IN THE SUPREME COURT OF FLORIDA

NO. 73982

ANDREA HICKS JACKSON,

Petitioner,

v.

RICHARD L. DUGGER, Secretary,
Department of Corrections, State of Florida,

and

MARTA VILLACORTA, Superintendent,
Broward Correctional Institution,
Pembroke Pines, Florida,

Respondents.

PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION, AND APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF FLORIDA

ANDREA JACKSON, Prisoner #279567, Broward Correctional Institution Pembroke Pines, Florida Petitioner, v. RICHARD L. DUGGER, Secretary, Florida Department of Corrections and MARTA VILLACORTA, Superintendent, Broward Correctional Institution Pembroke Pines, Florida, Respondents.	Case No. _____

PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION, AND APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

I. INTRODUCTION

Petitioner Andrea Jackson was convicted of first degree murder and sentenced to death by The Honorable Donald R. Moran, Jr., of the Fourth Judicial Circuit Court, in and for Duval County. Ms. Jackson's death sentence was affirmed on direct appeal by this Court. Jackson v. State, 498 So. 2d 406 (Fla. 1986). Subsequent to this decision, there have been significant

fundamental changes in the law which require reconsideration by this Court of its earlier holding.

During the penalty phase of Ms. Jackson's trial, the only evidence presented by the State consisted of victim impact evidence elicited from the Sheriff of Duval County. On direct appeal, this Court found that evidence to have been improperly admitted as a matter of state law but found the error to be harmless. This Court did not consider the constitutional significance of the admission of this victim impact evidence. Under Booth v. Maryland, 482 U.S. ____, 107 S.Ct. 2529 (1987), the presentation of this evidence, through the testimony of a witness directly to the sentencing jury constitutes fundamental error requiring resentencing. (5th Cir. case)

Resentencing is also required because this Court's holding (a) that the aggravating factor of "cold, calculated, and premeditated" was present in this case, and (b) that the mitigating factor of "no significant history of prior criminal activity" was absent, constituted an arbitrary and capricious application of those circumstances in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

Finally, petitioner was denied the effective assistance of appellate counsel, in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, in that her counsel on direct appeal failed to raise a claim based on the United States Supreme Court decision in Caldwell v. Mississippi, 472 U.S.532 (1985), a ruling rendered by the U.S. Supreme Court

after the verdict and sentence by the trial court but before this Court affirmed the conviction and sentence.

5. Accordingly, pursuant to Subsections 3(b)(7) and (9) of Article V of the Florida Constitution and Rule 9.030 (a)(3) of the Florida Rules of Appellate Procedure, this Court should grant the petition of habeas corpus, vacate Ms. Jackson's death sentence and enter a life sentence or in the alternative require a new sentencing hearing with a jury.

II. STATEMENT OF THE CASE

Death Warrant

The Governor of the State of Florida signed a death warrant on March 7, 1989, providing for Ms. Jackson's execution during the week of May 8 - 15, 1989. Pursuant to that warrant, Superintendent of the Florida State Prison has scheduled May 9, 1989, as the date for her execution.

Ms. Jackson has filed a motion with this Court seeking a stay of her execution pending consideration of this petition for habeas corpus. Ms. Jackson has also filed a motion for a stay of execution with the Circuit Court of the Fourth Judicial Circuit, pending consideration of her Rule 3.850 motion which has been filed with that court.

III. PROCEDURAL HISTORY

1. The Circuit Court of the Fourth Judicial Circuit in and for Duval County, Florida, entered the judgment and sentences in

question.

2. Judgment of conviction was entered on one count of first degree murder (R 595).[1] The jury recommended a death sentence (R 587) which the Court imposed on February 10, 1984 (R 600 - 607). A copy of the judgment and sentence are attached hereto as Appendix "A".

3. On June 2, 1983, a grand jury indicted Ms. Jackson for one count of first degree murder (R 10).

4. Ms. Jackson entered a plea of not guilty to the indictment. She was tried by a jury, which also rendered an advisory sentence (R 587).

5. Ms. Jackson pleaded not guilty to the charge of first degree murder. She did not testify at the guilt-innocence phase of the trial or at sentencing.

6. Ms. Jackson filed a motion for new trial on December 14, 1983 (R 591), and this Court denied the motion.

7. Ms. Jackson's conviction and sentence were affirmed on direct appeal by the Florida Supreme Court on November 13, 1986. The opinion is reported at 498 So. 2d 406. Rehearing was denied by the Supreme Court on January 5, 1987. The United States Supreme Court denied Ms. Jackson's petition for writ of certiorari on June 22, 1987.

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[1]References to the trial transcript are herein referred to as "T _____." References to the record on appeal are herein referred to as "R _____."

8. Executive Clemency was held and denied with the signing of a death warrant on March 7, 1989, by Governor Bob Martinez. The superintendent of Florida State Prison has scheduled Ms. Jackson's execution for 7:00 a.m., May 9, 1989.

IV. JURISDICTION TO ENTERTAIN PETITION, ENTER A STAY OF EXECUTION, AND GRANT HABEAS CORPUS RELIEF

A. Jurisdiction

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents consitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of Ms. Jackson's capital conviction and sentence of death. See Jackson v. State, 498 So. 2d 406 (Fla. 1986). Jurisdiction in this action lies in this Court. See, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981) for the fundamental constitutional errors challenged herein involved the appellate review process. See Wilson v. Wainwright, 474 So.12d 1163 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); See also Johnson (Paul) v. Wainwright, 498 So. 2d 938 (Fla. 1987). Cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Ms. Jackson to raise the claims presented in this petition. See, e.g., Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Wilson, supra.

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwright, supra, and has not hesitated to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Johnson (Paul) v. Wainwright, 498 So. 2d 938 (Fla. 1987); Wilson v. Wainwright, 474 So.12d 1163 (Fla. 1985). This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Ms. Jackson's capital conviction and sentence of death, and of this Court's appellate review. Ms. Jackson's claims are therefore of the type classically considered by this Court pursuant to its habeas corpus jurisdiction. This Court has the inherent power to do justice. As shown below, the ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. See, e.g., Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Johnson (Paul) v. Wainwright, 498 So. 2d 938 (Fla. 1987); Wilson v. Wainwright, 474 So.12d 1163 (Fla. 1985). The petition pleads claims involving fundamental constitutional error. See Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984); Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965). The petition includes claims predicated on significant, fundamental, and retroactive

changes in constitutional law. See, e.g., Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Downs, supra; Tafero v. Wainwright, 459 So. 2d 1034, 1035 (Fla. 1984); Edwards v. State, 393 So. 2d 597, 600 n. 4 (Fla. 3d DCA), petition denied, 402 So. 2d 613 (Fla. 1981). Cf. Witt v. State, 387 So. 2d 922 (Fla. 1980). The petition also involves a claim of ineffective assistance of counsel on appeal. See Knight v. State, 394 So. 2d 997, 999 (Fla. 1981); Johnson (Paul) v. Wainwright, 498 So. 2d 938 (Fla. 1987); Wilson v. Wainwright, 474 So.12d 1163 (Fla. 1985). These and other reasons demonstrate that the Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein plead, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Ms. Jackson's claims.

With regard to ineffective assistance, the challenged acts and omissions of Ms. Jackson's appellate counsel occurred before this Court. This Court therefore has jurisdiction to entertain Ms. Jackson's claim, Knight v. State, 394 So. 2d at 999, and, as will be shown, to grant habeas corpus relief. Wilson, supra; Johnson, supra. This and other Florida courts have consistently recognized that the Writ must issue where the constitutional right of appeal is thwarted on crucial and dispositive points due to the omissions or ineffectiveness of appointed counsel. See, e.g., Wilson v. Wainwright, supra, 474 So. 2d 1163; McCrae v. Wainwright, 439 So. 2d 768 (Fla. 1983); State v. Wooden, 246 So. 2d 755, 756 (Fla. 1971); Baggett v. Wainwright, 229 So. 2d 239,

243 (Fla. 1969); Ross v. State, 287 So. 2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So. 2d 846, 849 (Fla. 2d DCA 1973), affirmed, 290 So. 2d 30 (Fla. 1974). The proper means of securing a hearing on such issues in this Court is a petition for writ of habeas corpus. Baggett, supra, 287 So. 2d at 374-75; Powe v. State, 216 So. 2d 446, 448 (Fla. 1988). With respect to the ineffective assistance claim, Ms. Jackson will demonstrate that the inadequate performance of her appellate counsel was so significant, fundamental, and prejudicial as to require the issuance of the Writ.

Ms. Jackson's claims are presented below. They demonstrate that habeas corpus relief is proper in this case.

B. Request for Stay of Execution

Ms. Jackson's petition includes a request that the Court stay her execution (presently scheduled for May 9, 1989). As will be shown, the issues presented are substantial and warrant a stay. This Court has not hesitated to stay executions when warranted to ensure judicious consideration of the issues presented by petitioners litigation during the pendency of a death warrant. See Riley v. Wainwright, 517 So. 2d 656 (Fla. 1989); Groover v. State, 489 So. 2d 15 (Fla. 1986); Copeland v. State 457 So. 2d 1012 (Fla. 1986); Jones v. State, 478 So. 2d 346 (Fla. 1985); Bush v. State, 461 So. 2d 936 (Fla. 1986); Spaziano v. State, 489 So. 2d 720 (Fla. 1986); Mason v. State, 489 So. 2d 734 (Fla. 1986). See also Downs v. Dugger, 514 So. 2d 1069 (Fla.

1987) (granting stay of execution and habeas corpus relief); Kennedy v. Wainwright, 483 So. 2d 426 (Fla.), cert. denied, 107 S. Ct. 291 (1986). Cf. State v. Sireci, 502 So. 2d 1221 (Fla. 1987); State v. Crews, 477 So. 2d 984 (Fla. 1985).

This is Ms. Jackson's first petition for a writ of habeas corpus. The claims she presents are no less substantial than those involved in the cases cited above. She therefore respectfully urges that the Court enter an order staying her execution, and, thereafter, that the Court grant habeas corpus relief.

III. GROUNDS FOR HABEAS CORPUS RELIEF

By her petition for a writ of habeas corpus, Andrea Hicks Jackson asserts that her capital conviction and sentence of death were obtained and then affirmed during the Court's appellate review process in violation of her rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein.

POINT I

THE PRESENTATION OF VICTIM IMPACT EVIDENCE TO THE JURY AND TO THE JUDGE VIOLATED DEFENDANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AS ESTABLISHED IN BOOTH V. MARYLAND WHICH CONSTITUTES A FUNDAMENTAL CONSTITUTIONAL CHANGE IN LAW REQUIRING RELIEF FOR THE PETITIONER.

A. Introduction

1. The United States Supreme Court in Booth v. Maryland, 482 U.S. ____, 107 S.Ct. 2529 (1987) considered the issue of admissibility of victim impact evidence at the penalty phase of a capital trial. Its holding was stern and unequivocal: such evidence inflames the jury and renders the penalty proceeding violative of the Fifth, Eighth, and Fourteenth Amendments by diverting the attention of the jury from its proper and sole consideration, namely the defendant's background and record and the circumstances of the crime, and by creating an impermissible risk that the death penalty will be impored in an arbitrary fashion.

2. Victim impact evidence of two types was introduced in the sentencing trial of Andrea Jackson. The State's entire case in chief to the jury during the penalty phase consisted of the testimony of Dale Carson, Sheriff of Duval County. His testimony was offered in an attempt to persuade the jury that the safety of each and every citizen of the county was jeopardized by the killing of Officer Gary Bevel, and to show that Officer Bevel was well liked and well respected among his peers in law enforcement. In addition, through the Pre-sentence Report (PSI),[2] the trial court was presented with voluminous hearsay victim impact evidence, from members of the Bevel family and from Gary Bevel's fellow officers, urging that Andrea Jackson deserved death

[2]A copy of the Pre-Sentence Report is appended hereto for the convenience of the Court.

because of the sterling character of the victim and the depravity of the defendant.

3. The Booth violations which pervade this conviction and sentence require this Court to revisit its affirmance of Ms. Jackson's sentence on direct appeal given this Court's holding in Witt v. State, 387 So. 2d 922 (Fla. 1980). Petitioner below sets out the nature of the victim impact evidence introduced over objection at her trial and its indisputable prejudicial effect on the jury. She then demonstrates that the admission and consideration of this victim impact evidence cannot constitute harmless error and requires the vacating of the death sentence and a new sentencing hearing.

B. The decision of the United States Supreme Court in Booth v. Maryland constitutes a fundamental change in law.

4. In 1987, after the affirmance of Andrea Jackson's conviction and death sentence on direct appeal, the United States Supreme court decided the case of Booth v. Maryland, 482 U.S. _____, 107 S. Ct. 2529 (1987). As this Court recognized in Grossman v. State, 525 So. 2d 833 (1988), Booth held that victim impact evidence may not constitutionally be presented to the jury or judge as a relevant consideration in a penalty proceeding. The Booth holding firmly rejected determination by the Congress, the Florida Legislature, and the legislatures of at least thirty-five other states "that the effect of the crime on the victims should

have a place in the criminal justice system," at least in the context of capital cases. Grossman, supra at 842, quoting from Booth, supra at 2536 n.12.

5. Booth requires this Court to revisit its analysis of the legal effect of the presentation to the jury of the testimony of Dale Carson, Sheriff of Duval County. On direct appeal, this Court found that the Sheriff's testimony did not tend to establish any applicable statutory aggravating factor, but nonetheless, under the law as it then stood, viewed the error as one not of constitutional dimension. This Court, finding that two properly found aggravating factors remained without it, was of the opinion that the inadmissible testimony was essentially harmless surplusage. Jackson v. State, 498 S.2d 406, 411 (1986).

6. Booth establishes, however, that the admission of victim impact evidence "creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." Id. at 2533. Instructed by Booth, therefore, this Court, which has already found the admission of Sheriff Carson's testimony improper, must address its effect on the constitutionality and fundamental fairness of Andrea Jackson's sentence.

7. The presentation of improper victim impact evidence to the trial jury and court in this case, constituting state law error now known to be constitutional error, occurred in a form so rare as to be without parallel in the reported Florida cases. In no other case found by counsel was victim impact evidence, not

admissible as proof of a statutory aggravating circumstance and duly objected to when offered, been heard by a sentencing jury. The uniqueness of this sentencing testimony, now rendered definitionally unconstitutional by Booth, brings this case squarely within the holding of Witt v. State, 387 So. 2d 922 (1980), with its emphasis upon fairness and individual rights:

> [T]he doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications . . . sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Considerations of fairness and uniformity make it very `difficult to justify depriving a person of his liberty of life, under process no longer considered acceptable and no longer applied to indistinguishable cases.'

Id. at 925 (quoting from ABA standards relating to Post-Conviction Remedies 3 (Approv. Draft 1968)) (emphasis added).

8. There is no question that the Booth claim was preserved for review and reconsideration. Sheriff Carson's testimony was vigorously objected to at trial, was the subject of repeated motions for a mistrial, and was pursued as fundamental error and prejudicial in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments not only on appeal to this Court (see Point VII of Initial Brief of Appellant on direct appeal) but also in

Ms. Jackson's petition for certiorari in the United States Supreme Court.[3]

C. The victim impact evidence testified to by Sheriff Carson in violation of the principle of Booth v. Maryland requires a new sentencing hearing.

9. Over vigorous and repeated objections, the Sheriff of Duval County testified to the jury regarding the impact of Officer Bevel's shooting on the Sheriff's Department and on the safety of all inhabitants of Duval County. That Booth v. Maryland precludes such evidence is now acknowledged even by Supreme Court Justices who dissented from the original holding in Booth. See, e.g., Chief Justice Rehnquist, dissenting in Mills v. Maryland, 486 US ___, 108 S.Ct. 1860, 1876 (1988), who there recognizes that under Booth, "[t]he state is precluded from demonstrating the loss to the victim's family, and to society as a whole, through the defendant's homicide" (emphasis added).

10. Defendant, even before the Sheriff testified, identified precisely the impropriety of the proposed evidence, beyond its irrelevance to any statutory aggravating circumstance. Specifically, her counsel stated: "I don't think the overall

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[3] That Booth is a sufficient change in law to survive the procedural bar of lack of timely presentation to the state courts -- a bar which is not applicable herein -- has already been recognized by the United States District Court for the Southern District of Florida. Blanco v. Dugger, 691 F.Supp. 308, 322 (S.D., Fla. 1988).

function of the City of Jacksonville is a proper factor to go before the jury." (T 1817).

11. This prefatory objection was overruled. The State's first and only witness in its case in chief during the penalty phase, the man whose testimony was specifically offered to persuade the jury to recommend the execution of Andrea Jackson, was the chief law enforcement officer of the very county in which each and every juror lived, worked, and raised his or her family. The sheriff's testimony was brief, well directed, and devastating; its inflammatory and cumulative effect on a group of law-abiding citizens sitting as a jury can only be gauged by reading it. Petitioner begs the indulgence of this Court in reproducing the testimony in its entirety here, objections omitted. (Asterisks indicate objections, colloquy, or rulings.)

Q. Sheriff, what is the population of Duval County; do you know?

A. It runs between 650 [sic] to 600,000, along in there. (sic)

Q. Between 550 or 600?

A. Along in there; yes, sir.

Q. What are the square miles; do you know?

A. 840.

Q. 840 square miles? Sheriff Carson, how many uniform patrolmen do you have employed in the Sheriff's Department?

A. 759.

* * *

Q. Sheriff, how many -- do you know how many uniform patrolmen were on duty between the hours of 11:30 p.m. and 12:30 a.m. -- 12:30 being on May the 17th, 1983, would you be able to tell me how many patrolmen were on duty at that time?

A. There were a hundred and one on duty after midnight on May the 17th, and prior to that, we had about the same number, plus 24 other officers. So, at the time of the -- of the crime, it was a hundred and one patrolmen, a hundred and one uniformed officers.

Q. I see. They were patrolling 840 square miles?

A. Yes.

Q. Are you familiar with the record of Patrolman Gary Bevel?

* * *

Q. Sheriff Carson, in carrying out his duties in making arrests, performing of just duties, generally, as a patrolman, what was Gary Bevel's reputation in the department?

* * *

Q. Do you know his reputation in the department as a policeman?

A. Yes, I do.

Q. And what were they?

A. It was an excellent reputation, his sufficiency reports were outstanding, and he was very well liked in the department, one of our best patrolmen.

* * *

Q. Sheriff Carson, on May the 17th, 1983, Patrolman Gary Bevel was shot and killed, what was the impact of that on your department?

* * *

THE WITNESS: Well, it had a tremendous impact at the beginning, of course, you have all of the officials wanting to know what happened.

And we have them assigned to beats, and they're supposed to stay in those beats, but it's disruptive, and many of them come to the hospital to try to find out what happened, calling their wives, making sure their wives know they weren't the ones who were killed.

It's a disruptive force, and it -- it upsets everyone, of course. And it has a force -- and effect that lasts long after that original effect.

Q. Well, let me ask you, then, the immediate impact is disruption of a hundred and one patrolmen?

A. Right, the county isn't as well protected as it was before because of them getting off their beats and coming to the scene.

Q. What is -- weeks and months immediately following the death and shooting and killing of Gary Bevels, what is the impact on the department and on the community?

A. Well, I think the department becomes closer, and they begin to look at every situation with more suspicion than they had before that they might get hurt.

I think it -- the public is not treated, sometimes, as courteously as I would like for them to be. I think there are traffic stops, when they make stops with guns in their hand, a few things like this. They just become more alert and more concerned about their safety.

Q. Do they -- didn't they have a tendency to overreact when some of their people are killed?

A. I would say that they are extra cautious, and that would be considered an overreaction to many things.

Q. Is that especially true when a vehicle is stopped?

A. Yes, it is.

* * *

Q. Has this episode had any effect on the attitude of the patrolmen that are employed by you in arresting female suspects? And in what way?

* * *

THE WITNESS: We have a situation where -- when an officer arrests a person, before they're placed in the back of the car to take them to jail, if they're to be searched. This is very difficult when it comes to the arrest of a female because, usually, all they can do is maybe look at their pocketbook. They can't do the pat down search that they should do on other people.

It's difficult thing for the patrolman to understand, I think, but the situation just is that you just can't search a female, a male officer can't search a female, a male officer can't search a female like they really should. And that, of course, is a morale problem we have.

Q. It causes a morale problem in the department?

A. Yes.

Q. What effect, if any, Sheriff, does the Defendant and an officer like Gary Bevel -- Bevel -- Gary Bevel have on the crew? What effect will it have? Has it had an effect?

A. Well, it has in this particular case, as you know, we're short on minority officers. We don't have what we should have, we have about less that 10 percent, we should have about 20. In this last class, we had -- we had openings for about 20 black officers, and we were taking them from the jail, as we have in the past. We were able to get, I think --

Q. What do you mean, "taken from the jail"?

A. The way we had been, we were recruiting; now, we're just taking officers after they had served time in Corrections, and we found that that was the best way.

Q. They became a correctional officer before becoming a police officer?

A. Yes, before becoming a police officer.

Q. Go ahead.

A. And we needed about 20 to bring us up to -- up to what's required, where we wanted to get spaces for these black officers, and there's -- we just

> couldn't get that many out of Corrections. We talked to several personnel, we talked to, I'd say, four or five in Corrections who would make excellent police officers, and they said they did not want to become police officers because of what had happened to Gary. I sent some black officers --
>
> Q. Recruiting effects law enforcement?

(T 1825-35).

12. This testimony was clearly and impermissibly calculated to suggest to every every juror that because Gary Bevel was a police officer, Andrea Jackson had made Duval County less safe by shooting him. The jury was told that the shooting had virtually removed police protection throughout the County: "the county isn't as well protected as it was before . . ." (T 1831). When asked, "what is the <u>impact</u> on the department and on the community", (T 1831) (emphasis added), the Sheriff replied that police officers "are extra cautious" and "overreact."

13. This line of questioning drew an immediate objection:

> They're trying to make this jury think -- this particular jury be fearful because of what happens to police officers.

(T 1832). The objection was overruled.

14. The testimony was clearly designed not only to impact on the community and induce fear for public safety, but also to elicit sympathy for the victim. The prosecutor baldly asked, "What was Gary Bevel's reputation in the department?" (T 1828). The proper objection -- "Bevel's character is not at issue here. The issue is the character of the Defendant, the circumstances of the crime, and what is the appropriate sentence" -- and motion

for a mistrial were overruled and denied. (T 1829). The Sheriff then responded:

> It was an excellent reputation, his sufficiency reports were outstanding, and he was very well liked in the department, one of our best patrolmen.

(T 1830).

15. At the close of Sheriff Carson's testimony, defense counsel moved to strike all the testimony and for a mistrial, noting that the testimony was offered "solely for the purpose of inflaming passions of the jury." These motions were denied. (T 1837).

16. The prosecutor -- who rested his entire case in chief at sentencing on the testimony of Sheriff Carson -- was not content to let his testimony speak for itself. In his summation, he persistently argued that the identify of the victim as a police officer, and the threat to the social order and the safety of the community, were factors that ought to lead the jury to decree the death penalty for Andrea Jackson.

> Gary Bevel was a policeman. I submit to you, the Legislation put two similar aggravating factors, escape from custody to prevent a lawful arrest and to interfere with law enforcement, because law enforcement people, <u>policemen, are put on that street as point men for society, and they're entitled for this kind of protection by the law</u>. You can consider their total role in government of going out and enforcing the laws, and someone trying to escape from them, and consider that, and consider both of those aggravating factors, and give them both great weight.
>
> I submit to you that killing a police officer. . . is enough to outweigh all of these mitigating factors, if they all exist,

> and none of them do, but that one of taking the life of the point man for self-satisfaction -
>
> * * *
>
> Did it to disrupt governmental function? You heard the Sheriff testify what it did. Every police car, hundreds out there rushing around to the scene, trying to help out a calling comrade.
>
> You've got about a hundred out there missing in an 804 square miles at one time, almost 600,000 people at any one time. And when something happens to one, it disrupts all of them at that moment.
>
> Then rushing to the hospital, them leaving, the police trying to find out what happened to our comrade, fellow police officer.
>
> The next day, the marshalling for ceremony, and then the long-range factor: Apprehension when you get up to a car, everytime you get up to a car, "I'm going to get killed." Everytime you interview someone, "Am I in jeopardy?" The awful part of going, leading your life, leaving your family -- . . . Even interfering with your personal life, for goodness sakes.
>
> Governmental function, long-range effect when you kill a police officer, a man. Society -- determined to be order out there, to be able to go about your business, freedom, society determines we are to be represented by that policeman shot six times in the head needlessly, senselessly, wantonly, evilly.

(T 1979-1981) (emphasis supplied).

17. The testimony of Sheriff Carson constitutes precisely the victim impact evidence condemned in Booth v. Maryland, supra, 107 S. Ct. 2529 (1987). The Court there rejected the prosecution claim that: "by knowing the extent of the impact upon and the severity of the loss to the family, the jury was better able to

assess the `granting or aggravating quality' of the offense." Id. at 2533. A fortiori, testimony and colorful argument that informs the jury of the extent of the impact of defendant's act upon every member of the community, including each individual juror, must be rejected.

18. For as the Booth court found:

> While the full range of foreseeable consequences of a defendant's actions may be relevant in other criminal and civil contexts, we cannot agree that it is relevant in the unique circumstances of a capital sentencing hearing. In such a case, it is the function of the sentencing jury to "express the conscience of the community on the ultimate question of life or death". . . . When carrying out this task the jury is required to focus on the defendant as a "uniquely individual human being." The focus of a VIS, however, is not on the defendant, but on the character and reputation of the victim. . . ."

Id. at 2533, 2524 (citations omitted). Under this standard, the Sheriff's testimony, which relates almost entirely to "the full range of foreseeable consequences" of the shooting, should not have been presented to the sentencing jury.

19. The Booth Court also directly addressed evidence as to the reputation of the victim:

> Nor is there any justification for permitting such a decision to turn on the perception that the victim was a sterling member of the community rather than someone of questionable character.

Id. at 2534. Thus, Officer Bevel's reputation as excellent and well liked, "one of our best officers," is definitionally and constitutionally irrelevant to the capital sentencing process. To

seek the death penalty because a defendant happened to shoot a "sterling" officer, "does not provide a 'principled way to distinguish [cases] in which the death penalty was imposed from the many cases in which it was not.'" Id. at 2534, quoting from Godfrey v. Georgia, 446 U.S. 420, 433 (1980) (Stewart, J.). When the prosecutor told the judge that "I'm not trying to build a lot of sympathy for Gary Bevel," (T 1829) (emphasis added), he betrayed precisely his intent in offering Sheriff Carson's testimony and established precisely why the sentence herein must be vacated.

20. In the very recent case of Rushing v. Butler, ____ F.2d ____ (5th Cir.) (March 30, 1989), slip opinion attached hereto, victim impact evidence in the form of live testimony to the jury was held to violate the defendant's Eighth Amendment rights. The Rushing Court, focusing on the constitutional requirement that "a capital jury is bound to make an 'individualized determination' of whether a defendant should be assessed the death penalty," concluded that:

> extraneous factors which are injected into the capital jury's decision-making process at the sentencing phase must be carefully scrutinized to ensure that they bear upon the defendant's personal responsibility and moral guilt.
>
> In the instant case, we are persuaded that the admission of emotionally charged, live testimony regarding the victim's character, demeanor and reputation in the community were altogether irrelevant to the question of whether David Rushing should be put to death.

> Thus, the introduction of the victim impact testimony resulted in a capital sentencing proceeding patently "inconsistent with the reasoned decisionmaking [required] in capital cases," and was therefore violative of Ruthing's constitutional rights under the eighth amendment. Booth v. Maryland, 107 S.Ct. at 2536. See Zant v. Stephens, 103 S.Ct. at 2747. Rushing's death sentence is therefore vacated.

Slip Op. at 2641. (citations omitted).

21. One final aspect of Sheriff Carson's testimony deserves attention, for it constitutes victim impact evidence of a type so egregious that it did not come even within the contemplation of the Booth Court. The Sheriff was permitted to testify, over objection and after a motion for a mistrial, that black jail guards "who would make excellent police officers . . . said they did not want to become police officers because of what had happened to Gary." (T 1835). Such testimony conveys but only one message -- intended for the black members of the jury: execute Andrea Jackson because she killed not only a black officer but all hope of an integrated police force, execute her as a traitor to your race. Today, no prosecutor would dare to call for a death sentence because the victim was white, and no court can approve a death sentence tainted by appeals to reverse racism premised on the fact that the victim police officer was an exemplary black. See McClesky v. Kemp, 481 U.S. 107; Peek v. State, 488 So. 2d 52 (Fla. 1986).

22. Racial appeals have "no place in our system of justice and ha[ve] long been condemned by this Court." Robinson v. State,

520 So. 2d 1, 7 (Fla. 1988). Where "[t]he questioning and resultant testimony had no bearing on any aggravating or mitigating factors," as was true of the questioning and testimony regarding the recruitment of black officers, and "particularly in the absence of a curative instruction, [the Court] cannot presume that the prejudicial testimony did not remain imbedded in the minds of the jurors and influence their recommendation". Id. at 7-8. Since "the risk of racial prejudice infecting a criminal trial takes on greater significance in the context of a capital sentencing proceedings," id. at 7, the racial appeal of the Sheriff's victim impact evidence alone requires the vacating of the death sentence.

D. Victim impact evidence presented to a capital sentencing jury is definitionally prejudicial, cannot be harmless error, and requires a new sentencing trial.

23. Sheriff Carson's testimony was offered and received in support of the States's attempt to prove that the shooting here was committed in hinderance of a law enforcement function. This Court properly ruled that this aggravating circumstance is not present when the law enforcement function involved is effectuating the arrest of the perpetrator herself. In such cases, the applicable aggravating circumstance is the commission of the capital offense to avoid a lawful arrest or in the course of an escape from lawful custody. As the Sheriff's testimony did not bear on either the arrest or the alleged attempt to escape, it was inadmissible. This Court, however, deemed the admission of

the testimony to be harmless error, concluding that at most, it permitted a "doubling" of aggravating circumstances.

24. In finding that the error was harmless, this Court could not, and thus did not, consider or apply the subsequent holding of Booth v. Maryland in assessing the effect of Sheriff Carson's victim impact evidence.

25. Nothing in Booth suggests that the consideration of victim impact evidence by the sentencer can ever be harmless error. It is "the nature of the information contained in a VIS" that "creates an impermissible risk that the capital sentencing decision will be made in an arbitrary manner." Booth, supra, 2534 (emphasis added).

26. In Grossman v. State, 525 So. 2d 833 (1988), this Court wrote extensively on the proper application of the harmless error rule to Booth errors. It began by noting that whether a Booth error can ever be harmless was not specifically addressed by the United States Supreme Court, "presumably because the issue was not raised." Grossman, supra, at 843. This Court, after reviewing several of the United States Supreme Court decisions on harmless error analysis, focused on the statement in Booth that the admission into evidence of victim impact evidence "creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." Id.at 844 (emphasis added by the Florida Supreme Court.) This Court then rested its conclusion that Booth errors are not definitionally fundamentally prejudicial on the emphasized term "may":

> The use of the word 'may' and the internal analysis of the Booth court show that some victim impact statutes will differ in impact from others. Id.

27. But as noted in the preceding paragraph of this Point, the Booth Court, speaking in the context of victim impact evidence presented to a sentencing jury, stated that the risks of an erroneous sentencing verdict is of fundamental proportion as one cannot ascertain whether the decision will be made in an arbitrary manner.

28. That Booth errors in regard to jury sentencing are not subject to harmless error analysis is consistent with the cases analyzing this doctrine in the United States Supreme Court. In a comprehensive review of the relevant jurisprudence, that Court noted that error affecting the impartiality of the jury is such as to require a new trial. Rose v. Clark, 478 U.S. 570, 578 (1986). Since the nature of a Booth error is precisely to prejudice the jury with evidence inviting "considerations that are 'constitutionally impermissible or totally irrelevant to the sentencing process'," Booth, supra at 253 (citations omitted), the effect is inevitably on the impartiality of the jury. Booth error prevents the fundamental neutrality that a jury must maintain throughout a criminal trial and carry with it until it retires to deliberate.

29. This Court has implicitly recognized that harmless error analysis has no place when victim impact evidence is presented to the jury. In Grossman, supra, at 845, it held that "the salient

distinction" between Booth and the typical Florida case is that in Florida, the sentencing authority that hears or reads the victim impact evidence is the judge. Grossman v. State, 525 So2d 833, 845 (1988). Where "the jury did not receive the improper evidence of victim impact, but recommended death by a twelve-to-zero vote based on the evidence of statutory aggravating circumstances only", Grossman, id. at 846, which is generally the case in the Florida bifurcated capital sentencing system, arguably harmless error analysis is applicable. But Andrea Jackson, of course, is atypical. Here, as in Maryland, the jury heard the victim impact evidence; here, as in Maryland, that taint requires a new sentencing hearing.

30. The Grossman opinion illustrates why resentencing is required in the present case. This Court found that a judge's sentence can be sustained even if he receives victim impact evidence precisely because in deciding on his sentence, he must give great weight, under the rule in Tedder v. State, to the jury's recommendation. "The trial judge's actual discretion here was relatively narrow." Id. at 216. Since the Grossman jury never heard the victim impact evidence, its sentence was untainted; all the judge did was find that the jury's sentence was correct. The Court also pointed out that the judge, unlike the jury, must articulate his findings, and in Grossman, "[t]he written findings here show that there was no reliance, or even a hint of reliance, on the [victim impact] evidence." Id. at 845-46. Since a Florida sentencing jury does not indicate which aggravating and

mitigating circumstances it has found present, let alone the factors that led it to recommend death over life, there is no way to verify that the error was harmless beyond a reasonable doubt.

31. Even were harmless error doctrine applicable to victim impact evidence when presented to a jury -- and it is not -- there can be no dispute that such constitutional error must be harmless beyond a reasonable doubt. Grossman, supra; Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986). Booth requires this Court at the very least to evaluate its prior harmless error decision under the reasonable doubt standard, which it did not previously apply to the Sheriff's testimony. When focused solely on that testimony as offered in support of one of a number of statutory aggravating circumstances, this Court felt itself obliged to find no prejudice in the testimony, as it found there was no prejudice in the doubling of aggravating circumstances itself. But now, the Court is required by Booth to focus on the testimony as improperly urging the jury to sentence on the non-statutory aggravating factor of community impact, which was the only evidence specifically presented in aggravation at the penalty phase. Petitioner respectfully suggests that there can be no ruling other than for a new sentence free of the infectious evidence.

E. The Victim Impact Evidence Contained in Presentence Investigation Report (PSI) requires a new sentencing hearing.

32. PSI reports have been recognized by the Supreme Court to as repositories of victim impact information. Grossman v. State, 525 So. 2d 833, 842 n. 6 (1988). In the present case, the PSI Report actually contains a section entitled "Victim Impact," which contains the comments of the members of Officer Bevel's family. While the PSI Report recounts that Reverend Jessie Bevel, Officer Bevel's elder brother, had made a statement to the court, it does not set out Reverend Bevel's position that death ought not be imposed. Rather, it informs the court that the victim's father and two sisters did not oppose the death penalty in this case. Given the "great weight" that the trial court gave to Reverend Bevel's position on choice of penalty, it cannot be said that the contrary position of other members of the Bevel family "was not used by the judge in imposing the death penalty." LeCroy v. State, 13 FLW 628, 629 (1988). In fact, the record reveals quite the opposite: the trial court specifically relied on the victim impact evidence in the PSI Report to counter Reverend Bevel's recommendation for mercy and to characterize his attitude as "unique" within the Bevel family:

> The defense produced a witness Reverend Jesse Bevel, brother of the deceased. Reverend Bevel testified that his family sought justice, but not a sentence of death for his brother's killer. The Court did not allow this testimony before the Advisory Jury, but has given it consideration and great weight in reaching its decision. The Court, however would note that the Presentence Investigation received in this case would indicate this attitude as to the sentence is more unique to Reverend Bevel than his entire family and should more properly be considered in relationship to his

> religious profession and consciously held beliefs in general rather than in particular.
>
> It is clear from a reasoned weighting of the above findings that there exist three statutory aggravating circumstances and only one factor that can be even remotely argued in mitigation.

Jackson v. State, 498 So2d 406, 413 (1986). Unlike Grossman v. State, supra at 845, 846, where "the written findings ... show that there was no reliance, or even a hint of reliance, on the evidence introduced regarding the impact of the murder on the next of kin," the trial court in the present case acknowledged openly its reliance on the family's victim impact statements. Inclusion of the adverse victim impact evidence was thus by definition not harmless error; while mercy is to be considered in mitigation, revenge or retribution at the family's suggestion is not properly for the court's consideration.

33. Even more significant, in light of the flagrantly erroneous admission of Sheriff Carson's testimony, are the plethora of victim impact statements from law enforcement personnel included in the PSI Report. No fewer than nine of Gary Bevel's brother law enforcement officers, ranging in rank from the Sheriff of Duval County to Officer Bevel's back-up colleague, urged that Andrea Jackson be put to death. Their statements cover, in their entirety, virtually every possible error in the Florida capital sentencing process.

34. In the PSI, Sheriff Carson not only discusses Officer Bevel's accomplishments as "a fine outstanding young police

officer" but opines that Ms. Jackson's shooting at a cab driver indicated to him that she felt no remorse for shooting Officer Bevel. The former statement directly violates Booth; the latter can only be viewed as an attempt to use a prior charge of which Ms. Jackson had been acquitted as a non-statutory aggravating circumstance.

35. The litany of law enforcers continues. Officer Rogers tells the court that Gary Bevel "had a little child that will be one year old next month", and that he "couldn't find a better individual both as a police officer and friend." Such statements virtually duplicate the statements in Booth, and are calculated to lead to the imposition of a death sentence based not on reason but rather on caprice or emotion. See Gardner v. Florida, 430 US 349, 358 (1977). Detective Starling "feels the defendant in this case is a most definite threat and a menace to society"; Lieutenant Smoot agrees, while Detective Bradley of homicide calls for the execution of Ms. Jackson as " a definite menace to society." Being a "menace" is, of course, another reference to a non-statutory, and hence illegal, aggravating circumstance.

36. Other officers -- "while adding their praise of Gary Bevel as one of Jacksonville's best officers, as a man whose only fault was being "too nice" -- concentrate on besmirching Andrea Jackson's reputation in a forum in which there can be no cross-examination or rebuttal. Sergeant Dipernia "feels that Andrea Jackson was a street-type person and indicated that if anyone ever deserved the death penalty, it was her." Officer Dean says

that "he has had problems with Andrea Jackson several times on different occasions," while Officer Evens recalls a prior experience with Ms. Jackson when she was "hostile, wild and very belligerent." Such opinion testimony is not relevant to any statutory aggravating circumstance, and if offered during the trial would be definitionally stricken. For it to be brought before the judge when he is considering the most critical sentencing decision that a judge can make in the form of irrebuttable hearsay, from police officers who opine with the authority of their office, is to infect fatally the sentencing process.

37. In light of the Grossman, holding that victim impact evidence, improperly presented to the court although withheld from the jury, can be harmless error, it is crucial to recall that the trial court had allowed the prosecutor to argue that a woman who kills a sworn officer ought to die for that reason alone. That court found nothing improper in such an argument for vengeance:

> And when you strike down one of them [a police officer] down, senselessly, needlessly, wantonly, willfully, intentionally, with all meanness that this woman manifested, the only appropriate, the only way society can show its outrage for that act is to recommend a sentence of death in the case, ladies and gentlemen.

(T 2015). That nine law enforcement officers echoed this call for vengeance when the court had to sit in final judgment over Andrea Jackson graphically illustrates the correctness of Booth. The

last evidence that the trial court considered before imposing sentence was precisely the call for vengeance that this Court criticized in this very case as "offensive." Jackson v. State, 498 So. 2d 406, 411 (1986). Inclusion of this retinue of victim impact evidence was prejudicial error and requires a new sentencing hearing.

POINT II

THIS COURT'S FINDING THAT THE AGGRAVATING FACTOR OF A "COLD, CALCULATED, AND PREMEDITATED" MURDER WAS PRESENT IN THIS CASE IS ARBITRARY AND CAPRICIOUS, AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 AND 16 OF THE FLORIDA CONSTITUTION

1. To hold that Andrea Jackson committed a "cold, calculated and premeditated" murder is totally contrary to this Court's precedents and thus constitutes an arbitrary and capricious application of that aggravating factor to petitioner. Petitioner has a federal constitutional right to be judged upon reasoned and uniformly applied criteria, Proffitt v. Florida, 428. U.S. 242 (1976). This Court's application of the cold, calculated and premeditated aggravating factor in this case is contrary to that principle.

2. The aggravating factor of "cold, calculated, and premeditated", added by the Florida legislature in 1979 in response to two gangland murders, was designed to be applied to those murders that can be described as execution style or contract killings. See e.g., Hamblen v. State, 527 So. 2d 800, 805 (1988):

> [W]e note that simple premeditation of the type necessary to support a conviction for first degree murder is not sufficient to sustain a finding that a killing was committed in a cold, calculated, or premeditated manner . . . What is required is a heightened form of premeditation which can be demonstrated by the manner of the killing. Those that are executions or contract murders fit within that class.

See also Caruthers v. State, 465 So. 2d 496, 498 (1985), Kennedy, Florida's "Cold, Calculated and Premeditated" Aggravating Circumstances in Death Penalty Case, 17 Stetson L. Rev. 47 at 60 (1987), and Skene, Review of Capital Cases: Does the Florida Supreme Court Know What It's Doing?, 15 Stetson L. Rev. 263 at 320 (1986). This court has further held that

> This circumstance can also be found when the facts show a substantial period of reflection and thought by the killer. Harmon v. State, 527 So. 2d 182, 188 (1988).

3. As this Court has recognized, the hallmark of a cold, calculated, and premeditated murder is one that exhibits "a careful plan and prearranged design." Rogers v. State, 511 So. 2d. 526, 533 (1987), cert. denied, 108 S. Ct. 733 (1988). Absent the heightened premeditation required by such cases, there would be no "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not", Gregg v. Georgia, 428 U.S. 153, 188 (1976).

4. As will be demonstrated herein, the affirmance by this Court of the finding that Andrea Jackson killed in a cold, calculated and premeditated way is an arbitrary and capricious finding. There is simply no way to reconcile the facts of this

case with this Court's own precedents and pattern of affirmances and reversals regarding the "cold, calculated, and premeditated," aggravating circumstance. Especially in light of post-Rogers cases, application of this factor to Andrea Jackson is freakish; she is singled out for death in a fashion that can be supported neither by articulated standards nor by this Court's own prior decisions. Thus, imposition of the death penalty, based on a finding that the offense was "cold, calculated and premeditated" must be set aside as violative of her Eighth and Fourteenth Amendment rights.

5. This Court, in affirming the trial court, referred to three considerations in its discussion of this aggravating factor: (a) that Andrea Jackson was armed; (b) she did not attempt to disarm Officer Bevel or escape without the necessity of deadly force; and, as this Court stated, (c) she "had the presence of mind while struggling with [Officer Bevel] to devise a method to catch him off guard, i.e. the statement that she had dropped her keys." Jackson, 498 So. 2d at 412. On the facts proven in this case, these findings, taken alone or collectively, do not establish beyond a reasonable doubt the "heightened" premeditation required to support a finding of the "cold, calculated and premeditated" aggravating circumstance. Under the jurisprudence of this Court, given the narrowing of the application of this aggravating circumstance, particularly following Rogers, to continue to uphold the finding of cold,

calculated and premeditated murder is to authorize the execution of Andrea Jackson in violation of the Constitution.

6. This Court apparently placed great reliance on the fact that Andrea Jackson possessed a weapon. Possession of a weapon, however, has never formed the basis for heightened premeditation or of a finding of a careful plan or prearranged design. Being armed is not itself an aggravating factor. Were it to be, the aggravating factor of "cold, calculated and premeditated" would be present for all murders committed with a weapon. This Court has obviously never reached this conclusion. See, Amoros v. State, 531 So. 2d 1256; Garron v. State, 528 So. 2d 353; Hamblen v. State, 527 So. 2d 800; Harmon v. State, 527 So. 2d 182 and Hill v. State, 515 So. 2d 176; in each case the victim was killed by gunshot wounds and this Court did not find the aggravating factor of "cold, calculated and premeditated" to be present.

7. This Court stated that Andrea Jackson shot Officer Bevel because she was "a women determined not to be imprisoned who fashioned her opportunity to escape and then acted accordingly." Jackson, 498 So. 2d at 412. In order to find "heightened" premeditation as a careful plan or prearranged design, as is required by this Court's cases, the evidence would need to establish, beyond a reasonable doubt, that she acquired the weapon for the sole purpose of escaping by shooting Officer Bevel. The State could not and did not prove this. There is not one iota of evidence that Andrea Jackson procured the weapon in order to shoot Officer Bevel.

8. The facts of this case establish, at most, that for an instant during the struggle in the back seat of the police car, Andrea Jackson got Officer Bevel to back away from her, she reached into her pants and pulled out the gun, and convulsively emptied the weapon at the officer. There was no opportunity for careful planning or prearrangement. Until the moment that Officer Bevel placed her under arrest, Andrea Jackson could not have foreseen that she would be placed in a police car to be taken to jail. That she never planned to kill Officer Bevel is evidenced by her failure to threaten him in any way before he took her into custody. Given the brevity of the struggle, the brief moment of thought that the Supreme Court deemed sufficient to constitute premeditation does not, under the consistent pattern of this Court's cases, suffice to suggest the degree of reflection, planning, and deliberation necessary for a finding that the killing was cold, calculated, and premeditated. Nor can it establish this aggravating circumstance beyond a reasonable doubt.

9. In this case, there is no evidence that the defendant had a substantial period to reflect before the killing. That such reflection is part and parcel of the cold, calculated and premeditated aggravating circumstance is explicated by the recent case, Jackson v. State, 522 So. 2d 802, 810 (Fla. 1988). Clarence Jackson, after killing one victim, enticed a second into his car, drove him around for a period of time, shot him, forced him -- when he was begging for his life -- into a laundry bag in the

back of the car, drove around yet longer, and finally dispatching his second victim with a second series of shots, dumped both bodies in the river. The finding of cold and calculated premeditation for the second murder was affirmed precisely because

> the fact that [the perpetrator] had ample time during this series of events leading up to the [second] murder to reflect on his actions and their attendant consequences was sufficient to evidence the heightened level of premeditation necessary under section 921.141(5)9i) (emphasis added).

Id. Significantly in the Clarence Jackson case, both the jury and judge imposed a life sentence for the first murder, which also occurred in the car but before the extended travelling and opportunity for mature reflection and planning that was present regarding the second killing.

10. As set out previously, nothing in this record suggests that Andrea Jackson had a prior intent to shoot Officer Bevel before the struggle in the back of the police car began. Compare these facts with those in Amoros v. State, 531 So. 2d 1256, 1261 (1988), where the defendant, prior to shooting his former girlfriend's boyfriend, had threatened the girlfriend. While the Court found the existence of premeditation

> there was an insufficient showing in this record of the necessary heightened premeditation, calculation, or planning required to establish this aggravating circumstance.
>
> * * *
>
> The only evidence of a plan was [the defendant's] threat to his former girlfriend. However, no evidence was presented to es-

tablish that [the defendant] knew the victim.

Id.

The Amoros decision clearly controls the present case[4] and forces the conclusion that the Court's finding that this aggravating circumstance was present in this case is arbitrary and unjustified.

11. This Court also found that Andrea Jackson made no attempt to disarm Officer Bevel or escape without using deadly force. This Court has never held that it is necessary to disarm a victim or try to escape to sustain a finding of heightened premeditation. In Hill v.State, 515 So. 2d 176 (Fla. 1987), this Court found the absence of the aggravating factor of cold, calculated and premeditated. Notwithstanding the fact that the defendant killed an officer and wounded another when the officers were arresting the defendant's accomplice. The defendant and the accomplice were leaving the scene of an attempted robbery when the officers arrived. The defendant shot the officers from the

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[4] Simultaneously herewith, petitioner is filing a petition under Rule 3.850 in the Circuit Court for Duval County. She will demonstrate at a hearing on this Petition that she had ingested large quantities of drugs and alcohol immediately prior to this unfortunate incident. This showing will establish that her drug and alcohol intake on May 16, 1983 was sufficient to negate the degree of premeditation required for a first degree murder conviction. At a minimum, she will demonstrate that her drug and alcohol intake rendered her incapable of the "heightened" degree of premeditation required for a finding that the shooting was cold, calculated and premeditated. She was simply incapable of forming a prior intent to kill Officer Bevel. Thus, not only was there no evidence of such prior intent as mandated by Amoros, but in this case no such evidence could exist.

back as they were attempting to handcuff the accomplice. This Court did not suggest that the defendant should have escaped and left his accomplice behind, or that the defendant should have first attempted to disarm the officers before the defendant shot both officers. On the contrary, it stated:

> The evidence indicates that appellant's actions were committed while attempting to escape from a hopelessly bungled robbery. We find an absence of any evidence that appellant carefully planned or prearranged to kill a person or persons during the course of this robbery. While there is sufficient evidence to support simple premeditation . . . there is insufficient evidence to support the heightened premeditation necessary to apply this aggravating circumstance.

Id., 515 So. 2d at 179.

12. Finally, this Court found that Andrea Jackson devised a method of catching Officer Bevel off guard in order to shoot him, by inquiring about her car keys. As argued above, such momentary and opportunistic premeditation does not represent the heightened premeditation that separates, in a constitutionally permissible fashion, those for whom death is an appropriate punishment.

13. Far from a planned and settled intention to catch Officer Bevel "off guard," the evidence introduced at the trial indicates that Andrea Jackson and the officer fought continually from the time he announced his intention to arrest her. From the trial testimony of the eye witnesses, it is apparent that Andrea Jackson was obsessed and preoccupied with her car, which she apparently vandalized simply because it would not start. She was extremely distraught and angry, screaming at her car, and her

bizarre behavior continued when Officer Bevel announced his intention to arrest her. As eyewitness Jacquelyn Yvonne Flagg testified, "it was like she had become uncontrollable." (T 1050).

14. Clearly Andrea Jackson was in a highly emotional and uncontrollable state throughout this incident. The evidence establishes that Andrea Jackson was in a rage, in a panic, in a mental state where she had lost control. In such cases, this Court does not find heightened premeditation. See Mitchell v. State, 527 So. 2d 179,182 (1988). To find otherwise was, and is, arbitrary and capricious.

15. This case can be compared constructively with this Court's recent decision in Hamblen v. State, 527 So. 2d 800 (Fla. 1988). There the defendant, during the course of an armed robbery, ordered a store employee into a room and had her disrobe. The victim told the defendant she would lead him to more money in the back of the store, and on their way to the rear, she pressed a silent alarm. Defendant did not shoot her at this point; rather, he marched her back to the dressing room and there shot her once in the back of the head, execution style. This Court found that even on these facts, the aggravating factor of "cold, calculated and premeditated" was not established. The Court quoted extensively from Rogers, that in order to establish this aggravating factor a careful design or prearranged plan was needed. The court stated:

> [i]t was only after [the defendant] became angered because [the victim] pressed the alarm button that he decided to kill her . . . [the defendant's] conduct was more akin to

> a spontaneous act taken without reflection. While the evidence unquestionably demonstrates premeditation, we are unable to say that it meets the standard of heightened premeditation and calculation required to support this aggravating circumstance.

Id. at 805 (citations omitted.)

16. The requirement of individualized imposition of the death penalty upon a narrow class of persons sharing common characteristics that justify putting them to death. See e.g. Zant v. Stephens, 462 U.S. 862 (1983) is violated if the Court continues to find here that the killing was cold, calculated and premeditated.

17. If its earlier finding is not reversed now by this Court,

> Capital sentencing is reduced to a random, dramatically inconsistent procedure. The process is unfair in precisely the same way that being struck by lightening is unfair. The pattern of (5)(i) [cold, calculated, and premeditated] decisions alternates between two vastly different standards, producing vastly different results, for no apparent reason.
>
> * * *
>
> The misuse of paragraph (5)(i) strikes to the very core of the Furman court's concerns. This produces a scattershot pattern of virtually identical cases, in some of which the aggravating factor is applied and in the remainder of which it is not. The constitutional requirement of consistency, as well as Florida's legal mandate for proportionality in capital sentencing, are both clearly violated by such a pattern.

Kennedy, Florida's "Cold, Calculated and Premeditated" Aggravating Circumstances in Death Penalty Cases, 17 Stetson L. Rev. 47, 107 (1987)

18. Since reconsideration of its prior affirmance of the finding of "cold, calculated and premeditated is mandated to insure a consistent application of this aggravating circumstance, this Court should now vacate its earlier finding so as to be consistent with constitutional mandates.

POINT III

THIS COURT'S FAILURE TO APPLY THE STATUTORY MITIGATING FACTOR OF "NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY" TO PETITIONER IS ARBITRARY AND CAPRICIOUS AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

1. Under the Florida capital sentencing scheme, proof of mitigating circumstances is essential to avoid a death sentence when aggravating circumstances have been found. See, e.g., White v. State, 446 So. 2d 1031, 1037 (1984). Evidence of the mitigating circumstance of "no significant history of prior criminal activity" was offered in this case. This mitigating circumstance must be applied to death-eligible defendants in a rational and predictable manner so as to avoid arbitrary and capricious imposition of the death penalty. See argument in Point II, supra.

2. Given this Court's earlier precedent, the finding that the mitigating circumstance of "no significant history of prior

criminal activity" is absent in this case is arbitrary and capricious, in violation of the Eighth and Fourteenth Amendments to the United States Constitution. To the extent that this Court has guided the trial juries and judges, Ms. Jackson's case fits the criteria of persons whose criminal histories are not "significant," any finding that Andrea Jackson's criminal history was significant is arbitrary and capricious precisely because it is not measured against articulated standards. This does not permit the narrowing and individualization within the group of death-eligible defendants that the Constitution requires. Zant v. Stephens, 462 U.S. 862 (1983).

3. This Court has never set forth a specific judicial standard defining a "significant history of prior criminal activity." See, e.g., Funchess v. State, 449 So. 2d 1283 (1984):

> We have never required that any particular definition of this circumstance be given.

4. With few exceptions, when this Court has found the lack of significant criminal activity to apply, the facts (or absence of facts) upon which the finding is based are not articulated. See, e.g., Caillier v. State, 523 so.2d 158 (Fla. 1988); Irizarry v. State, 496 So. 2d 822 (Fla. 1986); Huddleston v. State, 475 So. 2d 204 (Fla. 1985); Rivers v. State, 458 So. 2d 762 (Fla. 1984); Moody v. State, 418 So. 2d 989 (Fla. 1982); Arango v. State, 411 So. 2d 172 (Fla. 1982); Buford v. State, 403 So. 2d 943 (Fla. 1981); Peek v. State, 395 So. 2d 492 (Fla. 1981); Fleming v. State, 374 So. 2d 954 (Fla. 1979); Mendendez v. State,

368 So. 2d 1278 (Fla. 1979); Salvatore v. State, 366 So. 2d 745 (Fla. 1979); Washington v. State, 432 So. 2d 44 (Fla. 1983); Sullivan v. State, 303 So. 2d 632 (Fla. 1974).

5. When this Court has tried to analyze whether this mitigating factor is present, the result has been a confusing and inconsistent evaluation of what the factor means and how it is to be applied. For example, lack of significant criminal history has been held to be, appropriately rejected by the trial court when the only evidence of prior unlawful activity was in the form of uncorroborated confessions, Smith v. State, 407 So. 2d 894 (Fla. 1981), but has been accepted when evidence of criminal activity existed but no convictions had resulted, Hargrave v. State, 366 So. 2d 1 (Fla. 1979).

6. Although this Court has provided inadequate guidance in explaining and applying this mitigating factor, it has become reasonably clear that the circumstances and character of prior criminal activity are to be considered in determining whether this mitigating factor is present. Johnson v. State, 442 So. 2d 185 (Fla. 1984). The Court has focused on the absence of harm to others in illegal conduct resulting in convictions as an important element in considering the applicability of the mitigating factor, Atkins v. State, 497 So. 2d 1200 (1986), and has specifically discussed the presence of violence as significant in this context. Ross v. State, 474 So. 2d 1170 (Fla. 1985).

7. Both these concerns are absent as to prior criminal activity of Andrea Jackson. Petitioner's prior convictions are non-violent in nature and are in fact illustrative of non-statutory mitigating evidence: substance abuse and poverty. Her record consists of four episodes of worthless check writing, one disorderly intoxication conviction, and a conviction for driving without a license. Public drunkenness, bad checks used to purchase food, and driving without a licence are the sum and substance of Petitioner's prior criminal conduct.

8. A reasoned, principled and consistent application of the mitigating circumstance of "no significant history of prior criminal activity" would find that factor to be present in the instant case. The random application of this mitigating factor serves to deprive the petitioner of a meaningful and individualized sentencing determination and constitutional appellate review.

POINT IV

APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE CALDWELL CLAIMS ON DIRECT APPEAL.

A) Appellate Counsel's failure to raise Caldwell claims on direct appeal, despite the fact that Caldwell was decided during the pendency of that appeal, amounted to a serious deficiency measurably below the standard of competent counsel, prejudicing petitioner's fundamental rights.

1. Andrea Jackson's sentence of death was entered on February 10, 1984. A notice of appeal was timely filed on March

1, 1984, and defendant's initial brief was filed on August 10, 1984. Defendant's counsel filed a reply brief on January 2, 1985.

2. On June 11, 1985, the United States Supreme Court rendered its decision in Caldwell v. Mississippi, 472 U.S. 320. At that time, the direct appeal herein was sub judice, and this Court did not deliver its opinion until November 13, 1986. By then, the Florida Supreme Court had already ruled in Middleton v. State, 465 So. 2d 1218 (1985), that Caldwell claims ought to be raised on direct appeal, and that failure to do so precludes, in the ordinary course of events, raising such claims on collateral attack.

3. Simultaneously herewith, defendant is filing a petition in the Circuit Court for Duval County under Rule 3.850, in which she raises, inter alia, substantial Caldwell claims. She argues that any procedural bar to raising such claims ought not be applied in her case. In the event that she is successful in raising these claims in that motion, the present claim of ineffectiveness of appellate counsel will become moot. However, in the event that the Circuit Court and this Court rule that she is precluded from raising her Caldwell claims because they were not raised on direct appeal, she will have ipso facto demonstrated that her appellate counsel was ineffective.

4. In two cases, this Court has indicated that Caldwell claims not preserved at trial can be raised on direct appeal, if the trial preceded Caldwell but the decision on appeal occurred

after Caldwell. In Cave v. State, 529 So. 2d 293, 296 (1988), this Court stated:

> We begin by noting that Caldwell was decided June 11, 1985, that our Cave decision on direct appeal was not issued until August 30, 1985, and did not become final until October 21, 1985, and that the United States Supreme Court did not deny certiorari until June 9, 1986. In view of this chronology, Caldwell does not represent new law to this case whatever its applicability may be otherwise.

And in Phillips v. Dugger, 515 So. 2d 227, 228 (1987), this Court, in applying the procedural bar to collateral attack based on a Caldwell claim, noted:

> In any event, Caldwell was decided while Phillip's appeal was still pending in this Court.

5. These statements have no meaning unless they constitute a holding that Caldwell claims can be raised on direct appeal, despite the failure to object at trial, since in both Cave and Phillips there was no timely trial objection on Caldwell grounds.

6. Even Dugger v. Adams, 57 U.S.L.W. 4276 (Feb. 1989), recognizes that a Caldwell claim is preserved unless "respondent did not object to the [Caldwell-violative] remarks at trial or challenge them on appeal." Id. at 4278 (emphasis added). The use of the disjunctive indicates that the United States Supreme Court accepts the Florida jurisprudence that Caldwell claims were not subject to a procedural bar if they were brought to the attention of the Florida Supreme Court during the appellate process. This is consistent with the intent of Dugger v. Adams, to allow Florida to make an authoritative ruling at the appellate

level that is "an accurate reflection of state law." Id. at 4278.

7. Since the Caldwell claim could have been raised on direct appeal, and failure to have raised the claims on direct appeal arguably bars defendant from raising them now, that failure constitutes ineffective assistance of counsel.

8. There can be no question that as of the date of the Caldwell decision in the United States Supreme Court, any competent Florida attorney who would undertake the awesome task of arguing a capital case in the Florida Supreme Court had to know that

> it is constitutionally impermissible to rest a death sentence on a determination made by a sentence who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rest elsewhere.

Caldwell v,. Mississippi, supra, at 328, 329.

9. The record herein is rife with Caldwell errors. This had to be apparent to petitioner's appellate counsel. Her brief to this Court contains numerous lengthy excerpts from the trial transcript, and argues as a major ground for reversal the plethora of misstatements by the prosecutor. Point VI of Ms. Jackson's initial brief on direct appeal. It is particularly significant that counsel cited, in the misconduct argument, the very case, Pait v. State, 112 So. 2d 380 (1959), that the United States Supreme Court cited in Dugger v. Adams to establish the pre-Caldwell law on misinforming a jury of its role. But Ms.

Jackson's counsel simply missed the error; counsel never brought to this Court's attention the facial violations of Caldwell that permeate the record.

10. When counsel fails to raise on appeal a significant error, and the client has been "depriv[ed] of a full and meaningful appeal" by virtue of counsel's "serious and substantial deficiency," the Supreme Court will find inadequacy of appellate counsel and will proceed to consider the point of appeal in question on habeas corpus. Fitzpatrick v. Wainwright, 490 F.2d 938 (1986).

B. The Caldwell errors herein require resentencing.

11. The petitioner's trial was rife with prosecutorial comments that misstated the jury's role and responsibility in sentencing. That the jury's sentencing determination was, in the view of the prosecutor, essentially meaningless was made clear during jury selection when he questioned a set of potential jurors over their possible reluctance to return a guilty verdict in a capital case. The prosecutor was clearly worried that a juror might not convict because he would have no control over the penalty, and sought to learn whether the panel had any qualms over that assumed impotence:

> Once you convict, you understand that, really, the bottom line under the Florida law, that the penalty is out of the hands of the jury so to speak? The Judge imposes the sentence, so your conviction may, indeed, lead to the imposition of the death penalty,

> and you might not have any further control over it. Could you vote for death under those circumstances?

The prosecutor's slip of the tongue here is most significant; as he recognized immediately, what he meant to say was

> Vote for guilty -- I'm sorry, could you vote for guilty under those circumstances?

(T 796). There could hardly be a more graphic illustration of prejudice from misinformation over the jury's role in sentencing. Had the prosecutor properly outlined the jury's role under Tedder, who knows what response he would have elicited from the prospective jurors.

12. The message that the jurors could adjudicate defendant's guilt or innocence under the misapprehension that they would bear no responsibility for an ultimate death sentence was hammered home in the prosecution summation on the guilt phase of the trial. In an obvious attempt to relieve the jurors from any qualms they might have over the effect of their verdict on the defendant's life or death, the prosecutor blatantly misstated the law:

> It is the Judge's job to determine what a proper sentence would be, if the Defendant is guilty. So, you're not to think, at all, about the penalty at this time....
>
> The penalty is for the Court to decide. You're not responsible for the penalty, in any way, because of your verdict. The possible results of this case are to be disregarded as you discuss your verdict.

(T 1596-8).

13. The trial court, rather than correcting the misstatements of the prosecutor in its instructions, drove home the denigration of the jury's role at sentencing. In its instructions at the guilt phase, the court stated:

> The penalty is for the Court to decide. You are not responsible for the penalty in any way because of your verdict.

(T 1726-27). After the verdict, the Court informed the jury, before any testimony was taken on the penalty phase, that

> The final decision as to what penalty shall be imposed rests solely with the Judge of this court, (T 1824)

quoting from the standard jury instructions that were explicitly held improper in Mann v. Dugger, 844 F. 2d 1446, 1456 (1988) (en banc, cert. denied, 109 S.Ct.____ (1989).

14. In its instructions to the jury on the penalty phase, again quoting from the standard jury instructions, the trial court misinformed the jury that its decision on sentencing was essentially surplusage:

> Okay, ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the Defendant for the crime of first-degree murder. As you've been told, the final decision as to what punishment should be imposed is the responsibility of the Judge; however, it is your duty to follow the law that will now be given you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

15. Because the Caldwell errors committed by the prosecution and the trial court are, nearly in hoc verba, the errors found in Mann v. Dugger, supra, fundamental prejudice occurred. A resentencing is required.

CONCLUSION

Petitioner respectfully requests that this Court enter a stay of her execution scheduled for Tuesday, May 9, 1989, and grant the writ so as to allow a new direct appeal. In the alternative, Petitioner requests that her conviction and sentence of death be vacated. If fact resolution is necessary for the decision of this Court, Petitioner requests that a magistrate be appointed to take evidence.

Respectfully submitted,

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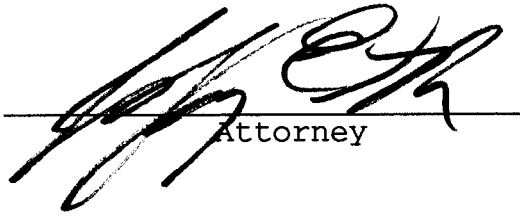
By: 
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing has been furnished by U.S. Mail/Hand Delivery to ROBERT A. BUTTERWORTH, Attorney General, Office of the Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida, 32301, this 6th day of April, 1989.

Attorney