

IN THE SUPREME COURT OF FLORIDA

FRED LEWIS WAY,

Appellant,

v.

Case No. 78,640

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

This is an appeal from appeal from a resentencing proceeding conducted by virtue of the Court's remand in this case. The record of the instant resentencing proceeding will be referred to by the symbol "R" followed by the appropriate page number. Reference to the original record on appeal used in case number 64,931 will be referred to by the symbol "OR" followed by the appropriate page number.

### SUMMARY OF THE ARGUMENT

As to Issue I: After conducting a hearing on this issue and reviewing the photographs and evidence presented during the original guilt phase, the trial judge specifically found that evidence that a propane gas tank was found underneath the breaker box was known to defense counsel during the original trial (R 1122). As such, it does not qualify as newly discovered evidence nor does it establish a Brady violation. Further, appellant has waived any claim of ineffective assistance of counsel by his failure to raise the claim in the original 3.850 motion. Successive motions are only permitted where the evidence could not have been obtained by due diligence. As the photographs were presented at the original trial and included in the record on direct appeal, any claims of ineffective assistance of counsel for failure to argue that the fire resulted from a propane explosion should have been presented in the original 3.850. Accordingly, appellant is not entitled to relief on this claim.

As to Issue II: The trial court did not err in excluding the testimony of two defense witnesses or by restricting the cross examination of a state witness. The testimony sought to be elicited dealt solely with guilt or innocence and was not relevant as to any sentencing issues. The question of whether an arson occurred, and the corollary issue pertaining to the underlying facts of the arson used to support the finding of the heinous, atrocious, or cruel aggravating factor, were previously

determined by a jury verdict in the first trial and, hence, these matters were not subject to relitigation.

As to Issue III: This Honorable Court should not recede from its clear precedent indicating that residual or lingering doubt may not be considered as a nonstatutory mitigating factor. Where a jury has previously found guilt beyond a reasonable doubt, it is not logical for a jury to rely on the fact that the defendant may instead be "just a little bit guilty." Residual doubt is not relevant in a capital sentencing proceeding.

As to Issue IV: The trial court did not err in instructing the jury on and finding the aggravating circumstance that the capital felony occurred during the commission of an arson. The original jury unanimously determined that appellant was guilty of an arson and, hence, the subject was not open for relitigation at a resentencing proceeding.

As to Issue V: This Honorable Court should adhere to its clear rulings that a contemporaneous violent felony may be considered as an aggravating factor. It is illogical to permit consideration of the fact that a defendant creates a great risk of death to many persons, yet not consider the fact that a defendant actually killed multiple victims or committed violent felonies against multiple victims.

As to Issue VI: The evidence adduced at the original trial, which was expressly relied upon by the trial court in its findings, clearly supports the application and, hence, the

instruction upon, the aggravating factor of especially heinous, atrocious, or cruel. The evidence showed that appellant's daughter when set ablaze by appellant screamed and cried out evidencing the unnecessary torment experienced by the victim.

As to Issue VII: The homicide committed by appellant was committed in a cold, calculated and premeditated manner. His luring of his daughter to her death occurred over such time as to permit the consideration and rejection of the horrible plan to murder. Your appellee submits that one would be hard pressed to imagine any homicide more "cold" than that of one's own child in order to cover up another murder.

As to Issue VIII: Appellant's contention that more than a bare majority should be required in order to support a jury recommendation of a death sentence has been clearly and unequivocally rejected previously by this Honorable Court and no new reason appears as to why this precedent should be overturned.

As to Issue IX: The death sentence imposed in the instant case for the cold murder of appellant's own child is proportionally warranted.

ARGUMENT

ISSUE I

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

Appellant argues that photographs obtained during the preparation for the resentencing constitute evidence which strongly suggests that Adriennene and Carol Way died in an accidental propane gas explosion and fire. It is the state's position that the record refutes this claim and that whether this claim for relief is based upon newly discovered evidence, a Brady<sup>1</sup> violation, or ineffective assistance of counsel, appellant is not entitled to relief. Jones v. State, 591 So. 2d 911, 916 (Fla. 1991); Hedgwood v. State, 575 So. 2d 170 (Fla. 1991); Strickland v. Washington, 466 U.S. 668 (1984).

After conducting a hearing on this issue and reviewing the photographs and evidence presented during the original guilt phase, the trial judge specifically found that evidence that a propane gas tank was found underneath the breaker box was known to defense counsel during the original trial (R 1122). As such, it does not qualify as newly discovered evidence nor does it establish a Brady violation. Further, appellant has waived any claim of ineffective assistance of counsel by his failure to raise the claim in the original 3.850 motion. Successive motions are only permitted where the evidence could not have been

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<sup>1</sup>Brady v. Maryland, 373 U.S. 87 (1963).

obtained by due diligence. As the photographs were presented at the original trial and included in the record on direct appeal, any claims of ineffective assistance of counsel for failure to argue that the fire resulted from a propane explosion should have been presented in the original 3.850. Accordingly, appellant is not entitled to relief on this claim.

Under Florida law, the trial court should grant an evidentiary hearing only where one is warranted. Jones v. State, 446 So. 2d 1059 (Fla. 1984). It is the movant's burden to show his entitlement to a hearing; it must be considered whether the movant would be entitled to relief if the allegations are true. Ramsey v. State, 408 So. 2d 675 (Fla. 4th DCA 1981) and Johnson v. State, 362 So. 2d 465 (Fla. 2nd DCA 1978). However, if the motion and the files in the record of the case conclusively show the defendant is entitled to no relief, then the motion can be denied without a hearing. Accord, Rule 3.850, Fla. R. Crim. P.; Porter v. State, 478 So. 2d 33 (Fla. 1985); Middleton v. State, 465 So. 2d 1218 (Fla. 1985).

As the records before the trial court conclusively refuted any claim by appellant that he was entitled to relief, the trial court properly denied the motion for an evidentiary hearing.

With regard to the motion to vacate judgment and sentence the state asserts that this motion should have been dismissed as a successive petition and as untimely filed. Rule 3.850 Florida Rules of Criminal Procedure provides that even successive motions

must be filed within two years after the judgment and sentence becomes final and that a second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant or its attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules. The motion in the instant case was not only untimely filed,<sup>2</sup> but also contains issues which were previously ruled upon and new or different grounds for relief which were known to counsel prior to the original motion. Accordingly, the claims now presented are procedurally barred and the motion could have been properly denied on that basis. Jones v. State, 591 So. 2d 911 (Fla. 1991); Francis v. Barton, 581 So. 2d 583 (Fla.), cert. denied, \_\_\_ U.S. \_\_\_ (1991); Squires v. State, 565 So. 2d 318 (Fla. 1990); Smith v. State, 453 So. 2d 388 (Fla. 1984); Songer v. State, 463 So. 2d 229 (Fla. 1985); Francois v. State, 470 So. 2d 687 (Fla. 1985).

Although, successive motions must be filed within two year time limit of Florida Rule of Criminal Procedure 3.850, allegations of newly discovered evidence fall within the exception to the two year time limit. Therefore, the claim of newly discovered evidence was properly considered and rejected.

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<sup>2</sup>The judgment and sentence became final on December, 17, 1986. The second motion to vacate was filed June 4, 1991.

Jones v. State, 591 So. 2d 911, 913 (Fla. 1991).

In Scott v. Dugger, 604 So. 2d 465 (Fla. 1992), this Honorable Court noted that there are two requirements that must be met in order to set aside a conviction or sentence because of newly discovered evidence. First, the asserted facts must have been unknown by the trial court, by the party or by counsel at the time of trial and it "must appear that the defendant or his counsel could not have known that by the use of due diligence". Scott v. Dugger, supra, quoting Hallman v. State, 371 So. 2d 482, 485 (Fla. 1979). Second, "the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial." Id. at 468, quoting Jones v. State, 591 So. 2d 911, 915 (Fla. 1991). Appellant's argument fails on both prongs of this test.

First, the asserted facts were not unknown by the trial court or by counsel at the time of trial as reflected by the evidence presented at the original trial (OR 1810). Furthermore, even if counsel was not aware of all of the facts, it is clear that the defendant or his counsel could have known them by the use of diligence, in that counsel could have discovered the existence of the propane by simply looking at the photographs as presented at the original trial.

Second, this Court requires that newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial. Appellant's theory of defense presented at

the original trial was that the murders were a result of mutual combat. Fred Way testified that on the night before the fire his wife tripped and bumped her head. He also testified that he believed his son had spilled some gas in the garage (OR 1265).

Appellant also testified that later the next morning his wife was working in the garage and spilled paint thinner or gasoline. He said that she used some newspaper to blot it up. The defendant was outside of the garage working (OR 1275). Way testified that he heard his wife yell; she had bumped her head and fallen. He took off his shirt so that his wife could use it to stop the bleeding (OR 1276). He claimed that Mrs. Way then asked him to call Adriennene to the garage (OR 1276 - 1277). The wife and daughter then began arguing and pushing and shoving. He saw the daughter swing at her mother, but he didn't see a weapon (OR 1278 - 1279, 1341, 1343). Appellant testified that he grabbed his daughter and told her to calm down. He then offered to take the daughter to Oklahoma with him but his wife said no (OR 1279). Mr. Way had told officer Nykanen that his wife fell and hit her head on some weights and that he tried to break up the fight but his wife told him to leave as she would handle it (OR 629). Appellant also told officer Staunko that as he was leaving the scene, he heard the mother tell the daughter that if she didn't straighten up she would kill her (OR 647). In support of the theory of mutual combat the defendant presented expert witness Dr. William Gibson, a pathologist who testified that in

his considered opinion the wounds could have been inflicted in mutual combat (OR 1177).

This theory of defense was also urged in appellant's initial 3.850 motion. On appeal to this Court, Way urged that his defense counsel was ineffective for failing to use all available evidence in support of the theory of mutual combat. See Initial Brief of Appellant, Case No. 73,649, pages 46 - 47.

In the second Motion for Post Conviction Relief, however, appellant urged that the murders were not the result of mutual combat but rather were the result of an accidental explosion in which the victims were hurled against blunt objects located in the garage area or were the result of other objects being thrown about the garage as a result of the explosion. Upon review the trial court below found that this position did not stand up to close scrutiny of the record and the exhibits.

The trial court noted that the testimony of Dr. Diggs, the medical forensic pathologist who testified at the initial trial provided that Carol Way suffered numerous wounds to her head located at various places including near the right ear, left of the midline, on top of the halo of her head, lower to upper part of the back of her head, and the back of head on the right side behind the ear. The Court also noted that there was additional evidence that these wounds were consistent with being struck by a blunt instrument such as a hammer (R 1140 - 1141). There was evidence presented that Fred Way on the day following the murder

went into the garage, took out a hammer that was covered with blood and threw it over the back fence (OR 986 - 987, 1001, 1083 - 1084). The trial court also noted that according to Dr. Diggs, the wounds on Carol Way were consistent with being inflicted with the same type of instrument and it is highly unlikely that the same weapon was not used. This refutes the defendant's new theory of the explosion in that during an explosion the same blunt instrument would not have repeatedly struck her in the head. The court also noted that the defendant presented his own expert forensic pathologist who testified regarding the defendant's theory that the wounds occurred as a result of mutual combat. The court also found appellant's new theory of defense to be refuted by Dr. Gibson's opinion that the wounds on Adriennene Way were consistent with being driven into her skull at an angle by a blunt instrument and that the wounds to Carol Way were consistent with some part of a hammer (OR 1141 - 1142). The court further noted that the blood splatter expert testified that the blood stains in the garage area and on the vehicle in the garage indicated that one of the victims was struck while located on the ground next to the car specifically next to the left front wheel and that the other victim was struck at or near the cardboard box and moved along the wall. In his opinion, both of the victims were struck when they were at or near the ground (OR 1143). Again, this is inconsistent with the defendant's theory that the explosion resulted in objects being hurled at the

victims resulting in the injuries. The court also noted that an examination of the photographs depicting the garage area refutes Way's claim regarding the explosion:

"As noted, I have examined certain photographs depicting the garage area. I don't need any expert testimony to determine from a review of these photographs that the wounds caused the victims' heads could not have been caused by any object designated in that area. If you look at them its just preposterous to think that those wounds could have been caused by being thrown against some unknown object in a garage area and I looked at them closely.

Based on a review of the record, it is sheer sophistry, in my opinion, to suggest that the number, nature and location of the wounds suffered by these victims could have been caused by any stretch of the imagination by their having been flung against some object or objects in the garage area following an accidental explosion or the wounds could have been caused by some objects having struck them in the head.

It simply in my opinion, I have been wrong before, but in my opinion, it defies logic that the wounds suffered by Carol Way and Adriennene Way, as testified to by Dr. Diggs and by the defendant's own expert pathologist and as depicted in exhibit 47 and 48 could have, possibly were, or even might have been caused in the manner suggested by the defendant in this motion." (R 1143 - 1144)

Indeed, a review of the photographs as presented in the original trial record and those presented at the hearing on the second motion to vacate shows that the murders could not have happened as now alleged by the defendant.<sup>3</sup> The court

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<sup>3</sup>Copies of the photographs from the original trial were included in the record on appeal in 1984 and were labeled as State's Exhibit

specifically focused on state exhibit numbers 6, 10, 11, 12, 13, 47 and 48 which were introduced at the defendant's first trial (R 1139, OR 1798-99, 1806-7, 1808-9, 1810-11, 1812-13, 1853-54, 1855-56). A review of these photographs supports the trial court's finding that there were no blunt instruments located at or near the bodies which were consistent with the wounds inflicted upon the victims and that the murders could not have possibly resulted from the propane tank exploding (OR 1798-99, 1806-7, 1808-9, 1810-11, 1812-13). Your appellee urges this Honorable Court to review all of the photographs. In particular, note the area of the garage where the propane tank and the breaker box are located. The tank and box are on or above a wooden counter which shows no evidence of being damaged (R 1532, 1544, 1546, 1558, 1560, 1562). If the fire had been a result of this propane tank exploding, common sense dictates that this area would have been the most severely damaged area of the garage. Instead, as is reflected in arson expert Henry Regaldo's report and diagram of the garage (R 1796), the bulk of the damage was towards the front-center of the garage, well away from the propane tank and breaker box. (R 1546) Interestingly enough the bulk of the damage was where Adriennene's gasoline-soaked and

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#1-57. (Volume XII, OR 1788 - 1878) Most of the originals of those photographs have apparently been sent to this Court and are designated as Exhibit No. 3 (Composite), Manilla Envelope with Photos. (R 1728 -1756) The original photographs that Way claims were never shown to his counsel are also included in this record and are designated as Exhibit Nos. 1 and 2, Manilla Envelope with Photos and Kodak Box with Photos. (R 1587 -1727)

badly burned body was found. (R 1771) Also, as noted by the court below, a review of the photos does not reveal the presence of any instruments that could have caused the number and type of blows received by the victims.

Accordingly, appellant's claim of newly discovered evidence must fail in that even if such evidence had not been presented at the original trial and was not discoverable by due diligence, it is unlikely that this evidence would probably produce an acquittal on retrial.

Appellant also alleges that the prosecutor's alleged failure to provide all of the photographs constitutes a violation of Brady v. Maryland, 373 U.S. 83 (1963). To establish a Brady violation a defendant must establish the following:

(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.

Hegwood v. State, 575 So. 2d 170 (Fla. 1991), quoting, United States v. Meros, 866 F.2d 1304, 1308 (11th Cir. 1989).

It should be noted that the purpose of the Brady rule is not to displace the adversary system as the primary means of uncovering the truth; rather, the paramount goal is to guard against miscarriages of justice. Therefore, unless the

prosecutor's omission deprives the defendant of a fair trial, there is no constitutional violation requiring the verdict to be set aside. Consequently, the United States Supreme Court has deemed it appropriate to apply the harmless error rule adopted in Chapman to Brady violations, thereby preventing the automatic reversal of convictions where the discovery violation was harmless beyond a reasonable doubt. Smith v. State, 500 So. 2d 125 (Fla. 1986).

The standard under Brady is in fact quite similar to the newly discovered evidence standard in that the defendant must establish that the evidence could not have been obtained by the defense with any reasonable diligence and that had the evidence been disclosed to the defense there was a reasonable probability that the outcome of the proceedings would have been different. The defendant must also show that the prosecution suppressed the favorable evidence. Appellant has failed to make a showing of any of the foregoing.

First, appellant's claim that the prosecutor gave them the box of photographs and advised them that no one had ever seen these photos before is refuted by the record. At the hearing on the motion to vacate, the prosecutor denied making such a statement and represented to the court that all of the photographs had been given to original defense counsel as well as the office of capital collateral representatives who represented Way during the first 3.850 (R 1117, 1120). Further, as the

original record shows, the photos not introduced at trial were essentially duplicates of the photos that were introduced. Also, a review of the arson expert's report also shows that prior to the original trial many of these photos were in trial counsel David Rankin's possession (R 1757-1836).

Accordingly, Way's Brady claim fails in that he has failed to establish that favorable evidence was suppressed and that he could not have obtained said evidence through due diligence. Even if Way had established the foregoing, as the court below found, there is no reasonable probability that presentation of the additional photographs would have affected the outcome of the proceedings (R 1145).

Way also urges that even if this evidence was available during the original trial his trial counsel was ineffective for failing to use it to establish that the fire was the result of a propane explosion and not arson as the state contended.

First, the claim of ineffective assistance of counsel was presented by way of the original motion for post conviction relief. It is the state's position, therefore, that this claim is procedurally barred. As this Court noted in Jones v. State, 591 So. 2d 911 (Fla. 1991), "A defendant may not raise claims of ineffective assistance of counsel on a piecemeal basis by filing successive motions." Appellant Fred Way had the opportunity to challenge ineffective assistance in the previous motion and his failure to raise this claim bars subsequent review. The claim of

ineffective assistance of counsel was thoroughly addressed in the first motion for post conviction relief. Thus, as the court below found, the claim of ineffective assistance of counsel is barred as successive (R 1146-7).

Even if this claim was now cognizable, it is without merit. Your appellee submits that when reviewing allegations of ineffective assistance of counsel, the general presumption is that defense counsel is presumed to have performed competently and effectively within the meaning of the Sixth Amendment. Strickland v. Washington, 466 U.S. 668 (1984). Furthermore, the defense is required to prove prejudice. Strickland v. Washington, id. A defendant presenting a claim of ineffectiveness must sufficiently plead deficiency and prejudice. Hill v. Lockhart, 474 U.S. 52 (1984). To establish deficient performance, a defendant must show that counsel made errors so serious that counsel did not function as "counsel" within the meaning of the Sixth Amendment. Strickland v. Washington, supra. To establish prejudice, the defendant must establish that there is a high probability that the outcome of the proceeding would have been different, but for the actions of defense counsel. In applying the two-prong test, a reviewing court must indulge in a strong presumption that counsel's representation was effective. Furthermore, effective assistance does not mean errorless assistance and an attorney's performance must be judged in the totality of the circumstances in the entire record rather

than on specific actions.

Way has failed to establish that counsel's performance was deficient or that he was prejudiced by the alleged deficiency. As the court below found, that there was no reasonable probability that had the newly formed defense been presented (as opposed to the mutual combat story that Way urged from the moment the fire was discovered) that it would have affected the outcome of the proceeding. Thus, this claim was also properly denied.

Your appellee urges this Honorable Court to affirm the trial court's denial of the motion to vacate because; 1) this evidence was available to the defense at the time of the original trial, 2) the record refutes Way's claim that the fire was a result of a propane explosion and 3) the basis of the ineffective assistance claim was known at the time of the first motion to vacate.

## ISSUE II

WHETHER THE TRIAL COURT ERRED BY EXCLUDING  
THE TESTIMONY OF PROSPECTIVE DEFENSE  
WITNESSES AND BY RESTRICTING CROSS  
EXAMINATION OF STATE WITNESSES.

Appellant contends that the trial court reversibly erred by not permitting testimony of prospective defense witnesses Craig Tanner and Dr. John Feegel and by restricting the cross examination of state witnesses. The proffered testimony of the prospective defense witnesses and the proffered cross examination of a state witness all pertained to matters which, as the trial judge correctly ruled, pertained to guilt or innocence rather than the proper sentence to be imposed upon appellant. (e.g., R 449, 431, 507, 601 - 602, 663, 670). The trial court's ruling was correct and, therefore, no reversible error is made to appear.

Appellant contends that he had the right to litigate before the jury any and all circumstances pertaining to his newly-crafted theory that Adriennene and Carol Way died in an accidental propane gas explosion and fire rather than at the hands of appellant by virtue of his setting fire to the garage. This contention is based upon the erroneous assumption that a criminal defendant is entitled to have the jury disrespect a verdict obtained as to guilt and innocence in a prior proceeding. Your appellee submits that the resentencing jury, in accordance with the trial court's rulings, was constrained to rely on the facts which were the underlying basis for a legally obtained

conviction.

As discussed above under Issue I, appellant has attempted to create a new theory of the case which flies in the face of the evidence which was presented at the original trial. Indeed, where the jury in the original trial found appellant guilty of arson, the resentencing jury was required to rely on the fact that an arson occurred as opposed to the possibility of some type of accidental explosion. As discussed above under Issue I, appellant was not entitled to 3.850 relief based on his newly created factual theories and, therefore, the resentencing jury was obliged to consider the facts as established by the legally proper verdict and conviction obtained beforehand. The proffered defense witnesses and the proffered cross examination of state witnesses at issue here dealt solely with an attempt to contradict or rebut the facts which had been previously established by the original jury's verdict.

The instant case is very much akin to the situation presented in King v. State, 514 So. 2d 354 (Fla. 1987), cert. denied, 487 U.S. 1241 (1988), wherein this Honorable Court rejected the lingering doubt theory in no uncertain terms. In King, as in the instant case, defense counsel attempted to introduce exculpatory evidence in an effort to convince the resentencing jury to recommend a sentence less than death. In both King and the instant case, guilt had already been established by the prior jury and evidence which rebuts the

underlying facts of those convictions is simply irrelevant in a resentencing proceeding.

Appellant's basic contention is that he was foreclosed from challenging the fact that an arson occurred and, as a corollary matter, that the heinous, atrocious, or cruel aggravating factor was not factually available to the state because an arson did not occur. The state's theory regarding the existence of the heinous, atrocious, or cruel aggravating factor was directly linked to the existence of the arson. Testimony had been adduced at the original trial, and accepted by the jury by virtue of its verdict, that appellant had set fire to the garage by soaking at least one of his victims in gasoline and igniting same. Thus, the 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.

Appellant's reliance upon Waterhouse v. State, 596 So. 2d 1008 (Fla. 1982), is completely misplaced. In Waterhouse, this Court held that it was not error for the trial court to preclude the defendant from presenting evidence questioning his guilt of the murder where the defendant was not precluded from challenging the state's evidence pertaining to the commission of a sexual battery. However, the sexual battery discussed in Waterhouse was introduced by the state to support an aggravating circumstance for which no conviction had been obtained. Thus, the defendant

was properly permitted to present evidence rebutting the existence of the sexual battery as an aggravating factor. In the instant case, however, the conviction for arson had been obtained, and the trial court correctly rejected the defense request to relitigate a matter which had been established by virtue of a jury's verdict.

In King v. Dugger, 555 So. 2d 355, 358 - 359 (Fla. 1990), this Honorable Court discussed the rule that a resentencing proceeding is a new and separate proceeding as compared to the first sentencing. In that context, a mitigating factor found by a trial court at the original sentencing is not conclusively established for all time. Thus, where the judge in the original proceeding found age to be a mitigating factor and a different judge on resentencing did not find age to be a mitigating circumstance, this Court held that "a mitigating circumstance in one proceeding is not an 'ultimate fact' that collateral estoppel or the law of the case would preclude being rejected on resentencing." This is true inasmuch as a resentencing proceeding is separate and distinct from the original sentencing. However, your appellee respectfully submits that a conviction obtained by virtue of a jury's verdict is an ultimate fact" that collateral estoppel or the law of the case would preclude from being relitigated in a subsequent proceeding. This Honorable Court's decision in Waterhouse is undeniably correct when it is considered that there is no requirement that the jury specify its

findings regarding aggravating and mitigating factors when recommending a sentence. Cf. Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989). Where, however, a previous jury has found, by its verdict, that certain basic facts have been established, a resentencing jury is bound by those facts and the defendant is not permitted to completely undermine the validity of a jury verdict.

Inasmuch as the trial judge correctly precluded appellant from presenting evidence of purported innocence at his resentencing proceedings, no error appears. The proffered defense testimony dealt with a newly-crafted theory concerning the propane fire to the exclusion of a gasoline fire which was established by virtue of the original jury's verdict. Appellant's second point must fail.

### ISSUE III

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

In his third claim, appellant urges this Honorable Court to recede from its clear precedent that residual or lingering doubt cannot be considered as a nonstatutory mitigating factor. Appellant contends that if this Court does not recede from its prior holdings, the risk that an innocent person will be executed is increased. Your appellee submits that appellant's contentions are baseless and this Honorable Court should adhere to its well-established precedent.

This Court correctly analyzed this issue in King v. State, 514 So. 2d 354 (Fla. 1987), therein this Court discussed the fact that residual or lingering doubt is not relevant in a sentencing proceeding because it does not relate to determining the appropriate punishment. Indeed, the genesis of the King holding appears to be this Court's decision in Buford v. State, 403 So. 2d 943, 953 (Fla. 1981), wherein this Court held:

A convicted defendant cannot be "a little bit guilty". It is unreasonable for the jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy.

In Buford, this Court observed that the defendant's attempt to attach responsibility for a murder to another person was thwarted by the rendition of the verdict of guilty. Thus, it was

inappropriate to attempt to raise this matter in a sentencing proceeding. Similarly, in the instant case, the question of appellant's guilt as to the arson had been previously determined and established by a jury's verdict. This Court has stressed the need for finality in capital litigation. Cf. Johnson v. State, 536 So. 2d 1009 (Fla. 1988) (the credibility of the criminal justice system depends upon both fairness and finality). The concept of finality has no meaning if a defendant is permitted to relitigate matters which have been previously established by a just and valid verdict of a jury. As discussed above under Issue II, your appellee submits that a jury verdict is entitled to be considered as final for the purposes of collateral estoppel or law of the case precluding relitigation of clearly established matters.

Your appellee respectfully submits that this Honorable Court should adhere to its well-established rule rejecting residual doubt as a nonstatutory mitigating factor.

#### ISSUE IV

WHETHER 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.

This aggravating factor was properly found and applied in the instant case. There is no question that appellant had been previously convicted of an arson and the state was permitted to have a valid conviction considered by the jury and trial judge in determining the proper sentence to be imposed. As discussed above under Issues II and III, the trial court correctly refused to permit appellant to introduce exculpatory evidence at a sentencing proceeding. King v. State, supra; Waterhouse v. State, supra.

## ISSUE V

WHETHER THE TRIAL COURT ERRED BY INSTRUCTING  
THE JURY ON AND FINDING THE PRIOR VIOLENT  
FELONY AGGRAVATING FACTOR.

It is not alleged in appellant's brief, nor does it appear that the record indicates, that objection was made by the defense below as to the purportedly improper instruction on the prior violent felony aggravating factor. It is axiomatic beyond the need for citation that the failure to object to jury instructions precludes appellate review. On this basis alone, appellant's fifth point must fail.

Even if objection had been properly made and this claim could be considered on its merits, appellant's point must fail. In Pardo v. State, 563 So. 2d 77 (Fla. 1990), the trial court had ruled that, in his opinion, the Florida legislature intended the aggravating factor for a prior conviction for a capital felony to apply to offenses other than the ones for which the defendant was being presently tried. Id. at 80. In rejecting this position, the same position as now advanced by appellant sub judice, this Honorable Court held:

This is not a correct statement of the law. We have consistently held that the contemporaneous conviction of a violent felony may qualify as an aggravating circumstances, so long as the two crimes involved multiple victims or separate episodes. Wasko v. State, 505 So. 2d 1314 (Fla. 1987). (text at 80; emphasis supplied)

In the instant case, the appellant's murder of multiple victims rendered him susceptible to a finding of this aggravating

circumstance. This Court has consistently applied the principle enunciated in Wasko. For example, in Santos v. State, 591 So. 2d 160 (Fla. 1991), the defendant therein murdered his twenty-two month old daughter and her mother at the same time in the same place. This Court agreed with the state that the aggravating factor of a prior violent felony properly exists, citing Wasko, supra. The same result must obtain in the instant case and your appellee urges this Honorable Court to continue its consistent application of the multiple victim principle. In assessing the character of the defendant, it is essential to permit the sentencing to consider all relevant factors, including the fact that multiple deaths occurred at the hand of the defendant. It would be totally illogical for a sentencer to be able to consider that the defendant created a great risk of death to many persons, yet that same sentencer could not consider the fact that the defendant actually murdered multiple victims at the same time. Appellant's fifth point should be rejected.

## ISSUE VI

WHETHER THE TRIAL COURT ERRED BY INSTRUCTING  
THE JURY ON AND FINDING THE HEINOUS,  
ATROCIOUS, OR CRUEL AGGRAVATING FACTOR.

Appellant next contends that the trial court erroneously instructed upon and found the aggravating factor that the homicide was especially heinous, atrocious, or cruel. Although a prior finding of a particular aggravating circumstance, with the exception of an aggravator for which a conviction had been obtained, is not an "ultimate fact" which collateral estoppel or law of the case would preclude being relitigated, Preston v. State, 607 So. 2d 404, 407 - 409 (Fla. 1992), your appellee submits that the facts as presented at the resentencing proceedings justify the application of this aggravating factor. In the original direct appeal in this cause, this Court found:

The medical examiner's report clearly shows that the victim was still alive at the time of the fire. She was observed by eyewitnesses to be on fire in the garage and struggling to move. Certain witnesses heard screams coming from the garage. It was not unreasonable for the trial court, based on all of the circumstances, to infer that the victim suffered immense mental agony from the time she was first struck until her death during the ensuing fire.

Way v. State, 496 So. 2d 126, 129 (Fla. 1986). Thus, although the trial judge was not bound to find the heinous, atrocious or cruel aggravating factor to apply, it is certainly not error for the trial judge, under the facts of this case, to find that this aggravator was proved beyond a reasonable doubt.

The heinous, atrocious, or cruel aggravating "factor is permissible only in torturous murders -- those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference or enjoyment of the suffering of another." Williams v. State, 574 So. 2d 136, 138 (Fla. 1991). Your appellee submits that the facts of the instant case satisfy this standard. At the very least, Way's actions exhibited an "utter indifference to" the suffering of another. Indeed, what can be more outrageously depraved than setting fire to your own child and preventing aid and assistance from reaching that child before she has been consumed by fire.

In his brief, appellant attempts to show that the victim who was screaming could have possibly been Carol Way, rather than Adriennene Way. The evidence in this record totally belies that claim. The trial judge noted in her sentencing order that she had "reviewed the evidence presented in the guilt/innocence phase of the trial in December of 1983 . . . ." (R 1497). One of the witnesses to the screaming as discussed in this Court's original opinion set forth above was Tiffany Way, the daughter of appellant and the sister of Adrienne. Tiffany testified at the original proceedings that the screams she heard had been Adrienne's (OR 860, 864). Indeed, Tiffany Way testified that she heard Adrienne screaming and crying "Tippie", the nickname used by Adrienne to identify Tiffany, shortly after Adrienne was

called to the garage by her father (OR 839 - 841). Tiffany further testified that she never heard her mother say anything after Adrienne left the room and Tiffany was pretty sure that the screams were Adrienne's (OR 873).

In State v. Dixon, 283 So. 2d 1 (Fla. 1973), this Court defined heinous to mean "extremely wicked or shockingly evil"; atrocious to mean "wicked and vile" and cruel to mean "infliction of a high degree of pain with utter indifference to or even enjoyment of the suffering of others." Your appellee submits that the facts of this case demonstrate the applicability of this aggravating factor to this case. Illustrative of the fact that the instant murder was especially heinous, atrocious, or cruel is the closing argument presented by the prosecutor at the resentencing proceedings:

\* \* \*

And that third aggravating circumstance would be the murder was especially heinous, atrocious or cruel.

How much weight are you going to assign the fact that this girl, Adrienne Way, suffered a blow that went two inches into her brain?

How much weight are you going to assign the fact that she was breathing in the fire?

How much weight are you going to assign the fact that she was more than likely breathing in that fire as Randall Hierlmeier looked under the garage door and saw her trying, in his words, to get up on all fours and engulfed in flames?

I know Dr. Smith told you about his

hearing problem, and I know Dr. Merin alluded to his hearing problem, but Fred Way heard Randall Hierlmeier, "Is the house on fire?" Fred Way, "Yes." Question: "Is there anyone in the house?" No answer. Question: "Is there anyone in the house?" No answer. Question: Q: "Is there anyone in the house?" Answer: Fred Way, "No." Question: Q: "Is there anyone in the garage?" No answer. Question: "Is there anyone in the garage?" No answer.

And then recall Randall Hierlmeier heard screaming within the garage and he looked at Fred Way and he said, "Who the hell is in the garage?" And he says, "My daughter."

\* \* \*

(R 862 - 863)

Thus, where the instant record reveals that Fred Way bludgeoned his daughter and set her afire after which Adrienne screamed and attempted to move according to the evidence, your appellee submits that there is no reasonable doubt that the instant murder was especially heinous, atrocious, or cruel.

## ISSUE VII

WHETHER THE TRIAL COURT ERRED BY FINDING THAT  
THE CAPITAL FELONY WAS COMMITTED IN A COLD,  
CALCULATED AND PREMEDITATED MANNER.

In the order entered below, the trial judge stated that she did not rely upon the aggravating circumstance of cold, calculated, and premeditated because it was not asserted by the state. Of course, the trial court was free, if she chose, to consider any aggravating factors which were proved beyond a reasonable doubt based upon the record. Thus, to the extent that this Honorable Court wishes to consider the cold, calculated and premeditated factor in the context of a proportionality analysis, evidence exists in this record which supports its application.

Although not bound by its conclusions reached in the original appeal, the facts as found by this Honorable Court previously illustrate that the cold, calculated and premeditated aggravating factor can be validly applied to this case:

. . . The record before us contains an abundance of evidence to support a finding of this aggravating circumstance. (citations omitted) Here, appellant called the victim into the garage and struck her twice in the head with a blunt instrument. He poured gasoline over her and doused the rest of the garage, setting the area ablaze. Appellant then returned to the house to smoke a cigarette and, after being alerted to the fire by a younger daughter, he impeded subsequent rescue attempts by denying knowledge or possession of a key to a locked garage door. These acts warranted characterization by the trial court as "highest degree of calculation and premeditation."

Way v. State, 496 So. 2d 126, 129 (Fla. 1986). In his brief,

appellant contends that the standards have changed pursuant to the more recent case law developed by this Court and, therefore, the cold, calculated and premeditated aggravating factor should not be applied, essentially because this is a domestic-type of case. However, appellee respectfully submits that this Honorable Court has not yet created a per se rule of inapplicability of the cold, calculated and premeditated aggravating factor in a domestic setting. Recent decisions of this Court reveal that even in a domestic setting the cold, calculated and premeditated aggravating factor may be justifiably applied. In Porter v. State, 564 So. 2d 1060 (1990), this Court held that "while Porter's motivation may have been grounded in passion, it is clear that he contemplated this murder well in advance." Id. at 1064. In Turner v. State, 530 So. 2d 45 (Fla. 1987), this Honorable Court also held that the cold, calculated and premeditated aggravating factor was applicable in a domestic setting. In Turner, this Court observed that the defendant had threatened to kill his ex-wife and her live-in female roommate because the defendant believed that that two women were enjoying a lesbian relationship. The defendant also believed that his ex-wife's female companion had seduced Turner's wife and had taken Turner's family away from him. The cold, calculated and premeditated aggravating factor was applicable in Turner. Indeed, your appellee asserts that the significant factor appears to be not whether the homicides are not "domestic", but rather

whether the method employed by the defendant fits the definition of this factor. This Court has rejected the applicability of this factor in "domestic" settings where the circumstances evidenced heated passion and violent emotions arising from hatred and jealousy associated with a relationship between the parties. See Santos v. State, 591 So. 2d 160 (Fla. 1991); Douglas v. State, 575 So. 2d 165 (Fla. 1991). However, Santos and Douglas are materially distinguishable from the instant case where the murder of appellant's daughter did not occur as a result of heated passion arising from hatred and jealousy. Rather, appellant coldly and calculatedly set about to lure his daughter to her death in order to cover up the murder of his wife. Your appellee respectfully submits that there may not be any "colder" murder possible than that of one's own child under the circumstances of this case.

The instant case is not one such as Maulden v. State, Case No. 75,595 (Fla. March 25, 1993). There, in a domestic setting, this Court held that the murder committed could not be characterized as "cold" where there was mental health testimony indicating that the defendant was overwhelmed by his emotions and was in a depersonalized state. In the instant case, however, there is simply no indication that the murder committed by appellant of his daughter was anything but the coldest murder imaginable. Therefore, your appellee therefore submits that the cold, calculated and premeditated aggravating factor is

applicable under the circumstances of the instant case and may be considered by this Court in its proportionality analysis.

ISSUE VIII

WHETHER APPELLANT'S DEATH SENTENCE IS  
CONSTITUTIONALLY INFIRM WHERE A FAIR MAJORITY  
OF THE JURY RECOMMENDED TO IMPOSE THE DEATH  
SENTENCE.

Appellant's concession that his argument under this issue has been rejected in Brown v. State, 565 So. 2d 304 (Fla. 1990), is well taken. Your appellee would note that the same argument now advanced herein by appellant based upon Johnson v. Louisiana, 406 U.S. 356 (1972), was squarely rejected many years ago in Alvord v. State, 322 So. 2d 533 (Fla. 1975), cert. denied, 28 U.S. 923 (1976).

## ISSUE IX

### WHETHER THE DEATH PENALTY IMPOSED IN THE INSTANT CASE IS PROPORTIONALLY WARRANTED.

Appellant lastly contends that the sentence of death imposed in the instant case is not proportionally warranted.

Essentially, appellant contends that because the instant murder arose from a purported "domestic" situation, and because appellant has nonstatutory mitigation in his favor, the death penalty should not stand. Your appellee strenuously contends otherwise and, therefore, the death sentence imposed in the instant case should be affirmed.

Your appellee submits that the sentence of death was properly imposed in the instant case where the aggravating factors established below set Way and this killing apart from the average capital defendant. The imposition of the death sentence was proportionate to other capital cases where the death sentence has been upheld. Cf. Brown v. State, 473 So. 2d 1260 (Fla. 1985).

Additionally, your appellee submits that the instant case is not a typical "domestic" case such as those relied upon by appellant. In Garron v. State, 528 So. 2d 353 (Fla. 1988), and Wilson v. State, 493 So. 2d 1019 (Fla. 1986), this Court found that killings were the result of heated, domestic confrontation and, although premeditated, were most likely committed upon reflection of a short duration. Yet, the decisions in Garron and Wilson should not have precedential effect in the instant case

where the factual dissimilarities are marked. It is highly significant that appellant lured his daughter into the garage to commit the murder in an apparent attempt to "cover up" the prior murder of his wife. Had a death penalty been imposed for the murder of Carol Way, appellant's point might have merit in that a husband killing a wife is often the result of a heated, domestic confrontation. However, the cold-blooded murder of appellant's daughter stands on a different footing. This murder was the result of a cold plan formulated over a period of time sufficient to accord reflection and contemplation of the defendant's actions. The instant case is more akin to cases such as Porter v. State, 564 So. 2d 1060 (Fla. 1990), and Brown v. State, 565 So. 2d 304 (Fla. 1990), wherein this Court upheld domestic cases on the grounds of proportionality. The same result should obtain in the instant case.

CONCLUSION

Based upon the foregoing reasons, arguments and authorities, the judgment and sentence of death imposed by the trial court should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Stephen Bolotin, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this \_\_\_\_\_ day of June, 1993.

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OF COUNSEL FOR APPELLEE