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CLERK, SUPREME COURT

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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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

The state's brief will be referred to herein by use of the symbol "SB." Other references will be as denoted in appellant's initial brief.

ARGUMENT

ISSUE I

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

The state in its brief extensively disputes the factual allegations of appellant's motion with regard to (1) whether the prosecutor provided all of the fire scene photographs to defense counsel at the original trial;¹ (2) whether the critical facts which would have supported the defense that the fire occurred as a result of an accidental propane explosion were known to defense counsel at trial; (3) whether these facts could have been discovered by due diligence on the part of counsel; and (4) whether the evidence was credible, and whether it would probably result in an acquittal

¹ Contrary to the state's suggestion, the critical photograph is not State Exhibit 12 from the original trial (OR1810, see R1122, SB4,7), but rather Defense Exhibit 13 from the proceeding of June 5, 1991 (R1526). It is the latter photograph -- a close up of the breaker box -- which shows that at least four of the circuits have been tripped (a position in which, according to Craig Tanner, they could not have been placed manually). It is this photograph which appears to contradict the conclusions of the state's experts at the original trial that there was no indication of an electrical fire, and which suggests instead that the fire may have been the result of a propane explosion triggered by an electrical failure.

(SB1,4,7-15). The assertions of fact in the state's brief (including the prosecutor's unsworn representations as to which photographs had been disclosed, see SB 14, R1117, 1120) and the allegations in appellant's motion are so completely at odds that it only further demonstrates the need for an evidentiary hearing to resolve the disputed issues. See Jones v. State, 591 So. 2d 911, 916 (Fla. 1991); Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989); Morgan v. State, 475 So. 2d 681 (Fla. 1985); Cammarano v. State, 602 So. 2d 1369, 1371 (Fla. 5th DCA 1992).

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 state repeatedly refers to what it calls appellant's "newly-crafted theory" (SB18,19,22). If the prosecutor had disclosed all of the fire scene photographs at the time of the original trial, as he represented to defense counsel he had done (OR1687-88), then appellant would have had the opportunity to show the first jury that the fire resulted from an accidental propane explosion, and that it was not an incendiary gasoline fire. There might well have been no necessity for a penalty phase at all. The state should not be heard to insinuate that appellant's theory is newly "crafted", when in fact it is newly discovered because critical evidence was belatedly disclosed.

The state's argument on the merits amounts to an assertion that, because of the original jury's guilty verdicts, the state is

entitled to two automatic aggravating factors (arson and HAC), while the defense is foreclosed from challenging those aggravators either on cross-examination or by the presentation of contrary evidence, because that -- according to the state -- would involve "residual doubt." The state says "[T]he existence of the heinous, atrocious, or cruel aggravating factor is inextricably entwined with the commission of the arson, and that appellant committed an arson was not subject to dispute in the resentencing proceedings" (SB20).

Contrary to the state's position, due process and basic fairness require that if the state is allowed to introduce evidence (including hearsay) 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. See Downs v. State, 572 So. 2d 895, 899 (Fla. 1990), pointing out (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 recognizing that where evidence relevant to the circumstances of the offense is "inextricably intertwined" with evidence pertaining to the issue of guilt, it is admissible.

The Eighth Amendment of the U.S. Constitution requires heightened reliability in capital sentencing. See e.g., Lockett v. Ohio, 438 U.S. 586, 604 (1978); Zant v. Stephens, 462 U.S. 862, 884-85 (1983); Caldwell v. Mississippi, 472 U.S. 320, 329-30 (1985); Sumner v. Shuman, 483 U.S. 66, 72 (1987). This Court has recognized that jurors impaneled for capital sentencing proceedings cannot be expected to make wise and reasonable decisions in a vacuum [Teffeteller v. State, 495 So. 2d 744, 745 (Fla. 1986)], and that:

The basis premise of the [capital] sentencing procedure is that the sentencer² 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.

Preston v. State, 607 So. 2d 404, 409 (Fla. 1992).

The position advocated by the state necessarily results in resentencing jurors making the life or death decision not in a vacuum, but -- worse yet -- upon a one-sided, distorted, and misleading presentation of the circumstances. A capital sentencing proceeding in which the jury is allowed to hear only the state's version of the events violates elementary standards of due process and reliability.

² The penalty phase jury is, under Florida law, a "co-sentencer." Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993).

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert J. Krauss,
Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on
this 12th day of August, 1993.

Respectfully submitted,



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