IN THE SUPREME COURT OF THE STATE OF FLORIDA

FRED LEWIS WAY :

Appellant :

vs. : Appellate Case No. 64,931

STATE OF FLORIDA :

Appellee :

:

INITIAL BRIEF OF APPELLANT

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1. "Appellant" refers to Fred Lewis Way.
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STATEMENT OF THE CASE

The case was commenced by the filing of an Indictment (R 13-14) which charged Appellant with the first degree murder of his wife, Carol Way, the first degree murder of his daughter, Adrienne Way, and the first degree arson of the dwelling at 8030 Jackson Springs Road, Hillsborough County, Florida.

Appellant's bifurcated trial upon the Indictment (R 13-14) commenced on December 12, 1983, (R 2). At the conclusion of the state's case upon the first phase of said trial dealing with the issue of Appellant's guilt or innocence, Appellant moved for a judgment of acquittal which was denied (R 1116, 1119). Thereafter, Appellant presented his case during which he attempted to put on an expert witness, to-wit: Dr. Sidney Merin, to testify as to the reasons for his reaction to the fire which consumed his wife and daughter (R 1361-1375). The state's objection to Dr. Merin's testimony was sustained (R 1375), and his testimony, for purposes of the record, was proferred outside the presence of the jury (R 1376-1392).

Upon the conclusion of the first phase of the trial, Appellant moved for a judgment of acquittal which was denied (R 1398, 1399).

On the question of Appellant's guilt or innocence, the jury found him guilty of:

(a) The lesser included crime of second degree murder in the death of Carol Way (R 98).

(b) The first degree murder of Adrienne Way (R 99) as charged in the second count of the Indictment (R 13-14).

(c) The first degree arson at 8030 Jackson Springs Road (R 100) as charged in the third count of the Indictment (R 13-14).

As a result of (b) above, a second phase of Appellant's trial occurred on December 22, 1983. To all instructions on the aggravating circumstances contained in Chapter 921.141(5) Florida Statutes, Appellant objected and all objections were overruled (R 1619-1635). The second phase of the trial concluded with a jury recommendation, by a vote of 7 - 5, that Appellant be put to death for the first degree murder of Adrienne Way (R 101).

On December 22, 1983, Appellant was adjudicated guilty of the crimes of which he was convicted (R 111-112).

On December 30, 1983, Appellant filed a Motion for New Trial (R 102-105) which was denied on January 12, 1984, (R 2).

On January 23, 1984, Appellant was sentenced to ninety-nine years for the second degree murder of Carol Way (R 113-114), death

for the first degree murder of Adrienne Way (R 115) and thirty years for first degree arson (R 116). Amended Sentences (R 133-136) were signed on January 26, 1984, imposing the same sentences upon Appellant.

On January 27, 1984, the trial judge's Amended Sentence (R 133-144), prepared pursuant to Chapter 921-141(3) Florida Statutes was filed.

Notice of Appeal (R 152) was filed on February 21, 1984.

STATEMENT OF THE FACTS

On July 11, 1983, a fire occurred in the garage at the home at 8030 Jackson Springs Road (R 522). The home was occupied by Appellant, his wife and two daughters to whom it had been rented (R 560).

The first person on the fire scene was Randall Hierlmeier who observed Appellant standing by the garage door of the home (R 522-525). At this time, Appellant's demeanor, according to Mr. Hierlmeier was very calm (R 526).

The next person on the fire scene was William T. Brown, who

described Appellant's demeanor as upset and anxious but not hysterical (R 553).

One of the next persons on the fire scene was Robert L. Blume, a paramedic with Hillsborough County Emergency Medical Services (R 575). He also observed Appellant and described Appellant as appearing a little bit nervous (R 578).

Accompanying Mr. Blume to the fire scene was his co-worker, Bill Corso, (R 583) who also observed Appellant whom he described as being calm and subdued (R 585).

One of the next persons on the fire scene was Randy Castro, a fireman with the Hillsborough County Fire Department (R 589) who brought the fire under control (R 597). After he brought the fire under control, Mr. Castro observed two bodies in the garage (R 598). Mr. Castro also observed Appellant at the scene and, to him, Appellant seemed to be a bystander (R 612).

Kevin Nykanen, a sergeant with the Hillsborough County Sheriff's Department arrived on the fire scene where, among other things, he spoke with Appellant who advised that the two bodies in the garage were those of his wife and daughter (R 620-626). According to Mr. Nykanen, Appellant did not appear to be overly upset (R 628).

With regard to the fire, expert witnesses presented by the state concluded that the fire in the garage was deliberately set with gasoline being the accelerant (R 681, 687, 714, 748). By stipulation, the state and Appellant agreed that components of gasoline were found on the clothing of Carol and Adrienne Way.

Another person who went to the fire scene was Dr. Charles Diggs, the Hillsborough County Medical Examiner (R 756, 758, 763). After pronouncing the victims dead at the scene (R 763), Dr. Diggs subsequently performed autopsies upon the bodies of Carol and Adrienne Way.

With regard to the body of Carol Way, Dr. Diggs observed multiple first, second and third degree burns over one hundred percent of her body and twelve wounds to the head (R 766, 776). As to the wounds, Dr. Diggs concluded that all twelve were inflicted by a blunt instrument (R 769), that all of the wounds were potentially lethal by themselves (R 774) and that each wound would potentially cause the recipient to lose consciousness (R 776). Dr. Diggs was unable to expound upon the order in which the twelve wounds were inflicted (R 768). As to the cause of Carol Way's death, Dr. Diggs concluded that such was due to blunt trauma to the head and total body burns and that either would have caused

death (R 787).

With regard to the body of Adrienne Way, Dr. Diggs observed one hundred percent multiple first, second and third degree burns (R 792) and two blunt impact wounds to the head (R 792). As to the two wounds, Dr. Diggs was unable to expound upon the order in which they were inflicted (R 799). One wound was a laceration wound which would have rendered Adrienne unconscious and which by itself could have caused her death (R 799). As to the other wound, it caused a depressed skull fracture so severe that portions of the brain tissue had entered the wound itself (R 800). This other wound would have totally incapacitated Adrienne Way, would have certainly rendered her unconscious and would certainly have caused her death (R 801). Based upon the foregoing, Dr. Diggs opined that Adrienne's death was due to total body burns and blunt trauma to the head, though which actually caused death is undeterminable (R 803).

One other conclusion reached by Dr. Diggs, which he based on his observation of carbon deposits in the larynx and trachea of both Carol and Adrienne Way was that both were alive sometime during the fire (R 786).

The state's key witness at trial was Tiffany Way who

testified to the following:

(a) Appellant suggested that she and her sister, Adrienne Way, play in their room, so that he could be alone with their mother, Carol Way (R 837).

(b) Tiffany and Adrienne, in response to the suggestion, played parcheesi in Tiffany's room (R 837).

(c) Ten or fifteen minutes after said suggestion, Appellant called to Adrienne to "come here" (R 837).

(d) At the time he called for Adrienne, Appellant was in the kitchen near the garage (R 838).

(e) Adrienne left Tiffany's room in response to Appellant's call (R 838).

(f) About thirty to forty seconds after Adrienne left the room, Tiffany heard Adrienne scream out her name (R 839).

(g) Tiffany remained in her room after she heard Adrienne scream as aforesaid (R 839).

(h) While in her room, Tiffany saw her father walk down the hallway, enter a bathroom, leave the bathroom and walk to the patio at the back of the Way home (R 840).

(i) Then, Tiffany heard a scream, looked out her window towards the garage and observed a can rolling and a line of fire

therein (R 840-841).

(j) One to two minutes, not much time, elapsed between when Appellant called Adrienne from Tiffany's room and when Tiffany saw the line of fire in the garage (R 843).

(k) After she saw the line of fire in the garage, Tiffany ran to the living room of the house and observed Appellant on the back patio smoking a cigarette (R 859-860).

(l) While in the living room, Tiffany heard what she thought was Adrienne's scream (R 860).

In addition to the foregoing, the following transpired on the cross examination of Tiffany, to-wit:

"Question: On July 12, 1983, do you recall this conversation at the Hillsborough County Sheriff's Office: 'Do you think the hollering and screaming you heard between your mom and sister in the garage, they had been fighting then or not?

Answer: They were fighting.

Question: Pushing each other?

Answer: Probably.

Question: Did you hear anyone scream like they were hurt or anything like that?

Answer: When I looked out the window, I saw the fire

and I heard my sister scream real loud.

Question: Okay, but prior to the fire, had you, had you? Did anyone indicate to you that they needed first aid or anything?

Answer: No, they were just yelling.'

Question: Do you recall that conversation?

Answer: Yes, sir.

Question: Is that the truth?

Answer: Yes, sir.

Question: Excuse me?

Answer: Yes, sir.

Question: Is that the truth?

Answer: Yes, sir.

Question: So they were probably pushing each other; is that correct?

Answer: I guess....

Question: So, that statement is the truth, is that correct?

Answer: Yes, sir." (R 861-863)

ARGUMENT UPON ISSUE I

WHETHER THE FIRE RESULTING FROM THE FIRST DEGREE ARSON OF WHICH APPELLANT WAS CONVICTED CREATED A GREAT RISK OF DEATH TO MANY PERSONS

After allegedly killing his daughter in the garage of their home, Appellant supposedly started a fire in the garage. As a result of the foregoing, Appellant was convicted of first degree murder (A 99) and first degree arson (R 100). Upon said murder conviction, Appellant was sentenced to death (R 135).

In his Amended Sentence (A 137) prepared as required by Chapter 921.148(3) Florida Statutes, the trial judge found that the aggravating circumstance set forth in Chapter 921.141(5)(c) Florida Statutes had been established. Specifically, the trial judge concluded that when he set the fire in the garage, Appellant should have reasonably foreseen that the blaze posed a great risk of death to neighbors and to police and firefighters responding to the call.

In concluding as he did, the trial judge was obviously borrowing directly from King v. State, 390 So.2d 315 (Fla. 1980). In King, the defendant, after killing his victim in her home, set fire to the home. In disputing the application of Chapter 921.141(5)(c) Florida Statutes to him, the defendant in King claimed that he created no risk of death to anyone, since the only

one in the burning house was the already deceased victim. This contention was rejected and the following rule established, to-wit:

> "...when Appellant intentionally set fire to the house, he should have reasonably foreseen that the blaze would pose a great risk of death to the neighbors, as well as the firefighters and police who responded to the call."

In Appellant's view, there are two major problems with the rule expressed in King.

The first problem is that inherent in the rule is the unsupported assumption that all house or structure fires (a) create great risk, not just of injury, but of death and (b) that the risk is to neighbors and police and fire fighters. While Appellant recognizes that there have been fires that have spread to nearby buildings, Appellant has no idea with what frequency such spreading occurs and how often occupants of the nearby building are killed by the spreading fire. Apparently, the Florida Supreme Court also lacks such knowledge since it cited no statistics or studies in support of the assumption inherent in the King rule. Appellant is also aware that fire fighters have died fighting fires. However, in this day and age of skilled firefighting techniques, scientific firefighting precautions and protective equipment, Appellant is without knowledge as to the

probability of a fireman losing his life while carrying out his duties. Apparently, the Florida Supreme Court likewise lacks such knowledge, since it expressed none in supporting the assumption inherent in the King rule. Finally, Appellant assumes that there must have been a fire sometime and somewhere in which a policeman lost his life. However, since a policeman's job is not a fire fighter, one must assume that the likelihood of a policeman dying as a result of an arson is significantly less than that of a fireman would so be. And, of course, the Florida Supreme Court, in King, has offered nothing to support its assumption insofar as it pertains to policemen.

The second problem with the rule expressed in King is that it applies regardless of the evidence adduced in a particular case. In Appellant's case, for example, the record is totally devoid of any indication that:

(a) Any neighbor, policeman or fire fighter was injured, much less killed, as a result of the fire in Appellant's garage.

(b) Any neighbor, policeman or fire fighter was ever in danger of injury, much less death, as a result of the fire in Appellant's garage.

(c) The fire spread beyond Appellant's garage.

(d) The fire was the type that it was more likely than other types of fires to spread or endanger police and fire fighters. In Appellant's case, the state called one neighbor of Appellant as a witness, to-wit: William E. Fickes who was not asked one question about the fire (R 572-574).

In Appellant's case, the state called as a witness, Michael Tumbleson, a fire department caption, who was asked the following questions and gave the following answers:

"Q. You know Randy Castro?

A. Yes sir, I do.

Q. How do you know him?

A. He works with me.

Q. Was the fireman who entered the garage that day to fight the fire.

A. Yes sir." (R 616-617)

In Appellant's case, several police officers on the fire scene were called as State's witnesses, none of whom commented on any danger from fire. The upshot of the foregoing is that the reality of the fire in Appellant's garage is that it was extinguished by one fireman, never spread and posed no danger to anyone except perhaps Randy Castro though such is only a guess since whether or

not Randy Castro was ever in danger of losing his life is a subject unaddressed by any witness in the case.

When the subject is aggravating circumstances in capital cases, the law is clear. Aggravating circumstances must be proven by the state beyond a reasonable doubt, Williams v. State, 380 So.2d 538 (Fla. 1980) and inferences, no matter how logical, will not suffice when the burden of proof beyond a reasonable doubt is not met by the State. Clark v. State, 443 So.2d 973 (Fla. 1983). Furthermore, when the specific subject is the aggravating circumstance found in Chapter 921.141(5)(c) Florida Statutes, such is not proven when all that is shown is what might have occurred or what is possible but is only proven by proof of what is likely or highly probable. Lusk v. State, 446 So.2d 1038 (Fla. 1984). When these legal principals are applied to the case at hand, it becomes more than obvious that there is a fatal lack of proof that anyone was, in actuality, exposed to any risk of death from the fire in the garage, and when these legal principles are viewed in light of the assumptions inherent in the King rule previously quoted herein, it appears that the King rule either ignors the requirements of Williams, Clark and Lusk or deliberately sidesteps said requirements by creating an assumption or presumption which

almost seems to rise to the level of judicial notice, though same apparently lacks authoritative independent support and flies in the face of what may be the actual facts in a particular case.

Appellant suggests, as a result of the foregoing, that:

(a.) The King rule reviewed and reversed, and

(b.) It be concluded, through the application of the requirements of Williams, Clark, and Lusk, that the trial judge erred in concluding that the first degree arson of which Appellant was convicted created a great risk of death to neighbors, police and fire fighters.

ARGUMENT UPON ISSUE II

WHETHER THE TRIAL COURT ERRONEOUSLY GAVE A FELONY MURDER JURY INSTRUCTION DURING THE PENALTY PHASE OF APPELLANT'S TRIAL

Appellant was convicted of the first degree murder of Adrienne Way (R 111) and sentenced to death thereon (R 135). Over Appellant's objection (R 1629), the trial judge instructed the jury, during the penalty phase of Appellant's trial, that one of

the aggravating circumstances which the jurors could consider in deliberating upon their recommendations was whether:

> "The capital felony for which Defendant is to be sentenced was committed while he was engaged in the crime of arson." (R 1673).

Appellant contends that his objection to the instruction should have been sustained because no felony murder occurred in this case.

On this point, the evidence is as follows. Adrienne Way and her sister, Tiffany Way, were playing a game in Tiffany's room when Appellant called Adrienne from the room (R 837). Thirty or forty seconds thereafter, Tiffany heard Adrienne scream out her name (R 839). Thereafter, Tiffany observed Appellant walk down the hall of the family home, briefly stop in the bathroom, and then proceed to the patio at the back of the house (R 840). Next, Tiffany heard a scream, looked out her window towards the garage and observed a rolling can and a line of fire in the garage (R 840). According to Tiffany, one or two minutes elapsed between when Appellant called Adrienne from the room and when Tiffany saw the line of fire (R 842-843).

Dr. Charles Diggs, the Hillsborough County, Florida, Medical Examiner, (R 758) performed an autopsy on the body of Adrienne Way

(R 792). Dr. Diggs observed that Adrienne was burned over one hundred percent of her body and had two blunt impact injuries upon her head (R 792). As to one of the blunt impact wounds (herein called the "laceration wound"), Dr. Diggs described it as a laceration which produced hemorrhaging and swelling of the brain below the wound (R 799). As to this wound, Dr. Diggs opined that it could have caused Adrienne to lose consiousness and could, by itself, have caused death (R 799). With regard to the other blunt impact would (herein called the "fracture wound"), Dr. Diggs concluded that it caused a depressed skull fracture of such severity that portions of the brain tissue entered the wound (R 800). According to Dr. Diggs, this latter wound would have totally incapacitated Adrienne, would have rendered her unconcious and by itself would have caused her death (R 801-803). In addition to the foregoing, Dr. Diggs observed carbon deposits in Adrienne's trachea and larynx from which he concluded that Adrienne was alive sometime during the fire (R 786). Dr. Diggs concluded that Adrienne died of blunt trauma to the head and total body burns, that either blunt trauma could have caused her death, that the body burns could have caused her death and that there is no way to determine whether death was actually caused by blunt

trauma or body burns (R 802-804).

From the foregoing and from the fact that there is no evidence that Appellant was physically effected by the fire, the only logical scenario as to Adrienne's death is that, though she was alive for some time during the fire, the fire was started after she suffered the two blunt impact wounds to the head. Thus, the issue is whether the capital felony, the killing of Adrienne Way, occurred during the commission of the arson.

For two reasons, Appellant contends that the capital felony occurred and was complete before the fire so that Adrienne Way's death cannot be treated, for sentencing purposes in a capital case, as a felony murder.

The first reason is based on People v. Stamp, 82 Cal. Reporter 598 (2d DCA 1969). In Stamp, the defendant robbed a man with a heart condition. As a result of the fright and stress caused by the robbery, the victim died some fifteen to twenty minutes after the robbery of a heart attack. In concluding that the felony murder rule applied in the case, California's Second District Court of Appeal stated that:

> "The doctrine (felony-murder) is not limited to those deaths that are foreseeable. ...(citing authority)...Rather, a felon is held strictly liable for all killings committed by him or his accomplices in the

> course of the felony. (citing authority)...As long as the homicide is the direct causal result of the robbery the felony-murder rule applies whether or not the death was a natural or probable consequence of the robbery. So long as the victim's predisposing physical condition, regardless of its cause, is not the only substantial factor bringing about his death, that condition, and the robber's ignorance of it, in no way destroys the robber's criminal responsibility for the death (citing authority)... So long as life is shortened as a result of the felonious act, it does not matter that the victim might have died soon anyway."

In Appellant's case, the two blunt impact head wounds, especially the one which impacted directly upon her brain, had placed Adrienne well on the path to certain death prior to any fire being set. Thus, it cannot be said, as in Stamp, that the death of Adrienne Way was the direct causal result of the fire. Secondly, because Dr. Diggs was unable to render an opinion as to whether the wounds or the burns actually caused death and was unable to determine at what point in time Adrienne died (R 803), the record is devoid of any evidence to support the conclusion that the fire shortened Adrienne's life even though it is known that she was alive sometime during the fire.

Appellant's research of Florida law has turned upon no cases, like Stamp, which discuss felony murder from the point of view of causation where two successive, as opposed to concurrent, acts would have caused death. Accordingly, if the principles announced

in Stamp represent the law, Appellant's position is that status of the record in his case precludes a theory of felony(arson)-murder.

The second reason for Appellant's position that Adrienne Way's death cannot be felony murder is grounded in State v. Williams, 254 So.2d 548 (Fla. 2d DCA 1971). In Williams, the defendant procured Hannsen to commit an arson. While committing the arson, Hannsen burned himself to death and defendant was charged with felony murder. The charge was dismissed by the trial court and the dismissal was upheld on appeal on the following rationale:

> "The test we suggest is predicated upon the obvious ultimate purpose of the felony murder statute itself which is, we think, to prevent the death of innocent persons likely to occur during the commission of certain inherently dangerous and particularly grievous felonies. The method employed by the statute to accomplish this purpose is, of course, to create a deterrent to the commission of such felonies by substituting the mere intent to commit those felonies for the premeditated design to effect death which would otherwise be required in first degree murder if someone were killed in the commission thereof."

Since Hannsen was not an innocent person of the type referred to in the aforequoted rule, the defendant in Williams could not be responsible for his death.

When the facts of Appellant's case are examined in light of Williams, it is clear that the murder of Adrienne Way could not be

felony murder. This is because certain events which unquestionably set her on the path to death had already occurred, to-wit: the blunt impact head wounds. Therefore, the deterrent effect of the felony murder statute would have played no part, and would have been of no value with regard to whether or not the killer decided to subsequently set fire to the crime scene. If Appellant is Adrienne's killer and if Appellant is the arsonist, what purpose would the deterrence factor have played in the decision to set the fire when acts, more than sufficient to kill, had already been committed.

Appellant's case is not unlike the case of King v. State, 390 So.2d 315 (Fla. 1980). In King, the defendant stabbed and beat his victim to death with the death occurring at 3:00 a.m. The foregoing occurred in the victim's house which defendant set afire, after the stabbing and beating, sometime between 3:00 a.m. and 3:30 a.m. From the opinion in King, it is clear that felony-murder was not an aggravating circumstance considered in connection with the sentence upon the defendant's first degree conviction. As far as Appellant can fathom, the only difference between his case and King is the rather fortuitous circumstance that Appellant's alleged victim was still breathing sometime

during the fire but after the delivery of fatal wounds whereas such was not the case with the victim in King. Appellant's position is that such a fortuitous circumstance does not automatically convert a homicide to a felony-murder in light of the deterrence purpose which the felony-murder statute was designed to serve.

As the preceding amply demonstrates, Appellant's jury, despite objection, was erroneously instructed as to the aggravating circumstance of felony murder during the penalty phase of his trial. Appellant's jury recommended a death sentence by a vote of seven to five. One more vote for life would have resulted in the jury's recommendation being for a life sentence. Chapter 921.141(3) Florida Statutes. Thus, the question is what would the jury's vote have been had it not been erroneouly instructed as aforesaid? The answer is unknown but of the utmost importance because of the fact that the shift of merely one vote would have radically altered the jury's sentencing recommendation. And, of course, had there been such a shift resulting in a recommendation of life imprisonment, what sentence would the trial judge have actually imposed in view of the requirements of Tedder v. State, 322 So.2d 908 (Fla. 1975) that:

a. "A jury recommendation...should be given great weight

b. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."

The error addressed herein is grievous because the presently unanswerable questions spawned by the error assume the utmost importance. After all, upon the answers to the questions hangs a man's life. And, a failure to properly and adequately answer the questions, via a new penalty phase of Appellant's trial, would constitute almost a complete vitiation of the acknowledged importance of the jury's function in Appellant's case, and perhaps other capital cases.

For the reasons stated herein, the trial judge erred in giving the aforementioned felony murder instruction and such error is grievous.

ARGUMENT UPON ISSUE III

WHETHER THE TRIAL JUDGE ERRED IN FINDING THAT THE CAPITAL CRIME WAS COMMITTED WHILE APPELLANT WAS COMMITTING AN ARSON

In his Amended Sentence (R 137-144), the trial judge found as

an aggravating circumstance that the capital felony was committed while Appellant was engaged in the commission of an arson. Chapter 921.141(5)(d)Florida Statutes. For all the reasons set forth in his argument upon Issue II of this Brief, Appellant contends that said finding was erroneous.

ARGUMENT UPON ISSUE IV

WHETHER THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY THAT IT COULD CONSIDER WHETHER APPELLANT'S CAPITAL CRIME WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL

Appellant was convicted of the first degree murder of Adrienne Way (R 111) and upon this conviction Appellant was sentenced to death (R 135). Over Appellant's objection (R 1630), the trial judge, during the penalty phase of Appellant's trial, instructed the jury as to the aggravating circumstance set forth in Chapter 921.141(5)(h) Florida Statutes. Specifically, the trial judge advised that the jurors could consider, in deliberating upon their sentencing recommendation, whether:

> "The capital felony for which the defendant is to be sentenced was especially heinous, atrocious or cruel." (R 1673)

Appellant contends that the evidence in the case did not warrant or support the giving of this instruction.

On this point, the evidence is the same as is mentioned in the argument upon Issue II in this brief with the following additions, to-wit:

a. Dr. Diggs was unable to determine in which order the two blunt trauma wounds to Adrienne Way's head were inflicted (R 799), and

b. Dr. Diggs was unable to determine at what point during the fire Adrienne expired (R 803).

From the foregoing and the fact that there is no evidence that Appellant was physically affected by the fire, the scenario as to Adrienne's death is the same as described in the argument upon Issue II in this brief. Additionally, since the order in which the blunt impact wounds to Adrienne's head is undetermined, the benefit of the doubt as to such order must be given to Appellant and thus, for the purpose of this argument, it must be assumed that the fracture wound which totally incapacitated and rendered Adrienne unconscious, must have been the one initially inflicted.

If such be the case, as Appellant claims it must be for the purposes hereof, then the killing of Adrienne could never be deemed as especially heinous, atrocious or cruel. As stated in State v. Dixon, 283 So.2d 1 (Fla. 1973), the aggravating

circumstance of Chapter 921.141(5)(h) Florida Statutes was intended to apply in

> "...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 conscienceless or pitiless crime which is unnecessarily tortuous to the victim."

The following is a sampling of cases which were found to be especially heinous, atrocious and cruel.

a. Preston v. State, 444 So.2d 939 (Fla. 1984) - victim forced to walk a considerable distance speculating upon her fate and cognizant of possible death; victim felt terror and fear as events unfolded which culminated in the slashing of victim's throat prior to instantaneous or near instantaneous death;.victim subjected to agony over the prospect of death soon to occur.

b. Routley v. State, 440 So.2d 1257 (Fla. 1983) - victim robbed in home by assailants who assaulted and bound and gagged him; bound and gagged, victim placed in trunk of car, driven to isolated area, removed from trunk and shot; prior to death, victim subject to agony over prospect of death soon to occur.

c. Scott v. State, 441 So.2d 866 (Fla. 1982) - struggle between assailants and victim moved from room to room with blood everywhere; victim alive when hands and feet bound; high degree of

pain repeatedly inflicted upon victim; victim beaten about head, chest and arms; evidence of violent struggle by victim.

d. Straight v. State, 397 So.2d 903 (Fla. 1981) - victim bound with wire and placed in a large box; victim tormented with hammer blows and stab wounds before he finally died from the stab wounds.

The following is a sampling of cases in which the aggravating circumstance of Chapter 921.141(5)(h) Florida Statutes was found not to exist.

a. Clark v. State, 443 So.2d 973 (Fla. 1983) - victim shot once in the head over the right eye; though victim moaned after being shot, no evidence of whether she was conscious after being shot; no evidence of degree of pain suffered by victim or of how long she survived after being shot.

b. Teffeteller v. State, 439 So.2d 840 (Fla. 1983) - victim sustained massive abdominal damage from shotgun wound; victim lived for a couple of hours after being shot during which victim was in pain and knew that death was imminent.

When Adrienne Way's death is examined in light of the aforecited cases, it is apparent that her death was not and could not be treated as especially heinous, atrocious or cruel. Prior

to infliction of any blow to her head, she was not subjected to a period of any significant length during which she agonized over the prospect of death. This is amply proven by Tiffany Way's testimony that only thirty to forty seconds elapsed between when Appellant called Adrienne from Tiffany's room and when Tiffany heard Adrienne call out her name and that only one to two minutes elapsed between when Appellant called Adrienne from the room and when Tiffany observed fire in the garage. Additionally, since the fracture wound which, for the purposes hereof must be deemed to be the first blow inflicted, was of such severity so as to totally incapacitate and render Adrienne unconscious, it is clear that Adrienne was, by the fracture wound, put out of any further misery she might otherwise have experienced by reason of the laceration wound and subsequent fire.

Adrienne's death is similar to that of the victim in Clark v. State, supra, in that:

a. The initial impact precluded the victim from consciously experiencing anything further.

b. The length of the victim's survival time is both short and unknown.

c. The degree of pain experienced by the victim is

unknown.

And, when compared to the death of the victim in Teffeteller v. State, supra, it is clear that Adrienne's death was less heinous, atrocious and cruel since, unlike said victim, Adrienne was not tortured after the death dealing impact by any period during which death was consciously expected.

Appellant's position is that Adrienne's death is more the normal than the abnormal of capital felonies and was not unnecessarily tortuous. Adrienne's misery was shortlived and, if contemplated at all, was only contemplated for the shortest period of time. On the scales of prolonged pre death ordeals and tortuousness, Adrienne's death rates low when compared to cases like Preston v. State, supra, Routly v. State, supra, Scott v. State, supra, and Straight v. State, supra.

As the preceding amply demonstrates, Appellant's jury, despite objection, was erroneously instructed as to the aggravating circumstance of especially heinous, atrocious or cruel during the penalty phase of his trial. Appellant's jury recommended a death sentence by a vote of seven to five. One more vote for life would have resulted in the jury's recommendation being for a life sentence. Chapter 921.141(3) Florida Statutes.

Thus, the question is what would the jury's vote have been had it not been erroneouly instructed as aforesaid? The answer is unknown but of the utmost importance because of the fact that the shift of merely one vote would have radically altered the jury's sentencing recommendation. And, of course, had there been such a shift resulting in a recommendation of life imprisonment, what sentence would the trial judge have actually imposed in view of the requirements of Tedder v. State, 322 So.2d 908 (Fla. 1975) that:

a. "A jury recommendation...should be given great weight

b. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."

The error addressed herein is grievous because the presently unanswerable questions spawned by the error assume the utmost importance. After all, upon the answers to the questions hangs a man's life. And, a failure to properly and adequately answer the questions, via a new penalty phase of Appellant's trial, would constitute almost a complete vitiation of the acknowledged importance of the jury's function in Appellant's case, and perhaps

other capital cases.

For the reasons stated herein, the trial judge erred in giving the aforementioned felony murder instruction and such error is grievous.

ARGUMENT UPON ISSUE V

WHETHER THE TRIAL JUDGE ERRED IN FINDING THAT THE CAPITAL CRIME WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL

In this Amended Sentence (R 137-144), the trial judge found that the capital felony was especially heinous, atrocious or cruel. Chapter 921.141(5)(h) Florida Statutes. For all the reasons set forth in his argument upon Issue IV of the brief, Appellant contends that said finding was erroneous.

ARGUMENT UPON ISSUE VI

WHETHER THE TRIAL JUDGE ERRED IN EXCLUDING THE TESTIMONY OF APPELLANT'S EXPERT CLINICAL PSYCHOLOGIST

During the first phase of Appellant's trial, the state elicited from several of its witnesses testimony regarding Appellant's emotional response to the fire occurring in the garage in which his wife and daughter were located. Specifically, the witnesses referred to are:

a. Randall Bruce Hierlmeier - Appellant very calm (R 526).

b. William T. Browne - Appellant anxious but not hysterical (R 553).

c. Robert L. Blume - Appellant a little bit nervous (R 578).

d. Bill Corso - Appellant calm and subdued (R 585).

e. Randy Castro - Appellant seemed to be a bystander (R 597).

f. Kevin Nykanen - Appellant not overly upset (R 628).

In an effort to offset the effect of the Hierlmeier, Browne, Blume, Corso, Castro, and Nykanen testimony, Appellant sought to present the testimony of Dr. Sidney Merin, a clinical psychologist. Appellant was denied the right to present Dr. Merin as a defense witness (R 1375). However, Dr. Merin testified by way of proffer, and Dr. Merin was qualified by the trial judge as an expert in the field of clinical psychology (R 1379). From the proffer by Dr. Merin of his testimony, it is known what his testimony would have been had he been able to testify. Specifically, Dr Merin's testimony would have revealed the following:

a. That he interviewed Appellant for several hours (R 1379).

b. That a battery of psychological tests was administered to Appellant (R 1379).

c. That he reviewed depositions which, to some extent, dealt with Appellant and his emotional state at the time of and subsequent to the fire in question (R 1380).

d. That his opinion, within a reasonable degree of psychological certainty, is that:

(1) Appellant is a toned down personality, restrained and low key by nature (R 1381).

(2) Appellant is a restrained personality (R 1383).

(3) Appellant is a person who holds in his feelings (R 1383).

(4) Appellant is unlikely to outwardly express or reveal his internal feelings (R 1385).

(5) Appellant is a person who does not outwardly reveal his internal feelings (R 1385).

(6) Appellant is toned down even in the harshest of circumstances (R 1387).

(7) Appellant's calmness at the crime scene is

consistent with Appellant's reaction to such situations (R 1388).

(8) Appellant's reaction at the fire scene is not necessarily consistent with the average man's reaction (R 1388).

(9) The average person's reaction would be in a hysterical or anxious manner (R 1388).

The state's purpose in presenting testimony of Appellant's calmness and lack of visible and expressive emotional reaction during the fire was to bolster its case as to Appellant's guilt, because the state realized that a nonkilling husband and father would most likely have responded with hysteria or other outward and visible expressions of fear and bereavement if confronted with a fire in which his wife and daughter were engulfed. The state elicited from Messrs. Hierlmeier, Browne, Blume, Corso, Castro, and Nykanen that Appellant's appearance and demeanor were otherwise. The obvious inference which the state sought to leave with Appellant's jury was that Appellant was calm, subdued and nonhysterical because he was the killer, not a husband and father in the process of losing his wife and daughter in a fire.

The law is that expert testimony should be excluded when the facts testified to are of such nature as not to require any special knowledge or experience in order for the jury to form its

conclusions. Johnson v. State, 438 So.2d 774 (Fla. 1983). Thus, the question arising from all the foregoing is whether common knowledge and experience, as opposed to special knowledge and experience, was all that was necessary to form a conclusion from the fact of Appellant's calmness and lack of external emotion to the situation of his wife and daughter being caught in the garage fire? Appellant's response to the question is in the negative.

Dr. Merin testified as follows:

> "Mr. Way has an unusual way of dealing with emotions with stress. Most people would respond under those conditions with a tremendous amount of anxiety, with panic, with hysteria, with an observable emotional reaction. It is not because he purposely or voluntarily controls this. He is, in fact, a very toned down personality. He is capable of a lot of strong feelings internally, but observably, on the outside, he is remarkably toned down." (R 1381)

From this it is obvious that most people would have responded to Appellant's situation in one way while some, like Appellant, whose way of dealing with emotion and stress is "unusual," would have reacted as did Appellant. Does it take common or special knowledge and experience, such as that of an acknowledged expert like Dr. Merin, to realize that unusual responses like Appellant exist? Was there any evidence in Appellant's case, except that which, but for its exclusion, would have come from Dr. Merin, from

which Appellant's jury could have concluded that Appellant's personality was toned down and restrained leading to nonhysterical and unobservable reaction to the situation confronting his wife and daughter? Because the answer to the first question is in the affirmative and the second is in the negative, the need for Dr. Merin's special knowledge and experience is clear.

In Hawthorne v. State, 408 So.2d 801 (Fla. 1st DCA 1982), the defendant was charged with killing her husband. Her defense was self-defense. As part of her defense, the defendant sought the testimony of a clinical psychologist as an expert in the battered wife syndrome. The purpose of the expert testimony was to establiish that the defendant suffered from the syndrome which was related to defense of self-defense. In its opinion in Hawthorne, Florida's First District Court of Appeal adopted the view expressed in State v. Smith, 247 Ga. 612, 277 S.E. 2d 678 (1981) insofar as it concluded that jurors would not ordinarily understand:

> "...why a person suffering from the battered-woman's syndrome would not leave her mate, would not inform police and friends and would fear increased aggression against herself." State v. Smith, supra

In State v. Wanrow, 538 P.2d 849 (Wash. Court of Appeals, Division 3, 1975), the defendant was charged with murder and

assault. Specifically, defendant killed one man and wounded another who had allegedly molested a seven year old girl. The defendant's defense was insanity and, in this regard, defendant, an Indian, sought to present the testimony of an expert in Indian culture to show that Indians are family oriented, that unnatural sex acts are not accepted by Indian culture, that Indians maintain strong feelings for their elders, and that an Indian confronted by an older person attempting to perform an unnatural sex act on a young child (as supposedly was the defendant's situation) would undergo a more traumatic emotional experience than would a member of the Anglo Saxon culture. In its opinion, the Washington court stated:

> "However, we add that the trial court correctly ruled when it did not totally exclude this evidence but limited its use with respect to psychiatric testimony to show the effect defendant's culture might have on her state of mind at the time of the shooting."

From both Hawthorne and Wanrow, the legal principle is clear, to-wit: expert testimony to explain an unusual or abnormal response to a stressful situation is allowable because such explanation is not within common understanding. In Hawthorne, expert testimony would have been admissible to explain why a battered woman would remain with her mate and not report his

activities to police and friends because the answer to the question is "'...beyond the ken of the average layman'". In Wanrow, the use of an expert was approved to show the effect of tthe defendant's culture on her state of mind when she fired her gun because it is unusual and abnormal to kill someone even though they committed an unnatural sex act upon a young child. While Appellant suffers from no unusual syndrome and is from no particular culture which might account for an unusual emotional reaction to a given situation, he is a toned down personality whose unusual response - calmness, subdued, nonhysterical, etc. - to the garage fire is a subject which like:

a. why a woman would remain with her abuser husband and why a woman would not report such abuse,

b. why an Indian would kill an elder child molester,

he should have been able to deal with via the special knowledge and experience concededly possessed by Dr. Merin.

For the reasons stated herein, the trial judge erred in excluding the testimony of Dr. Merin.

ARGUMENT UPON ISSUE VII

WHETHER THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL

During the first phase of Appellant's trial, to-wit: that phase dealing with the question of his guilt or innocence of the crimes charged in the Indictment (R 13-14), the state presented the testimony of no eyewitnesses to those crimes, no confession of Appellant to those crimes and, otherwise, no direct evidence that Appellant was the perpetrator of those crimes. The state's case consisted solely of circumstantial evidence which the state acknowledged in its closing argument (R 1443).

At the conclusion of the state's case, Appellant, pursuant to Rule 3.380(a) Fla. R. Crim. P. moved for a judgment of acquittal (R 1398) which was denied (R 1399). Appellant contends that the trial judge's denial of his motion for judgment of acquittal was error. Thus, the appellate issue, by reason of said denial, is whether Appellant's jury might have reasonably concluded that the circumstantial evidence excluded every reasonable hypothesis of innocence. Owen v. State, 432 So.2d 579 (Fla. 2d DCA 1983); Tsvaris v. State, 414 So.2d 1087 (Fla. 2d DCA 1982).

For the purpose of his argument upon this issue, Appellant concedes the truth and correctness of all the evidence presented by the state prior to the lodging of his motion for judgment of

acquittal and claims that, assuming such truth and correctness and even viewing same in a light most favorable to the state, the circumstantial evidence presented by the state fails to prove his guilt of any of said crimes to a reasonable and moral certainty. Hall v. State, 107 So.2d 246 (Fla. 1925).

At the time Carol Way and Adrienne Way lost their lives and at the time the fire in the garage of their home was started, there was only one person, besides Appellant, present in the area of these occurrences. That person was Appellant's daughter, Tiffany Way, whose testimony is fully set forth in pages six through nine of this brief.

The state's theory of the case is set forth in its closing argument. According to the state, Appellant, after sending his daughters to play in a bedroom, entered the garage with his wife and beat her with a hammer (R 1457). According to the medical examiner, twelve blows were administered to Carol Way's head with a blunt instrument (R 776). After beating his wife as aforesaid, according to the state, Appellant called for Adrienne who, responding to the call, entered the garage, saw her beaten mother, screamed out Tiffany's name, and was then struck by Appellant with the hammer (R 1457). As the medical examiner testified, two blows

with a blunt instrument were administered to Adrienne's head (R 792).

Two problems result from all of the foregoing. The first problem is that the state's theory that Appellant first administered lethal blows to his wife, then called for Adrienne and then administered lethal blows to her does not comport with the testimony of Tiffany who, at the minimum, placed Adrienne and Carol in the garage together, conscious, fighting together before they died and before any fire was started. As the aforequoted excerpt from the cross examination clearly indicates, Tiffany, on four quototed occasions, confirmed and verified the truth of her statement. If Tiffany is to be believed and if her confirmations and verifications of the truth of the aforequoted portions of her statement of July 12, 1983, at the Hillsborough County Sheriff's office are to be taken as truth, as Appellant contends they must be since such confirmations and verifications were not recanted by Tiffany, then the reasonableness and certainty of Appellant's guilt is compromised beyond repair. For, if Adrienne and Carol were together before any blows to either of them were struck by Appellant, then Appellant would have had to do all of the following within anywhere from thirty to ninety seconds:

(a) Administer twelve lethal blows to Carol's head.

(b) Administer two lethal blows to Adrienne's head.

(c) Pour gasoline from a gas can.

(d) Light the gasoline.

(e) Walk back through the house, enter and leave a bathroom, proceed to the back patio and light a cigarette.

The reason Appellant claims that all of the foregoing would have had to occur within thirty to ninety seconds is that Tiffany testified that thirty to forty seconds elapsed between when Appellant called Adrienne from the room and when Adrienne screamed out Tiffany's name and that one to two elapsed between when Appellant called Adrienne from the room and when Tiffany saw the line of fire in the garage.

The upshot of the preceding is that the state's theory of the case does not coincide with Tiffany's testimony. And, if Tiffany's testimony is to be taken at face value and viewed in a light most favorable to the state, it raises a serious question as to whether Appellant could have done all the acts necessaary to kill his wife and Adrienne and start the fire in the garage and then remove himself to the back patio within the short period of time testified to by Tiffany. Unfortunately for the state,

Tiffany's testimony, including her estimates of elapsed times, stands unrebutted, unmodified and uncontradicted and, of course, without Tiffany's testimony the state would have had no case at all.

According to Owen v. State, 432 So.2d 581 (Fla. 2d DCA 1983):

> "It is well established that when the state relies on circumstantial evidence, the circumstances, when taken together, must be a conclusive nature and tendency, leading on the whole to a reasonable and moral certainty that the accused and no one else committed the offense charged...(citing cases)....It is not sufficient that the facts create a strong probability of, and be consistent with guilty. They must also eliminate all reasonable hypothesis of innocence."

Since it is not reasonable to conclude that Appellant could have done all that was necessary to commit the crimes charged in the Indictment (R 13-14) within the only time span testified to at trial, the circumstantial evidence in this case falls short of what is required by law. Accordingly, Appellant's motion for judgment of acquittal should have been granted.

ARGUMENT UPON ISSUE VIII

WHETHER THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY THAT IT COULD CONSIDER WHETHER APPELLANT'S CAPITAL CRIME WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION

Appellant was convicted of the first degree murder of Adriennee Way (R 111) and upon this conviction Appellant was sentenced to death (R 135). Over Appellant's objection (R 1635), the trial judge, during the penalty phase of Appellant's trial, instructed the jury as to the aggravating circumstances set forth in Chapter 921.141(5)(i) Florida Statutes. Specifically, the trial judge advised that the jurors could consider, in deliberating upon their sentencing recommendation, whether:

> "The capital felony for which the defendant is to be sentenced was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." (R 1673)

Appellant contends that the evidence in the case did not warrant or support the giving of this instruction.

For the purpose of this point, Aappellant will assume that the state's theory of the case is correct. Specifically, the state's version of the casse is that Appellant, after striking his wife twelve times upon the head with a blunt instrument in the garage of the family home, then called his daughter, Adrienne Way, to the garage (R 1659). Upon her entry into the garage, according to the state, Appellant then attacked Adrienne (R 1659) by striking her twice upon the head with a blunt instrument (R 792).

While the state's version of the case portrays a premeditated murder, said version does not rise to the premeditation encompassed by Chapter 921.141(5)(i) Florida Statutes. That this is so is obvious when said version is compared to the facts of:

(a) Preston v. State, 444 So.2d 939 (Fla. 1984) - victim forced to walk considerable distance at knifepoint speculating as to her fate and cognizant of the likelihood of death.

(b) Middleton v. State, 426 So.2d 548 (Fla. 1983) - victim asleep while defendant sat across with gun contemplating killing the victim; when victim awoke, she was shot in the back of the head.

(c) Bolender v. State, 422 So.2d 833 (Fla. 1982) - defendant held victims at gunpoint for hours and then ordered them to strip and then beat and tortured them before they died.

(d) Smith v. State, 424 So.2d 726 (Fla. 1982) - victim, after being robbed, was abducted, driven to motel room in next county where she was sexually battered and then taken to a wooded area where shot three times.

(e) Steinhorst v. State, 412 So.2d 332 (Fla. 1982) - three victims bound and gagged were confined to a small van; while guarded, they saw the firearms which would kill them; they each

heard the sobs of the other.

in which the aggravating circumstance of Chapter 921.141(5)(i) Florida Statutes was found to exist.

The state's version of the facts of Appellant's case, when compared to those cases which have upheld a finding of cold, calculated and premeditated...simply does not contain the components of "...particularly lengthy, methodic, or invoked series of atrocious events or a substantial period of reflection and thought by the perpetrator." Preston v. State, supra, necessary to sustain a finding of the aggravating circumstance set forth in Chapter 921.141(5)(i) Florida Statutes.

For all the foregoing reasons, the court erred in instructing the jury as quoted above.

ARGUMENT UPON ISSUE IX

WHETHER THE TRIAL JUDGE ERRED IN FINDING THAT THE CAPITAL CRIME WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION

For all the reasons set forth in the Argument Upon Issue VIII, the trial judge erred in finding, in his Amended Sentence (R 137-144), the existence of the aggravating circumstance set forth in Chapter 921.141(5)(i) Florida Statutes.

CONCLUSION

As a result of the error referred to in the Argument Upon Issue I, Appellant's death sentence should be vacated.

As a result of the error referred to in the Argument Upon Issue II, Appellant's death sentence should be vacated and a new penalty phase ordered.

As a result of the error referred to in the Argument Upon Issue III, Appellant's death sentence should be vacated.

As a result of the error referred to in the Argument Upon Issue IV, Appellant's death penalty should be vacated and a new penalty phase ordered.

As a result of the error referred to in the Argument Upon Issue V, Appellant's death sentence should be vacated.

As a result of the error referred to in the Argument Upon Issue VI, Appellant should receive a new trial.

As a result of the error referred to in the Argument Upon Issue VII, Appellant should be discharged.

As a result of the error referred to in the Argument Upon Issue VIII, Appellant's death sentence should be vacated and a new penalty phase ordered.

As a result of the error referred to in the Argument Upon Issue IX, Appellant's death penalty should be vacated.

Respectfully submitted,

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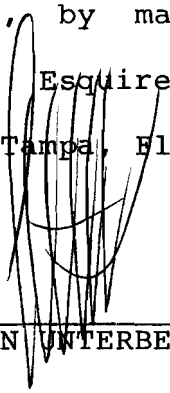
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished, by mail, this 8th day of August, 1984, to Peggy Quince, Esquire, Assistant Attorney General, 1313 North Tampa Street, Tampa, Florida 33602.



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