presnell v. Georgia, 439 U.S. 14, 16 (1978).

opportunity to rebut it. The principle that the sentencer must be allowed to consider all relevant evidence concerning the nature of the crime and the character of the defendant to determine the appropriate penalty, and that "[t]his is only accomplished by allowing a resentencing to proceed in every respect as an entirely new proceeding" [Preston, 607 So. 2d at 409], was thoroughly compromised, and the penalty determination was rendered fundamentally unfair. [In recognizing the harmfulness of the erroneous rulings, individually and in combination, it should be noted that (1) the jury recommended death by the narrowest possible margin, 7-5; (2) there were two statutory mitigating factors and numerous nonstatutory mitigating factors submitted to the jury, and found by the trial judge; and (3) even the prosecutor conceded prior to trial that, in view of the existence of mitigating factors, he would not ask for an override if the jury recommended life (R974,996-97,1051, 1198). Under these circumstances, even a relatively minor error -- to say nothing of the serious and repeated errors which occurred here -- could easily have contributed to the outcome of the penalty determination. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

The sentence of death cannot stand.

ISSUE III

THIS COURT SHOULD RECEDE FROM OR MODIFY ITS PRIOR DECISIONS PRECLUDING RESIDUAL DOUBT AS A NONSTATUTORY MITIGATING FACTOR.

While appellant's contentions in Issue II are based on the denial of his right to present evidence and to cross-examine wit-

nesses in order to rebut aggravating factors, rebut hearsay, and show the nature and circumstances of the offense -- and are in no way dependent on this Court receding from its rule precluding "residual doubt" as a nonstatutory mitigating factor -- undersigned counsel respectfully suggests that the Court consider receding from or modifying that rule, in order to reduce the risk that an innocent person will be executed. Florida's death penalty statute, like virtually all other post-Furman capital sentencing laws, is patterned in large part on the Model Penal Code, § 210.6, as adopted by the 1962 Annual Meeting of the American Law Institute. See Proffitt v. Florida, 428 U.S. 153, 189-91, 193-96 (1976). The Model Penal Code provides for a separate penalty proceeding before the trial court and jury, during which various aggravating and mitigating circumstances (most of which are identical or very similar to those enumerated in the Florida statute) may be established, and are weighed to determine whether a life sentence or a death sentence is appropriate. However, under certain circumstances, no penalty phase is conducted at all; the trial judge simply imposes a sentence of life imprisonment if one or more of the considerations listed in § 201.6(1) are met:

> (1) Death Sentence Excluded. When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree if it is satisfied that:
>
> > . . . (f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt.

See McGautha v. California, 402 U.S. 183, 222-25 (1971) (Appendix to Opinion of the Court).

In the 1980 Revised Comments to Model Penal Code § 201.6 (at p. 134), this provision was explained in the following terms:

> Finally, Subsection (1)(f) excludes the death sentence where the evidence of guilt, although sufficient to sustain the verdict, "does not foreclose all doubt respecting the defendant's guilt." This provision is an accommodation to the irrevocability of the capital sanction. Where doubt of guilt remains the opportunity to reverse a conviction on the basis of new evidence must be preserved, and a sentence of death is obviously inconsistent with that goal.

See Lockett v. Ohio, supra, 438 U.S. at 605 ("The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence").

The point is not that Florida or any other state is constitutionally compelled to adopt or apply the Model Penal Code in its entirety. [Indeed, Franklin v. Lynaugh, 487 U.S. 164, 172-175 (1988) declines to recognize a constitutional right to have residual doubt considered as a mitigating factor. However, while a state is not compelled to permit consideration of residual doubt as a mitigator, neither is a state precluded from doing so. 487 U.S. at 173. Moreover, Franklin certainly does not go so far as to authorize the exclusion of evidence in rebuttal of aggravating factors on the ground that it goes to residual doubt]. Undersigned counsel's position is simply that the nature and quality of the evi-

dence of guilt can reasonably be treated as a relevant consideration to the issue of penalty. The framers of the Model Penal Code considered the possibility of innocence to be so critically relevant to the issue of penalty that a death sentence should be precluded, notwithstanding the hypothetical existence of a dozen aggravating circumstances.

As Justice Marshall, concurring in Furman v. Georgia, 408 U.S. 238, 366-68 (1972) observed:

> Just as Americans know little about who is executed and why, they are unaware of the potential dangers of executing an innocent man. Our "beyond a reasonable doubt" burden of proof in criminal cases is intended to protect the innocent, but we know it is not foolproof. Various studies have shown that people whose innocence is latter convincingly established are convicted and sentenced to death.
>
> * * *
>
> No matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real. We have no way of judging how many innocent persons have been executed but we can be certain that there were some.

The rule precluding residual doubt as a mitigator (which appears to have originated in the life override context, on the simplistic theory that one cannot be "a little bit guilty," see Buford v. State, 403 So. 2d 943, 953 (Fla. 1981); Burr v. State, 466 So. 2d 1051, 1054 (Fla. 1985))[22] may do relatively little

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[22] The Richardson decision, sandwiched between Buford and Burr, did not expressly recognize the validity of a life recommendation based on residual doubt, but did state that where neither party was constrained from giving the newly impaneled penalty jury a full presentation of the guilt phase evidence, the trial judge's (continued...)

harm in the usual capital case where the guilt and penalty juries are one and the same, because at least that jury has heard all of the evidence, and has a complete picture of the circumstances of the offense. It is only in the context of resentencing (or unusual circumstances like those in Richardson) where misuse of the rule against residual doubt as a nonstatutory mitigator can distort the entire proceeding so that the jury hears only the state's version of the circumstances of the offense.[23]

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[22](...continued)
override of the jury's life recommendation based on his view that it "was not based on all available facts and evidence" was improper. 437 So. 2d at 1095. Later decisions which refuse to recognize residual doubt as a nonstatutory mitigator include Aldridge v. State, 503 So. 2d 1257, 1259 (Fla. 1987); King v. State, supra, 514 So. 2d at 358; Tafero v. Dugger, 520 So. 2d 287, 289 n.1 (Fla. 1988); White v. Dugger, 523 So. 2d 140, (Fla. 1988); King v. Dugger, 555 So. 2d 355, 358 (Fla. 1990); and Hitchcock v. State, 578 So. 2d 685, 690 (Fla. 1990).

[23] In her dissenting opinion in King v. Dugger, supra, 555 So. 2d at 360, Justice Barkett (joined by Justice Kogan) recognized that as a practical matter juries often do mitigate a sentence because of lingering doubt about the defendant's guilt. In this regard, undersigned counsel would also like to quote an insightful comment made by a prospective juror, Mr. Dye, during voir dire in appellant's 1983 trial. Asked by the prosecutor whether there were no circumstances under which he could recommend a death sentence, Mr. Dye replied:

> That is generally my position. I base it on two things: One, of course, is I think it's an uncivilized approach to use the death penalty, and, secondly, I think the law, like the medical profession, bury too many of its mistakes. I run into cases from time to time where, you know, a mistake was made. You cannot correct the death sentence, you know. It's just -- and I think that is probably my major basis. It's not essentially moral as such. It's just sort of, I insist on fair, fair play. (OR404-05)

Undersigned counsel submits that the approach taken in Richardson, 437 So. 2d at 1095, is the correct one: neither party should be constrained in giving a full presentation of the evidence. If "[w]e cannot expect jurors impaneled for capital sentencing proceedings to make wise and reasonable decisions in a vacuum" [Valle; Teffeteller], then due process and basic fairness demand that the defendant as well as the state be given an opportunity to fill the vacuum by presenting any evidence which would have been available to a guilt-and-penalty-phase jury. To the extent that the "residual doubt" cases can be read or misread to allow only the state's side to be heard, they should be receded from or modified.

ISSUE IV

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND FINDING THE AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL FELONY OCCURRED DURING THE COMMISSION OF AN ARSON.

The instruction on (R897) and finding of (R1498-99) this aggravating factor cannot constitutionally be upheld, because appellant was unfairly precluded from rebutting it. See Issue II, supra.

ISSUE V

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND FINDING THE AGGRAVATING CIRCUMSTANCE THAT APPELLANT WAS PREVIOUSLY CONVICTED OF A FELONY INVOLVING THE USE OF VIOLENCE, BASED SOLELY UPON HIS CONTEMPORANEOUS CONVICTION OF SECOND DEGREE MURDER ARISING FROM THE SAME EPISODE.

The trial court instructed the jury that it could consider as an aggravating circumstance that appellant was previously convicted of a felony involving the use of violence, and that second degree murder is such a felony (R897). In sentencing appellant to death, the trial court found this aggravating factor, based solely upon his contemporaneous conviction of second degree murder of his wife, Carol Way (which occurred during the same episode as the offense for which the death penalty was imposed)(R1498).

In enacting the aggravating circumstance provided for in section 921.141(5)(b), Florida Statutes, the legislature never intended for the circumstance to be applied where a contemporaneously committed violent felony supplies the "previous conviction," and this aggravator should not have been considered in the sentencing process in appellant's case.

Chapter 72-72, Laws of Florida, in its initial form as Senate Bill No. 465, listed the following two relevant aggravating circumstances:

> (b) The defendant was <u>previously</u> convicted of another capital felony or a felony involving the use or threat of violence to the person.

> (c) At the time the capital felony was committed the defendant also committed another capital felony.

This language was derived directly from the Model Penal Code, Section 210.6(3)(b)(c). The Commentary to the Model Penal Code, from which the language of the Florida Statutes was drawn, explains that the first aggravator quoted above was intended to be limited to offenses committed prior to the instant offenses;

> Paragraph (b) deals with the defendant's past behavior as a circumstance of aggravation. Perhaps the strongest popular demand for capital punishment arises where the defendant has a history of violence. Prior conviction of a felony involving violence to the person suggest two inferences supporting the escalation of sentence: first, that the murder reflects the character of the defendant rather than any extraordinary aspect of the situation, and second, that the defendant is likely to prove dangerous to life on some further occasion. Thus, prior conviction of a violent felony is included as a circumstance that may support imposition of the death penalty.

The second aggravator quoted above, which was eliminated from Senate Bill 465, was directed at contemporaneous convictions;

> Paragraphs (c) and (d) (knowing creation of homicidal risk to many persons) apply this rationale to two cases in which the contemporaneous conduct of the defendant is especially indicative of depravity and dangerousness. These are multiple murder and murder involving knowing creation of homicidal risk to many persons.

When the Legislature subsequently eliminated paragraph (c) quoted above, it expressed its intention that the aggravator at issue only be applicable where the prior conviction was obtained in a prior case and was not a part of the case giving rise to the capital conviction on which the defendant is being sentenced. This is

a reasonable position since the legislature was focusing (a) on the issue of failed rehabilitation, i.e., the defendant was already given a second chance, and (b) the issue of propensity or future dangerousness. The interpretation of this aggravator which has allowed its application to cases involving more than one homicide does not address this historical concern and, in effect, becomes a multiple-offense aggravator rather than a failed rehabilitation/ propensity aggravator. In this regard, this Court's conclusion in King v. State, 390 So. 2d 315, 320 (Fla. 1980), that:

> The legislative intent is clear that any violent crime for which there was a conviction at the time of sentencing should be considered as an aggravating circumstance

for which this Court gave no authority, is contradicted by the above facts. Furthermore, this Court has placed a significant limitation upon its holding in King that contemporaneous convictions prior to sentencing can qualify for the aggravator in question. In Wasko v. State, 505 So. 2d 1314, 1317-18 (Fla. 1987), this Court adopted a new policy that if there is but one incident and one victim, then contemporaneous crimes cannot be used as a prior violent felony. Appellant submits that the Wasko decision does not go far enough. Contemporaneous convictions arising out of a single incident should not be permitted to be considered regardless of the number of victims. The rationale of Wasko seems to be that contemporaneous convictions should not be used if the incidents are not separated in time, but are rather a single incident; it makes no sense for this rationale to require only a single vic-

tim. "Prior" means "prior", not "different victims even though at the same time."

Also relevant to this discussion is State v. Barnes, 595 So. 2d 22 (Fla. 1992), in which this Court recently construed the habitual offender statute concerning predicate felony convictions which contained virtually identical language to that found in section 921.141(5)(b), Florida Statutes (1991). Section 921.141(5)(b) provides for an aggravating circumstance if the defendant "was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." The habitual offender statute discussed in Barnes, section 775. 084(1)(a), Florida Statutes (Supp. 1988), provided for habitual offender treatment if, among other requirements, "The defendant has previously been convicted of two or more felonies in this state." This Court held in Barnes that the predicate felony convictions required for the habitual offender statute did not require sequential convictions. However, in Barnes, the convictions did arise from separate incidents, and the holding did not remove the requirement that the predicate convictions arise from separate incidents. Justice Kogan, concurring specially wrote,

> I concur with the rationale and result reached by the majority, but only because this particular defendant's felonies arose from two separate incidents. Were this not the case, I would not concur. I do not believe the legislature intended that a defendant be habitualized for separate crimes arising from a single incident, and I do not read the majority as so holding today. Under Florida's complex and overlapping criminal statutes, virtually any felony offense can give rise to multiple charges, depending only on the prose-

> cutor's creativity. Thus, virtually every offense could be habitualized and enhanced accordingly. If this is what the legislature intended, it simply would enhance the penalties for all crimes rather than resorting to a "back-door"method of increasing prison sentences.

Barnes, 595 So. 2d at 32. Since the language used in the two statutes is virtually identical, the legislature must have intended a previous conviction under Section 921.141(5)(b) to likewise arise from a separate criminal incident. Any other construction violates the rule of lenity set forth in section 775.021(1), Florida Statutes (1991), as well as principles of due process of law, and subjects the defendant to unconstitutional cruel and unusual punishment. Amends. VIII and XIV, U.S. Const.; Art. I, §§ 9 and 17, Fla. Const.

Since the jury was instructed on an invalid aggravating factor on a theory flawed in law, it must be presumed that this factor was weighed by the jury in reaching its 7-5 death recommendation. See Sochor v. Florida, 504 U.S. __, 112 S. Ct. __, 119 L. Ed. 2d 326, 340 (1992); Espinosa v. Florida, 505 U.S. __, 112 S. Ct. __, 120 L. Ed. 2d 854 (1992). Appellant's death sentence must therefore be reversed for a new penalty trial before a newly impaneled jury.

ISSUE VI

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND FINDING THE AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

An aggravating circumstance may not be weighed in imposing a death sentence unless it is proven beyond a reasonable doubt. State v. Dixon, 283 So. 2d 1,9 (Fla. 1973); Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992). Where the evidence of an aggravating factor is circumstantial, it cannot satisfy the burden of proof unless it is "inconsistent with any reasonable hypothesis which might negate the aggravating factor." Geralds, supra, at 1163; see Eutzy v. State, 458 So. 2d 755, 757-58 (Fla. 1984); Peavy v. State, 442 So. 2d 200, 202 (Fla. 1983).

In order to narrow the "especially heinous, atrocious, or cruel" aggravating factor to prevent it from being applied in an unconstitutionally overbroad manner,[24] this Court has construed it as follows:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the con-

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[24] See e.g. Godfrey v. Georgia, 446 U.S. 420 (1980); Maynard v. Cartwright, 486 U.S. 356 (1988); Shell v. Mississippi, 498 U.S. __ (1990); Espinosa v. Florida, 505 U.S. __ (1992).

> scienceless or pitiless crime which is unnecessarily torturous to the victim.

State v. Dixon, supra, 283 So. 2d at 9.

To establish the HAC factor, it is not sufficient to show that the victim in fact suffered great pain [see Teffeteller v. State, 439 So.2d 840, 846 (Fla. 1983)]; rather, the state must prove that the defendant intended to torture the victim, or that the crime was meant to be deliberately and extraordinarily painful. See Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990); Omelus v. State, 584 So. 2d 563, 566-67 (Fla. 1991); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991); Robertson v. State, __So. 2d __ (Fla. 1993)[18 FLW S 51,53].

In Simmons v. State, 419 So. 2d 316 (Fla. 1982), the trial court's finding of the HAC circumstance, based on the facts that the killing was done by bludgeoning with a heavy, sharp tool, and that the defendant attempted to conceal the crime by burning the victim's body, was overturned on appeal.

Under the facts of the instant case, the HAC finding could only be sustained if the state could show that appellant knew that Adrienne was alive when he set fire to the garage.[25] However, neither the evidence in the original trial nor the evidence in the resentencing proceeding establish that he knew she was alive. In fact, they strongly suggest the opposite conclusion. The state's own pathologist, Dr. Diggs, testified on direct examination in the

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[25] For purposes of this Point on Appeal, as well as the issues of CCP and proportionality, undersigned counsel will assume arguendo, without conceding, that appellant committed the crimes.

1983 guilt phase that the larger of Adrienne's two head injuries would have dropped her immediately and rendered her totally incapacitated (OR801). That wound, by itself, certainly could have rendered her unconscious, and certainly could have caused her death (OR801). She could not have moved more than a foot, if at all (RO802).[26] The defense's pathologist, Dr. Gibson, agreed that the wound would have rendered Adrienne unconscious (OR1173-74). Based on the presence of soot in the trachea and larynx, Dr. Diggs determined that at some point during the fire each victim was alive (OR786-87,802-03,R380,385-86). In his guilt phase closing argument, the prosecutor argued that, while the victims were still breathing when the fire was started, appellant thought they were dead (R1468-69). The prosecutor also suggested that appellant must have been shocked when he eventually found out otherwise (OR1468).

Therefore, not only did the state fail to prove beyond a reasonable doubt that appellant intended to torture Adrienne, or that the crime was meant to be deliberately and extraordinarily painful [see Porter, 564 So. 2d at 1063; Robertson, 18 F.L.W. at S 53], the reasonable hypothesis suggested by the prosecutor himself was that appellant set the fire in the belief that she was already dead.[27]

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[26] In the resentencing proceeding, Dr. Diggs again stated that the wound would have been a fatal injury, and would have incapacitated Adrienne almost immediately (R384). Generally speaking, such an injury would result in almost immediate loss of consciousness (R385). It was possible that she could have moved her arms up in reaction to the heat of the fire (R401).

[27] In addition, the trial court's finding assumes that the person whom Randall Hierlmeier heard screaming and saw trying to crawl out of the garage was Adrienne (R1499). The evidence, (continued...)

The trial court erred in instructing the jury on the HAC aggravating factor (R897-98, see defense objection at R814-23) and in finding it (R1499).In view of the prosecutor's emotionally charged emphasis on this aggravating factor in his penalty phase closing argument (R862-64), and in view of the presence of statutory and nonstatutory mitigating factors, and the fact that the jury recommended death by only a 7-5 margin, the error was plainly harmful both as to the jury recommendation and the sentence. See Omelus,

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[27](...continued)
however, was at least as consistent, if not more so, with the possibility that it was Carol Way that Hierlmeier heard and saw. The state's own expert, Dr. Diggs, testified that Adrienne's head injury would probably have rendered her immediately unconscious (OR801-02,R384-85). If she could have moved at all, it would have been no more than about a foot (OR802), or the involuntary raising of her arms (R401). Carol, on the other hand, could possibly have screamed during the fire, depending on how rapidly swelling of her brain took place (OR815-16,823). In arguing motions prior to the 1983 trial, the prosecutor and defense counsel agreed that Carol could not have been burned in the location where her body was found; she must have crawled there (OR473,477). State fire investigators Myers, Martinez, and Regalado all testified on direct that Carol sustained her burn injuries in a different area of the garage than where she was found (OR670-71,708,746-47). The prosecutor, in his closing statement, argued (based on Dr. Diggs' testimony) that Carol could have crawled and screamed during the fire; "[t]here is no question she moved" (OR1458). In the resentencing proceeding during his cross-examination of Craig Tanner outside the presence of the jury, the prosecutor asked:

> Q. Are you aware, Mr. Tanner, that she [Carol, see R498] moved during the course of the fire?
>
> A. One victim possibly could have moved, sir. The other victim I am told by even your experts that they did not move.
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> Q. But the victim you're talking about here moved . . . (R496-97)

584 So.2d at 567; State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).[28]

ISSUE VII

THE TRIAL COURT ERRED IN CONCLUDING (ALTHOUGH NOT RELYING ON AS AN AGGRAVATING FACTOR) THAT THE EVIDENCE SUPPORTED A FINDING THAT THE CAPITAL FELONY WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER.

Simple premeditation is not enough to support a finding of the "cold, calculated, and premeditated" aggravating factor. Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987). The state must prove beyond a reasonable doubt that the killing resulted from "a careful plan or prearranged design." Rogers, at 533 [receding from Herring v. State, 446 So. 2d 1047, 1057 (Fla. 1984)]. In the instant case, the prosecution's guilt phase theory was that appellant, "who was having marital difficulties, argued with his wife in the garage of their Tampa home, ultimately striking her in the head with a hammer." Way v. Dugger, 568 So. 2d 1263, 1264 (Fla. 1990). He then,

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[28] This Court's rejection, in his prior appeal, of appellant's contention that the HAC circumstance was improperly found, Way v. State, 496 So. 2d 126, 128-29 (1986), is not controlling. The "clean slate" rule applies to resentencing proceedings, and the prior findings of aggravating or mitigating circumstances are not "ultimate facts" which collateral estoppel or "law of the case" would preclude being revisited or relitigated. Preston v. State, supra, 607 So. 2d at 407-09. Resentencing proceeds de novo on all issues bearing on the proper sentence. Teffeteller, 495 So. 2d at 745; Preston; Hall v. State, supra, 18 FLW at S 65. Moreover, if the trial court's finding of HAC were to be affirmed, notwithstanding the state's failure to prove intent to torture or the deliberate infliction of extreme pain, such a holding would be inconsistent with the narrowing construction previously applied by this Court, and would render the aggravating circumstance unconstitutionally overbroad under Godfrey, Maynard, Shell, and Espinosa.

according to the state's hypothesis, called his daughter into the garage, struck her in the head with a hammer, and set the garage on fire. 568 So. 2d at 1264. The jury obviously found that Carol Way's death was not premeditated, because it acquitted appellant of first degree murder on that count, returning instead a guilty verdict for second degree murder.

Thus, even taking the evidence in the light most favorable to the state, the killings, as in Garron v. State, 528 So. 2d 353 (Fla. 1988) and Santos v. State, 591 So. 2d 160 (Fla. 1991), arose from a heated domestic confrontation. There was no evidence of any prior threats or planning. Compare Santos, 591 So. 2d at 162, rejecting CCP in a domestic dispute situation, even where the defendant had acquired a gun in advance and made death threats. The premeditation involved in the death of Adrienne -- again taking the evidence in the light most favorable to the state -- was of very short duration [see Wilson v. State, 493 So. 2d 1019, 1023 (Fla. 1986); Ross v. State, 474 So. 2d 1170, 1174 (1985)]; a spur of the moment decision made under extreme stress.

As recognized in Garron, 528 So. 2d at 361, the "heightened premeditation aggravating factor was intended to apply to execution or contract-style killings." It could constitutionally be applied in an intrafamily killing, if the evidence showed, for example, that the victim was murdered after careful planning or by prearranged design for an insurance payoff or an inheritance, or that a "contract" was carried out. See e.g. Buenoano v. State, 527 So. 2d 194 (Fla. 1988). However, to apply the CCP factor under the cir-

cumstances of this case -- a domestic confrontation where the death of the first victim was unpremeditated, and the killing of the second victim took place only moments later and could not have been planned beforehand -- would violate the limiting construction of this aggravating factor adopted in Rogers, and would render it unconstitutionally overbroad.

Therefore, in considering appellant's contention that the death sentence is disproportionate (Issue IX, infra], this Court should not consider the trial court's gratuitous conclusion in her sentencing order that (although she was not relying on it as an aggravating factor) the evidence supported a finding that the capital felony was committed in a cold, calculated, and premeditated manner (R1499-1500)[29] Instead, the Court should consider the facts that the killing arose from a domestic confrontation, that the premeditation was of short duration and under extreme stress, and that appellant had never before (and has never since) exhibited any violent or criminal behavior, as factors strongly supporting

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[29] For the reasons discussed in Issue VI concerning the HAC aggravating factor, this Court's opinion in appellant's prior appeal [Way v. State, 496 So. 2d 126, 129 (Fla. 1986)] is not controlling. Moreover, Rogers (adopting the "careful plan or prearranged design" limiting construction of CCP) states the law applicable to the instant resentencing, and to this appeal, while the broader interpretation which existed at the time of the earlier appeal is no longer good law. See Rogers, 511 So.2d at 553, receding from Herring v. State, 446 So. 2d 1047, 1057 (Fla. 1984). See Dougan v. State, 470 So. 2d 697, 701 n.2 (Fla. 1985) (in defendant's second appeal, "[t]he state argues . . . that we should apply the case law extant at trial or when the case was first appealed rather than the case law currently in use. We disagree because, as a general rule, the law in effect at the time of an appeal is the law that should be applied"). See also Lowe v. Price, 437 So. 2d 142 (Fla. 1983); State v. Jones, 485 So. 2d 1283 (Fla. 1986).

the appropriateness of a life sentence. See Blakely v. State, 561 So. 2d 560 (Fla. 1990); Garron; Wilson; Ross.

ISSUE VIII

APPELLANT'S DEATH SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION, BECAUSE A BARE MAJORITY (7-5) DEATH RECOMMENDATION IS NOT RELIABLY DIFFERENT FROM A TIE VOTE JURY LIFE RECOMMENDATION.

The defense contended below that a 7-5 death recommendation is not reliably different from a 6-6 life recommendation, and to accord such a narrow death verdict great weight amounts to arbitrary and capricious imposition of the death penalty (R1438-40). Defense counsel argued in his sentencing memorandum:

> [U]nless more than seven votes are required for a death recommendation, death sentences will be incorrectly imposed with such an unacceptably high probability that they violate the Eighth and Fourteenth Amendments' prohibition of cruel and unusual punishment and . . . imposition of the death penalty in such instances renders death penalty statutes unconstitutional as applied.

(R1440)

Recognizing that this argument has been rejected in Brown v. State, 565 So. 2d 304, 308 (Fla. 1990), appellant would request this Court to reconsider. In Johnson v. Louisiana, 406 U.S. 356 (1972) a plurality of the United States Supreme Court held that jury unanimity was not required under the Fourteenth Amendment in order to convict. A state statute allowing conviction by a 9-3 majority was upheld because nine jurors constituted a substantial

majority. In his concurring opinion, Justice Blackmun emphasized the requirement of a substantial majority and stated that a 7-5 standard "would afford me great difficulty" 406 U.S. at 366.

In view of the constitutionally based need for reliability in capital sentencing, Caldwell v. Mississippi, 472 U.S. 320, 329-330 (1985), and the "nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence," Lockett v. Ohio, 438 U.S. 586, 605 (1978), a substantial majority, if not unanimous agreement, of the jurors should also be required before a death recommendation may be returned. This is especially true in light of the fact that the trial court is required to give great weight to the jury's recommendation. See Grossman v. State, 525 So. 2d 833, 839 n.1 (Fla. 1988); Espinosa v. Florida, 505 U.S.__ (1993)[51 CrL 3096,3097].

ISSUE IX

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED BECAUSE (1) THE KILLING AROSE FROM A DOMESTIC CONFRONTATION, (2) THE PREMEDITATION WAS OF SHORT DURATION AND UNDER EXTREME STRESS, (3) APPELLANT HAS NO PRIOR HISTORY OF VIOLENCE OR CRIMINAL ACTIVITY, AND (4) THERE ARE SUBSTANTIAL NONSTATUTORY MITIGATING CIRCUMSTANCES.

Appellant has contended in Points IV through VII that none of the aggravating circumstances found or alluded to by the trial court can properly be applied. If this Court strikes all of the aggravating factors, then there is no legal basis for a death sentence, and appellant's sentence must be reduced to life impri-

sonment. Banda v. State, 536 So.2d 221, 222 (Fla. 1988). In the event that this Court upholds some or even all of the aggravating factors, it must then consider whether the death penalty is proportionally warranted. Brown v. Wainwright, 392 So. 2d 1327, 1331 (Fla. 1981).

In Blakely v. State, 561 So. 2d 560, 561 (Fla. 1990), a defendant's death sentence was reduced to life imprisonment on proportionality grounds:

> "[T]his Court [has] stated that when the murder is a result of a heated domestic confrontation, the death penalty is not proportionally warranted." Garron v. State, 528 So. 2d 353, 361 (Fla.1988). We have expressly applied this proportionality review to reverse the death penalty in a number of domestic cases. [cases cited in footnote]. On the other hand, we have affirmed the death sentence under express proportionality review where the defendant has been convicted of a prior "similar violent offense." [cases cited in footnote]. In the instant case, Blakely had committed no prior similar crime. The killing resulted from an ongoing and heated domestic dispute and was factually comparable to that in Ross v. State, 474 So.2d 1170 (Fla. 1985), wherein the husband bludgeoned the wife to death with a hammer or other blunt instrument. We reversed the death penalty there on proportionality grounds.

Where the defendant has no prior history of violent behavior, this Court has even reversed death sentences on proportionality grounds where he murdered two people during the same violent outburst. See Garron v. State, supra, 528 So. 2d at 361; Wilson v. State, supra, 493 So. 2d at 1023-24. As Justice Barkett observed in her dissenting opinion in Porter v. State, 564 So. 2d 1060, 1065 (Fla. 1990):

> Generally when we have affirmed death sentences in analogous situations, we have noted that the defendants had prior, unrelated convictions of violent felonies. See Hudson v. State, 538 So.2d 829 (Fla.)(defendant was on community control for sexual battery when he committed the murder), cert. denied, __U.S.__, 110 S.Ct. 212, 107 L.Ed.2d 165 (1989); Lemon v. State, 456 So.2d 885 (Fla. 1984) (defendant committed murder shortly after serving prison sentence for assault with intent to commit first-degree murder), cert. denied, 469 U.S. 1230, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985); Williams v. State, 437 So.2d 133 (Fla.1983) (defendant had been convicted of aggravated assault, and was on parole for possession of firearm by a convicted felon, when he committed the murder), cert. denied, 466 U.S. 909, 104 S.Ct. 1690, 80 L.Ed.2d 164 (1984); King v. State, 436 So.2d 50 (Fla. 1983) (defendant had a prior conviction of manslaughter for killing a woman with an axe), cert. denied, 466 U.S. 909, 104 S.Ct. 1690, 80 L.Ed.2d 163 (1984).

In the instant case (assuming the state's hypothesis of guilt is correct), the killings arose from a domestic argument between appellant and his wife Carol in the garage; and the premeditation in the death of Adrienne was of short duration and under extreme stress. Appellant has no history of criminal activity or violent behavior, and in fact has led a highly productive life as an engineer, in the field of air traffic control and instrument landing systems. To do so, he has had to overcome the twin handicaps of right side brain impairment and severe hearing loss. Through "an enormous amount of motivation" and drive to learn, and extreme diligence and struggle (R636,638-41), he became a highly respected expert in his field. In addition, at the time of resentencing, he had served over seven years in prison -- on death row for a crime he has always maintained he did not commit -- without receiving a

single disciplinary report, and without ever achieving less than the highest daily rating of his behavior. Therefore, he has demonstrated as a significant mitigating factor his potential for rehabilitation and for productivity within a prison setting. See Skipper v. South Carolina, 476 U.S. 1, 7 (1986); Maxwell v. State, 603 So. 2d 490, 492 (Fla. 1992); Cooper v. Dugger, 526 So. 2d 900, 902 (Fla. 1988). This, along with the other nonstatutory mitigating factors established by the evidence [see p. 32-35, of the Statement of the Facts] and found by the trial judge (R1500-01), provides even more reason why life imprisonment is the appropriate sentence in this case.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, appellant respectfully requests that this Court grant the following relief:

> Reverse the trial court's order summarily denying his motion for post-conviction relief, and remand for an evidentiary hearing [Issue I].
>
> Reverse his death sentence, and remand for a new penalty proceeding before a newly impaneled jury [Issues II, III, IV, V, and VI].
>
> Strike the statement in the trial court's sentencing order regarding the "cold, calculated, and premeditated" aggravating factor, and not consider this factor in conducting proportionality review [Issue VII].
>
> Reverse his death sentence, and remand for imposition of a sentence of life imprisonment [Issues VIII and IX].

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 1st day of March, 1993.

Respectfully submitted,

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