IN THE SUPREME COURT OF FLORIDA

ANDREA HICKS JACKSON,

Appellant,

v.

CASE NO. 79,509

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 158541

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-1778

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CONTENTS
(Continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Appellee accepts Jackson's Statement of the Case and Facts with the following additions.

Detective John Bradley was called to the scene on May 17, 1983, to investigate the death of Officer Gary Bevel. During the course of his investigation, he had occasion to observe Andrea Hicks Jackson and testified that on May 17, 1983, he observed that Jackson was neither drunk nor high (TR 488). Although he smelled alcohol on her, she was not intoxicated to the point where she could not understand what was happening (TR 486-487). Detective Bradley testified that he had two officers take Jackson to the hospital to be checked after she complained about pains in her knee and her abdomen (TR 498, 506).

Ms. Gena Allen Roulhac testified that on May 16, 1983, she observed Jackson busting windows in Jackson's car (TR 511). She observed Jackson removed stuff from the car (TR 512-513), and saw Jackson speaking to Officer Bevel (TR 516). Since her family knew Officer Bevel, he came over to their house and asked them if they saw anything that evening (TR 516-517). Officer Bevel told her that Jackson had said someone had vandalized her car. Ms. Roulhac told Officer Bevel that she had seen Jackson do it (TR 517). Ms. Roulhac heard shots and ran to the window. When she got there she saw nothing but the police car (TR 518), and did not personally see the shooting (TR 521).

Anna Allen testified for the State that Jackson's car was parked twenty to thirty feet from their house. At approximately 6:30 pm, she heard glass breaking and saw a young woman smashing

the car windows with a crowbar (TR 527). She observed the woman pulling wires out from under the hood of the car; remove items from the car, and take off the auto tag (TR 527). Ms. Allen testified that she heard the woman screaming for someone to help her get the battery out of the car and identified Andrea Hicks Jackson as the person who was vandalizing the car (TR 528). Ms. Allen observed Jackson's behavior and testified that she did not appear to be intoxicated (TR 532). When Officer Bevel came over to their house to ask whether she had seen anything that evening, she observed Jackson go to the side of the patrol car. Jackson was walking normally. She alerted Officer Bevel who turned to Jackson and yelled "Hey lady, what are you doing in my car?" (TR 536). As Bevel approached the car he informed Jackson that she was being arrested for making a false report. Jackson then got violent with the officer. Jackson lunged at Bevel and started hitting him (TR 537). Jackson hit the officer and Officer Bevel grabbed Jackson's hands and tried to move her to the back door of the car (TR 538). Officer Bevel asked her to get into the car. Jackson said "she was not going to" (TR 539). A struggle ensued and Ms. Allen heard Jackson say, "You made me drop my damn keys" (TR 540). At this point, Jackson was sitting in the car with her feet hanging out. Ms. Allen testified that the officer was not on top of Jackson (TR 540). After hearing the statement, Ms. Allen saw Bevel back away to help pick up the keys. She then heard the first shot (TR 541). There was a pause after the first shot and then four more shots were heard. She observed Officer Bevel fall into the car and then saw Jackson push him over and

get out of the car and run behind the apartments nearby (TR 542-543).

Ms. Allen testified that Officer Bevel was not touching Jackson when he was shot. Moreover, Jackson had no difficulty running away after she shot the officer (TR 543). On cross-examination, Ms. Allen testified that she heard Jackson say, "Why are you manhandling me", but further observed that Officer Bevel never frisked nor handcuffed Jackson (TR 564). As soon as the officer got Jackson to the back seat she heard the statement about the keys, saw the officer backed away and then the shooting started (TR 565). Ms. Allen heard the keys drop and after the first shot was fired, observed that Officer Bevel fell towards Jackson into the car (TR 565-568). Officer Bevel was never on top or lying down on Jackson (TR 571).

Leanderaus Fagg's testimony was read to the jury. Mr. Fagg testified that on May 16, 1983, he heard unusual noises, specifically glass shattering from a car parked directly outside his bedroom window. He later heard and saw the shooting of Officer Bevel (TR 580). He positively identified Jackson as the person who shot the officer (TR 581). Mr. Fagg overheard the conversation between Officer Bevel and Jackson regarding the towing of Jackson's car. Jackson asked the officer where he car was, at which point Officer Bevel told her that he had "told her the car would be towed" (TR 583). In response, Jackson said to the officer, "I told you don't take my god damn car nowhere" (TR 583). Mr. Fagg heard Officer Bevel tell Jackson that he was arresting her for false information. He attempted to place her

into the police car (TR 584). Jackson responded, "You ain't taking me anywhere", and Mr. Fagg heard her yell, "You made me drop my keys" (TR 584-585). Jackson was in a sitting position with her feet hanging out in the back seat of the patrol car. Officer Bevel was trying to place her in the patrol car. Mr. Fagg observed Officer Bevel step back and the first shots were fired. Officer Bevel fell forward into the car. Jackson then slid out from underneath the body and ran to the house across the street from his location (TR 585-586). Mr. Fagg testified that Officer Bevel at all times acted as a gentleman and never noticed anything improper or hostile or any vulgar conduct by the officer (TR 587). On redirect examination, Mr. Fagg testified that the struggle occurred between the officer and Jackson after Jackson was told that she was under arrest and after the officer tried to place her into the police car (TR 593).

Mabel Coleman also observed the shooting on May 17, 1983. She testified that she saw Jackson beating up on the car; taking the license tag off; opening the trunk and taking stuff out of the car (TR 597-599). Ms. Coleman observed that Jackson did not appear to be drunk (TR 599), and heard Jackson yelling after her car had been towed, "Where is my god damn car?" (TR 615). On the third time Jackson returned from the house, Coleman saw Jackson had a gun, which was placed in Jackson's pants' pocket (TR 616). Jackson, in response to the officer telling her that she had to go downtown, said she was not going anywhere (TR 616-617). Officer Bevel then told Jackson she was under arrest and to please get into the car (TR 617-618). After Jackson said she was

not going, Ms. Coleman heard Jackson say something about keys. She saw the officer reach down and, then, heard shooting, specifically five shots (TR 619-620). Coleman testified that Bevel was never on top of Jackson prior to the shooting. The officer fell forward after he was shot. Jackson pushed him aside and left the crime scene (TR 622).

Ms. Coleman further testified that later that morning she saw Jackson return to the crime scene. Jackson did not act drunk (TR 624). When the police arrested Jackson, Ms. Coleman heard her say that she "didn't kill no police" (TR 625). On cross-examination, Ms. Coleman stated Jackson did not seem high on drugs when she was arrested (TR 658). She positively saw Jackon with a gun when Jackson returned outside for the third time (TR 664).

Officer Burton Griffin, who went to the scene of the disturbance, testified that he had a brief conversation with Jackson. He asked her to get proof of ownership of the car, Jackson returned to the apartment and retrieved the registration papers (TR 670). Although he smelled a faint trace of alcohol on Jackson's breath, he did not believe she was drunk. Jackson was calm and acted polite. She had no difficulty walking or talking (TR 671-672). Moreover, Officer Bevel acted like a gentleman at all times (TR 673).

The State also called Adam Gray, who worked at Rocket Motors (TR 681). Jackson purchased her Buick from him and on May 16, 1983, came to Rocket Motors to complain about car trouble. When told she was going to have to pay for repairs, Jackson told

Gray that she would rather drive the car over the Main Street Bridge than pay any more money to have it fixed (TR 683). Mr. Gray observed that Jackson was not intoxicated nor high on drugs (TR 684).

Shirley Freeman testified that she saw Jackson on May 17, 1983, when she arrived at her house at approximately 1:30 am, covered with blood (TR 733-734). Jackson indicated that she needed her clothes washed to get the blood out and stated that she had "just shot a cop" (TR 735). Jackson told Freeman that she was "not going back to jail" and that was the reason why she did it (TR 735). Freeman observed that Jackson was sober and was not high. She further observed that Jackson had a gun and took the gun with her when she left the apartment (TR 736). On cross-examination, Ms. Freeman again affirmed that Jackson was sober, although she had been drinking (TR 736). Jackson became hysterical when she started talking about shooting the cop and said that she was sorry it happened (TR 739). Jackson asked Ms. Freeman to call the hospital to find out whether the officer had died and cried when she found out he had (TR 739). Ms. Freeman testified Jackson had told her that she, Jackson, was abused as a child (TR 740). Jackson also told her that the officer leaned on Jackson after he was shot (TR 741).

Carl Lee, a cab driver, picked up a fare on May 17, 1983, around 4:15 or 4:20 am. He identified Jackson as the person he picked up and testified that she seemed okay and was not high or drunk (TR 753-756). On cross-examination he testified he asked Jackson whether she had money before he took the fare and Jackson appeared normal to him (TR 757, 760).

When Jackson was arrested by Officer Dipernia, she went wild and started kicking and biting and fighting ferociously (TR 784-785). She was searched and cuffed, however, no weapon was found (TR 785). Jackson said she "did not shoot no policman" and did not appear to be high or intoxicated (TR 787). Officer Dipernia testified Jackson seemed "mean" like she had a grudge against policemen (TR 787). He observed that when he first saw her, she was hiding behind some garbage cans in a "fetal position" (TR 790).

The State rested its case (TR 791).

Dr. Mutter, a forensic psychiatrist, examined Jackson on January 29, 1988. He performed a hypnotic regression on Ms. Jackson to determine her memory with regard to the homicide (TR 802). He found Ms. Jackson competent and sane (TR 833, 834). When asked about hypnotically refreshed memories he noted that there was a real controversy with regard to their usefulness. Such testimony was precluded from courtrooms (TR 835-836).

Dr. Mutter's assignment was to determine "what Jackson was thinking at the time of the crime" (TR 839). He admitted that hypnosis is only as good as the hypnotist doing it and that it is subject to suggestive influences (TR 845). Dr. Mutter further observed that people under hypnosis are always in control and are not under the power of the hypnotist, although they may be subject to suggestive inquiries (TR 848).

In reviewing Jackson's background prior to the hypnosis session, Dr. Mutter observed that no mental disturbance was present in her background (TR 868), and, informed Jackson that he

was there to see her about the reasons for her inability to remember the crime (TR 869). He uncovered that Jackson was born in Jacksonville, Florida, the eldest of four children. She had a tenth grade education and had married at age twenty. She had two sons, age nine and eight, and during her lifetime had several head injuries. She had no history of prior psychiatric illness (TR 871-872). Jackson used drugs including marijuanna, LSD, Mescaline, Quaaludes and drank (TR 872). He observed that she seemed to be a person who avoided conflicts, however, when she got mad she would curse and have temper tantrums (TR 873-874). Jackson had a prior record for writing bad checks and a prior assault (TR 874). She performed various jobs from digging ditches to domestic work and seemed to have a good ability to conceptualize abstract thoughts (TR 875-876). In detailing the events leading to the murder of Officer Bevel, Jackson told Dr. Mutter at daylight on the day of the murder, she was at the Silver Star bar drinking and smoking (TR 876). Later that day she had problems with her car and smashed it (TR 877). When the police showed up, Jackson recalled speaking to the police and then the car was towed away. She recalled reading the police report and the attempted arrest but then her memory went blank (TR 877). She recalled that she was under the influence of alcohol and drugs having drunk malt beer and taken pills that day and did recall an altercation. She remembered lying to the police and the police telling her she was under arrest for making a false statement. She remembered nothing after that (TR 878). After the altercation, she told Dr. Mutter she recalled being in

a frenzy, running to a friend's house, and getting out of her clothes. She knew she had shot someone but did not know why (TR 878). Dr. Mutter testified Jackson told him that she had no conscious recollection of pulling the trigger but recalled returning to the crime scene and being placed under arrest (TR 879-880).

Jackson was then hypnotized and the questions and answers which followed were videotaped (TR 887-888). Under hypnosis, Andrea Jackson told Dr. Mutter that she wanted to get high that day and had been drinking beer and gin and Chevis Regal. She went to the Silver Star Bar where she got some T's and Blue's (downers) and Black Beauties (stimulants) (TR 879). Later that day she shot up with her friend Edith and discussed the problems she was having with starting her car (TR 898). She got upset and started smashing the windows. Later the police arrived and had the car towed. Jackson recalled reading the police reports and further informed Dr. Mutter that she knew she was going to be arrested because she had lied about the car (TR 899). When she tried to walk away, the officer grabbed her by the arm and she told him to "get his hands off her, I'm not going anywhere" (TR 899). She recalled repeatedly telling the officer to let her go (TR 899). Under hypnosis she stated the officer blocked her way and kept telling her to get into the car (TR 900). The officer tried to push her head down into the car, at which point she was pushed on her back. Her car keys fell and said to the officer, "You made me drop my keys". He leaned over her and suddenly she felt something warm all over her body. The officer was on top of

her and she had to slide out from under him. She called Joy and asked her to pick her up. She remembered that the gun was in her hand and she put it in her waist band. She then threw it into the woods, and then retrieved it and took it with her (TR 901). She recalled wanting her friend Joy to call the hospital to find out and "make sure the officer was okay" (TR 903).

Further inquiry by Dr. Mutter revealed that Jackson believed the officer was hurting her neck and arm but could not remember anything more (TR 909-910). She stated he grabbed at her and the buttons on her blouse popped. The officer tore her clothing. Jackson thought the officer was trying to rape her and recalled feeling her pistol, bringing it out and shooting (TR 912-913). She stated under hypnosis that she was scared and wanted to get out. She revealed she was first raped by her step-father at age ten (TR 914-915). She said that the police officer was all over her and would not get off (TR 915). The hypnosis session ended (TR 916).

Dr. Mutter opined that Jackson knew what she was doing, she knew it was wrong, she felt guilty but did not want to remember because of her traumatic childhood (TR 918). Jackson perceived that she was being assaulted and that perception was a result of a flashback of being raped at age ten. He speculated that she was responding out of fear and was under extreme emotional distress. Although she knew what she was doing was wrong, it was a painful circumstance for her. She was suffering from post-traumatic stress syndrome (TR 919-921). Dr. Mutter observed that Jackson was under stress and that "it really interefered with her

really thinking about what she was doing", she was in a state of panic (TR 925). Although she knew she did something wrong and ran away and wanted to rid the blood on her clothing, the doctor perceived no significance to these factors (TR 926-927). His explanation of Jackson's possession of a gun was for her protection. Jackson did not want to recall why she shot the officer (TR 930, 931). He believed that Jackson's ability to appreciate the criminality of her act was impaired and that she was under extreme emotional disturbance at the time of the crime. He observed that Jackson suffered a grave misconception of the officer's actions, which explained her actions based on her earlier experiences (TR 933).

On cross-examination, Dr. Mutter admitted that, if, it was Jackson's idea to wash her clothing that was consistent with her getting rid of evidence (TR 934). Dr. Mutter specifically stated he was not making any determinations as to whether the crime was cold, calculated or premeditated. He believed that was a jury question (TR 939). Dr. Mutter further observed that Jackson never told him about her statement after the murder that she was not going back to jail (TR 950). Jackson never mentioned to him anything about the previous rape or believing that she was going to be raped until after defense counsel handed him a note asking the doctor to ask Jackson about it (TR 956). In her pre-hypnosis testimony, Jackson never mentioned her childhood abuse (TR 957). Dr. Mutter admitted that the DSM-4R which was yet to be published would not contain recognition of the battered woman syndrome (TR 967). Dr. Mutter perceived it might have been important to know

that Jackson had said, immediately after the murder, that she "did not want to go to jail" (TR 967). Dr. Mutter thought it was not logical to kill just because Jackson was being arrested for a false statement (TR 970).

The defense next called David Lee, who, on May 17, 1983, at approximately 1:30 am, observed a young black woman with her hair messed up and her clothing disheveled, along the highway (TR 988). Mr. Lee testified that he thought someone had molested her and allowed her to get into her truck (TR 89). He observed that Jackson smelled of alcohol (TR 990), however, her speech was not slurred and she did not appear to be drunk (TR 994).

Patrolman George Barge testified for the defense that he was instrumental in arresting Jackson in 1983, when she returned to the crime scene at approximately 4:30 or 4:45 that morning (TR 999). When he attempted to grab her, she started to fight (TR 1018), and he finally hit her to stun her in order to handcuff her (TR 1018). He observed that Jackson was kicking and biting and fighting with all her might. When she was finally subdued, she screamed that she "didn't kill a policeman" (TR 1019). It was his observation, on cross-examination, that she was not impaired by either drugs or alcohol when arrested, although he did detect alcohol on her breath (TR 1020-1022).

Joy Shelton, Jackson's friend, testified that she saw Jackson on May 16, 1983, hours before the murder (TR 1027). She observed that she had never seen Jackson use drugs or drunk. When Jackson called her about the car, Jackson sounded upset. When Shelton saw Jackson, Jackson told her that she had "killed a

cop" because he was "trying to arrest her". Jackson told Ms. Shelton that when the officer tried to put her into the back seat, she shot him (TR 1032). While at Shelton's house, Jackson took off her clothes, had them washed and took a shower (TR 1035-1037). Someone called the hospital about the police officer. Jackson was upset when she found out the officer was dead (TR 1038). Jackson said that the officer had tried to rape her (TR 1038). Jackson also told Ms. Shelton that she did not want to go to jail and was not going to jail again (TR 1039). Ms. Shelton gave Jackson money for a cab and observed that Jackson took the gun with her when she left (TR 1040). Later that day, a police officer came by and told Shelton that Jackson had shot at the cab driver (TR 1041). On cross-examination, Ms. Shelton testified she was close friends with Jackson and she had never seen Jackson do drugs. She recalled that Jackson was upset about her car and noted that Jackson said she did not want to go back to jail (TR 1044-1046). Jackson told her that she, Jackson, shot the cop because he was on top of her (TR 1047). While the clothes were being washed, Jackson told Ms. Shelton that she was "going out of town" (TR 1048).

Richard Washington testified that he was with Jackson on May 16, 1983, at 10:30 am, at King's Liquor Bar. He bought her two drinks (TR 1051-1052), and in his view she acted as if she might be high (TR 1052). On cross-examination, Mr. Washington admitted that between 10:30 am and 1:30 pm, Jackson only had two drinks (TR 1056).

Kevin Hicks testified in behalf of Jackson, detailing her background. Mr. Hicks is Jackson's brother (TR 1058). He said Jackson was the oldest of four children and was thirty-two years old at that time. She was smart but a mischievious child (TR 1060). She changed the type of friends she had in the seventh grade and started getting into trouble. By ninth grade, she was probably using drugs and had become a behavioral problem (TR 1061-1062). He observed that his sister became mean and kept getting meaner (TR 1063). Their mother made Jackson quit basketball when Jackson got into trouble. Jackson would fight with their mother (TR 1064). When Jackson was still a teenager, he found drug paraphanalia in her room, specifically a spoon and a hyperdermic needle (TR 1066). Mr. Hicks recalled on one occasion, long before Jackson's children were born, Jackson's husband, Shelton, had beaten her up (TR 1067). When she was fourteen or fifteen years old, she ran away with her husband. Jackson and her step-father, Eddie Brown, got into arguments all the time (TR 1068-1071).

Edith Croft testified she knew Jackson for twenty-five years (TR 1075). She was Jackson's husband's sister. Jackson told her that her step-father had sexually abused her as a child (TR 1076). Ms. Croft further observed that Shelton and Jackson fought and had arguments. She had used drugs with Jackson, including intravenous drugs, marijuanna and alcohol (TR 1078). On May 16, 1983, Croft and Jackson started out using drugs and drinking that day. Jackson was separated from her husband and was staying in a hotel on Phillips Highway (TR 1081-1083). They

went to the King's Liquor Store and had lots of drugs that day (TR 1082-1083).

When Ms. Croft saw Jackson later that night after the murder, Jackson said, "they are mad because she killed an officer". A few minutes later, the police arrived and Jackson was placed under arrest (TR 1086). On cross-examination, Ms. Croft testified that both she and Jackson were high that day and although she was high she still knew what was happening (TR 1088). Ms. Croft testified that in May 1991, she signed an affidavit but could not recall signing it. She further recalled that the affidavit was drafted by Jackson's defense counsel. She could not remember the exact details of their drinking together that day. Ms. Croft knew nothing about seeing Richard Washington on May 16, 1983 (TR 1093-1096).

Mary Bloomquist, a nurse at the jail, testified that on May 17, 1983, she interviewed Jackson. The information obtained reflected that Jackson admitted to heroin use and cocaine use (TR 1108-1109), and Jackson admitted to once attempting suicide (TR 1109). When asked about allergies, Jackson indicated that she was allergic to "policemen" (TR 1110). Jackson indicated that she had bad headaches and blackouts and had tried to blow her head off with an unloaded gun (TR 1113). Jackson admitted using drugs. The record indicates that the police beat her up at the time of her arrest (TR 1114). When brought there after her arrest, Jackson appeared sleepy and testified she had been drinking and had no control of her actions (TR 1114). Ms. Bloomquist found needle marks on Jackson's left arm (TR 1117).

Dr. Ernest Miller, a psychiatrist, evaluated Jackson in May 1990. In a one hour session, he evaluated Jackson to determine her competency. He determined Jackson was competent to stand trial (TR 1125). He found that at the time of the shooting, Jackson was in a highly agitated state and was not thinking clearly (TR 1125-1126). He opined that she might be suffering from either chemical amnesia or recent blows to the head which caused memory problems (TR 1133). When Jackson shot the police officer, her thought process was at a basic emotional level. He did not believe she could have formulated the cold, calculated and premeditated intent to commit the murder (TR 1135). Based on her condition and her background it was his observation that Jackson suffered from a misconception of the arrest (TR 1138), that her mental capacity was impaired and that she was under extreme mental disturbance (TR 1139).

On cross-examination he noted that she was found competent and further observed that, if, she purposefully dropped her keys, that would lend credibility to the likelihood that she committed the murder in a cold, calculated and premeditated manner (TR 1140-1144). Dr. Miller testified that he did not agree with Dr. Walker's report nor Dr. Macaluso's report with regard to Jackson's state (TR 1148). Dr. Miller observed that if Jackson actually started taking her belongings out of the car that was evidence of someone who had a rational thought pattern (TR 1151). In observing and reviewing the hypnotic regression session by Dr. Mutter, it was Dr. Miller's observation that the questions used were leading and suggestive (TR 1152). Dr. Miller did not find

post-traumatic stress syndrome (TR 1152). Dr. Miller observed that, if the facts were as portrayed by the State, it was his view that Jackson was acting in a logical, rational progression (TR 1154).

Dr. Lenora Walker, a clinical and forensic psychologist specializing in the study of women and family violence, examined Jackson on March 29, 1989, for the first time (TR 1170-1173). Dr. Walker's testimony discusses the battered woman syndrome and family violence and, her belief that battered woman syndrome is a sub-category of post-traumatic stress syndrome (TR 1187-1235).

After examining Jackson, it was her opinion that at the time of the offense, Jackson suffered from battered woman syndrome (TR 1236). Dr. Walker interviewed Jackson on three separate occasions in March 1989, April 1991, and September 1991 (TR 1246). She reviewed the videotapes of the hypnotic regression session; police reports and other experts' testimony. She also had available Dr. Larson's reports from 1983 and spoke with him with regard to his evaluation of Jackson. She spoke with family members telephonically (TR 1248), and spoke with Jackson's husband (TR 1248).

Dr. Walker observed that Jackson was the oldest child of four and that Eddie Brown was her step-father (TR 1250-1251). She was abused at home starting at age five when Brown showed up. Jackson witnessed abuse by Brown to family members (TR 1251).

Jackson also told Dr. Walker that she was sexually abused by her step-father starting at age eight or nine and at ten or eleven she was raped by him (TR 1252). She also was sexually

abused by other playmates of her mother (TR 1252). Dr. Walker observed that Jackson was a good athlete and used sports to cope with the sexual abuse at home. Jackson became more aggressive (TR 1263). Jackson also started using alcohol and drugs to dull the pain of the sexual abuse (TR 1264). Her medical history reflects that Jackson developed migraine headaches and had vaginal infections as a result of the sexual abuse (TR 1265). The rapes ended when Jackson left home and went with her husband Shelton (TR 1269). Jackson apparently also told Dr. Walker that Shelton knew about the rapes because she sometimes "would have flashbacks with Shelton." (TR 1270). Although Shelton denied ever beating her, he did admit that he and Jackson had fights (TR 1271).

Jackson married Shelton in October 1977, and as a result of that union, two children were born (TR 1272). Although she tried to hide the violence in the household from her children, Jackson ultimately got into trouble for writing bad checks because they were so poor (TR 1273-1274). Jackson told Dr. Walker that she bought a firearm in 1983 (TR 1274). Dr. Walker opined that although Jackson still loved Shelton, it was typical of a battered woman to buy a gun and carry it around. Jackson said she was afraid of Shelton (TR 1275). It was Dr. Walker's opinion that Jackson fits all of the syndrome's factors. This was premised on Jackson's statements that Shelton would sexually abuse Jackson in the back seat of cars and that Shelton always wanted sex. Jackson complained because sex was often painful because Shelton paid no attention to her needs. As a result, Jackson would have flashbacks (TR 1276-1277).

Dr. Walker recounted how in late 1982, Jackson left Shelton and started living sometimes with her mother, sometimes with Joy and sometimes in hotel rooms (TR 1286). Based on a combination of drugs and the post-trauma syndrome, Dr. Walker believed Jackson could not recall everything that happened the day of the murder (TR 1288). Although Jackson was able to recall details leading up to the shooting even to the point of returning to the apartment and getting the car registration (TR 1293), Dr. Walker concluded that when Jackson came back out of the apartment and saw her car gone, she "did not recognize the police car as a police car." (TR 1294). Jackson did not even recognize the police officer as a police officer (TR 1295). The "flashback" began and Jackson "experienced a rape". Dr. Walker stated Jackson told the officer to stop and not to touch her. Jackson heard her blouse rip, heard the buttons pop and felt her breasts being touched. The officer had his hands between her legs and, she heard her keys drop (TR 1295). When the officer fell on top of her, Dr. Walker surmised that Jackson thought he had ejaculated because she felt a warm liquid on her (TR 1295). Dr. Walker observed that Jackson had no actual memory of the shooting and only after she tried to wiggle out from under the officer did she begin to realize what had happened. Jackson's next memory was going to the telephone booth and calling Joy (TR 1296). When Jackson finally saw Joy, she realized she "shot a police officer" (TR 1297).

In Dr. Walker's opinion, Jackson's emotional reasoning interefered with her thinking and she suffered from battered

woman syndrome and rape trauma syndrome (TR 1304-1308). Dr. Walker believed that at the time of the shooting, Jackson had a flashback and thought she was going to be sexually abused. Dr. Walker concluded that the murder could not be cold, calculated and premeditated. And, Jackson could not conform her conduct to the requirements of law because she suffered from child and sexual abuse, drug dependency and thought the police officer was raping her (TR 1310-1312).

On cross-examination, Dr. Walker admitted that the battered woman syndrome was not included in the DSM-3R, and that in most cases where she testifies, it is the husband or boyfriend who has been killed (TR 1313-1322). Although some women kill people due to flashbacks, especially if that person is "hypersensitive" (TR 1323), Dr. Walker was unable to answer the question of how many cases she had seen that fell within the aforenoted category (TR 1324). Dr. Walker also admitted she was applying her theory in a "new direction" (TR 1324). It was Dr. Walker's opinion that Jackson was improving and that she no longer was a "time bomb" because she had had counseling (TR 1225). Jackson would no longer have flashbacks because she could now control her reactions (TR 1326). Dr. Walker believed that Jackson was not sane at the time of the murder, did not know the difference between right and wrong and could not conform her conduct to the requirements of law based on the drug usage, her alcohol usage and the post-traumatic syndrome suffered at the time of the crime (TR 1328). Dr. Walker admitted that this assessment was contrary to Dr. Mutter's and Dr. Macaluso's conclusions (TR 1329).

In reviewing the facts of the case it was Dr. Walker's view that Jackson's anger about her car and having to pay repair bills were not known to Dr. Walker when she made her assessment (TR 1333-1334). In Dr. Walker's view, Jackson had a flashback when the officer grabbed her (TR 1343), she believed Jackson rather than testimony of independent witnesses who saw the murder (TR 1347). Jackson apparently did not mention to Dr. Walker that statements were made that Jackson wanted to leave town (TR 1349). Dr. Walker also noted that Jackson had a confused sexual identity and had engaged in relationships with women, as well as men, and had been involved sexually with Joy (TR 1368). Dr. Walker observed that when Jackson heard her blouse rip Jackson thought she was being raped. Dr. Walker pointed to Jackson's blouse which had a tear in it and stated this clearly indicated that there was evidence to support Jackson's belief (TR 1348).

A number of other witnesses were called by the defense, including school personnel and medical personnel who detailed Jackson's school background and medical history. The affidavits of Marvin Hicks and Barbara Hicks were read to the jury (TR 1442-1444). The defense rested at (TR 1450).

On rebuttal by the State, John Bradley was recalled and testified that the "tears" in Jackson's shirt were caused by lab technicians taking samples from the shirt to do tests (TR 1452).

The trial court, in his findings supporting the sentence of death, held:

> The court has reviewed an advisory opinion from the jury, during a resentencing, wherein the second jury also recommended to the court that death should be the penalty imposed.

> This recommendation was by a vote of 7 to 5.
>
> The jury's advisory opinion is entitled to be given great weight. McCrae v. State, 395 So.2d 1145 (Fla. 1980); Lewis v. State, 398 So.2d 432 (Fla. 1981).
>
> The court has deliberated the jury's conclusions for many weeks, weighing the advisory sentence and reviewing the evidence to determine the presence of aggravating and mitigating circumstances. The court has held additional hearings for further presentation of mitigation and has thereby arrived at a reasoned judgment as to the appropriate sentence to impose.
>
> The facts of this case have been outlined previously in this court in February of 1984, and by the Florida Supreme Court. Jackson v. State, 498 So.2d 406 (Fla. 1987); Jackson v. Dugger, 547 So.2d 1197 (Fla. 1989); and reviewed by the United States Supreme Court in Jackson v. Florida, 483 U.S. 1010, 97 L.Ed.2d 746, 108 S.Ct. 11 (1987).

(TR 380).

The trial court, after setting forth the aforenoted, found two statutory aggravating factors applicable:

> (1) The victim of the capital felony was a law enforcement officer engaged in the performance of his official duties.
>
> It is clear that this was a killing of a uniformed officer engaged in the lawful execution of his duties. Florida Statute 921.141(5)(j).
>
> (2) The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without pretense of moral or legal justification.
>
> The evidence indicates this defendant was armed throughout this entire event or armed herself when she went to her home to obtain the papers relating to the car. It further indicates that when she produced the pistol on the unexpecting officer, she made no attempt to disarm him or escape without the

> necessity of deadly force, but decided to shoot six (6) times at point blank range into his body. This decision was as coldly, and premeditatedly done as was her removal of the battery, spare tire and license plate from the just-damaged car. For this, there can be no moral or legal justification.
>
> Additionally, the defendant had the presence of mind while struggling with the victim to devise a method to catch him off guard, i.e., the statement that she had dropped her keys. This record does not show a woman panicking in a frightening situation, but rather a woman determined not to be imprisoned who fashioned her opportunity to escape and then acted accordingly. Jackson v. State, 498 So.2d at 406 (Fla. 1987).

(TR 380-381).

The court then went on to discuss statutory and other mitigating factors as follows:

> The court appointed numerous expert witnesses to assist in the preparation of the defendant's mitigation.
>
> It was established by a preponderance of evidence that defendant had a difficult childhood that included sexual abuse from a step-father.
>
> As an adult, the defendant suffered domestic violence and abused drugs and alcohol.
>
> (1) The crime for which the defendant is to be sentenced was committed while under the influence of extreme mental or emotional disturbance.
>
> The evidence introduced at trial would indicate the defendant was upset with her not yet paid for automobile and with her arrest. Her apparent intent with the automobile was to have it returned to the financing agent minus those items of value she removed. Her intent as it relates to the arrest is clear. Both these factors indicate a course of action inconsistent with extreme mental or emotional disturbances. The defense argued to the jury that the murder was a product of a flashback relating to a childhood sexual

> assault. The court is unable to find that the murder had any relationship to her childhood regardless of how pitiful that childhood may have been. As her brother testified, "as she got older, she got meaner."
>
> (2) The capacity of the defendant to appreciate the criminality of her conduct or to conform her conduct to the requirements of law was substantially impaired.
>
> The defense argued that this factors applies due to defendant's (1) flashback or post-traumatic stress disorder, (2) her self-ingested use of drugs and alcohol, (3) her history of domestic violence.
>
> It is this court's finding that the trial evidence negates this as a statutory mitigating factor.

(TR 381-382).

As a result of the foregoing, the trial court held "It is clear from a reasoned weight of the evidence that two aggravating factors exist and that while there is substantial evidence of mitigation relating to her background, it is not sufficient to diminish the compelling aggravating circumstances which require the imposition of the death penalty. . . ." (TR 382) (emphasis added).

SUMMARY OF ARGUMENT

POINT I: The trial court correctly concluded based on the evidence presented that the murder was committed in a cold, calculated and premeditated manner.

POINT II: The trial court properly weighed the eidence in mitigation, but rejected the two statutory mitigators proposed because the evidence presented clearly negated their existence.

POINT III: Even assuming without conceding that one of the two statutory aggravating factors might be found invalid, proportionality would dictate that the sentence of death is appropriate herein, where, Jackson murdered a police officer pursuant to §921.141(5)(j), Fla.Stat.

POINT IV: The trial court did not violate Jackson's rights by disallowing the taped video of Dr. Mutter's hypnotic regression session of Jackson to be played to the jury.

POINT V: §921.141(5)(i), Fla.Stat., is neither a constitutionally vague aggravating factor nor is the standard jury instruction read impermissibly vague, thus failing to guide the jury pursuant to Espinosa v. Florida, 120 L.Ed.2d 854 (1992).

POINT VI: The trial court did not err in failing to instruct the jury regarding the merger of §921.141(5)(e) and §921.141(5)(j). Any error of course would be harmless beyond a reasonable doubt, however.

POINT VII: The trial court properly found §921.141(5)(j), Fla.Stat., proven beyond a reasonable doubt and applicable to Jackson's case.

ARGUMENT

POINT I

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER

Jackson first argues that the trial court erred in finding that the murder was committed in a cold, calculated and premeditated manner without any moral or legal justification for the killing, pursuant to §921.141(5)(i), Fla.Stat. His argument is premised on a number of notions: (1) that at the time of the shooting Jackson was under the influence of drugs and alcohol, had a flashback and misperceived the struggle with Office Bevel as an attempted rape; (2) there was no plan to kill, and (3) she had a pretense of moral or legal justification for the killing. The State would submit that as to each of the aforenoted bases for not supporting a CCP aggravating factor, the record refutes Jackson's contention.

A. The influence of drugs and alcohol, flashback and misperception of an attempted rape

The State has presented a detailed accounting of the facts and circumstances developed at the resentencing with regard to what actually transpired on May 17, 1983. All the witnesses that testified at the resentencing stated that Jackson was not drunk nor high, although there was evidence that she had been drinking. Officer Griffin, who was one of the last persons who spoke to her prior to the shooting, testified that although there was a faint trace of alcohol on her breath, she did not appear drunk or high (TR 671). In fact, he recalled that she was calm and polite and

had no difficulty walking or talking or providing the officers with the information they requested as to the ownership of the car (TR 672-673). Witnesses who saw Jackson both before the murder and immediately thereafter testified that she did not appear to be drunk or high. Shirley Freeman testified at approximately 1:30 am, that Jackson said she had shot a cop and the reason she shot the cop, was because she was not going back to jail (TR 735). Ms. Freeman said Jackson was sober. Jackson was not high and Jackson had a gun. On cross-examination, Shirley Freeman said Jackson asked her to call the hospital to find out if the officer had died and when Ms. Freeman told her the officer had, Jackson cried and acted hysterical (TR 739-740).

Even defense counsel witness David Lee, who picked Jackson up right after the murder, testified that although she seemed messed up (TR 988), and he smelled alcohol on her breath (TR 990), her speech was not slurred and she did not appear to be intoxicated (TR 994).

Joy Shelton, who also testified for the defense, stated that Jackson told her that she had killed a cop (TR 1033). She said Jackson did not do drugs or drink (TR 1027). Joy Shelton testified that Ms. Freeman washed Jackson's clothes for her, ridding them of the blood, Jackson changed clothes, took a shower and drank some vodka (TR 1037).

Richard Washington also testified in behalf of Jackson. His testimony reflected that she had only two drinks from 10:30 am, to 1:30 pm, when she was with him on May 16, 1983 (TR 1054-1056).

With regard to whether Jackson had a flashback or misperceived that the struggle with Officer Bevel was an attempted rape, all the witnesses who saw the murder testified that the officer asked Jackson to please get into the back seat of the patrol car because he was placing her under arrest. Jackson said she was not going to go and only then did he move her towards the back of the car. He made her sit down on the back seat of the passenger side of the car. Jackson told Officer Bevel that he made her drop her keys; Officer Bevel stepped back, and in that instance, Jackson pulled the gun out from her waistband and fired six shots. The officer fell foward on top of Jackson. She wiggled out from under his body, got out of the car and ran from the scene.

The facts and circumstances surrounding the aforenoted events were not negated by the testimony of Dr. Mutter, or Dr. Walker, or Dr. Miller who all were not there. In fact, Dr. Miller testified that questions surrounding the rape asked by Dr. Mutter during the hypnotic regression session were leading and suggestive (TR 1152). Dr. Miller found Andrea Hicks Jackson to be competent and her conduct purposeful if she intentionally dropped the keys (TR 1140-1144). Dr. Miller testified he disagreed with Dr. Walker's report and Dr. Macaluso's report and found no evidence of post-traumatic stress syndrome (TR 1152). Dr. Miller testified that if the facts were as portrayed by the State's witnesses, there seemed to be a logical rational progression to Jackson's behavior the day of the murder (TR 1154).

Dr. Walker, for example, testified that Jackson suffered from battered woman syndrome. This diagnoses was premised upon what Jackson told her about Jackson's prior history of sexual abuse and the facts and circumstances leading up to the shooting. Dr. Walker admitted that she believed Jackson's account of what Jackson remembered rather than the other witnesses who actually saw the murder. It was Dr. Walker's belief that Jackson believed she was being raped because she heard her blouse being ripped. When confronted with the physical evidence that Jackson's blouse was not ripped, Dr. Walker pointed to a tear in the blouse (TR 1347-1348). The State presented evidence through the rebuttal testimony of Officer Bradley that the tears in Jackson's blouse occurred when holes were made to take samples of the blouse by lab people for tests (TR 1452). Clearly, the cross-examination of Dr. Walker, her methods and her results totally discredited her direct testimony.

In Rogers v. State, 511 So.2d 526 (Fla. 1987), the court defined with more particularity what was intended by the CCP aggravating factor. The court therein held that in order to have CCP, the State must prove there was a careful plan or prearranged design to kill, specifically, evidence to support heightened premeditation. Jackson points to Rogers for the proposition that in the instant case, the facts do not bear out that Jackson had the requisite heightened premeditation.

Pointing to Rivera v. State, 545 So.2d 864 (Fla. 1989); Hill v. State, 515 So.2d 176 (Fla. 1987), and, presumably, Rogers, supra, Jackson argues the shooting of Officer Bevel cannot stand.

First of all, the facts in Rogers, supra, are distinguishable from the case sub judice. Therein, the shooting of Smith occurred after an attempted robbery of the Winn Dixie grocery store. Mr. Smith was shot in the alley when he tried to escape during the botched robbery. The court reasoned that "while there is ample evidence to support simple premeditation, we must conclude that there is insufficient evidence to support the heightened premeditation described in the statute, which must bear the indicia of 'calculation.'" 511 So.2d at 533. Similarly, in Rivera v. State, supra, the murder occurred when the defendant struggled with the police officer and shot the officer with the officer's gun. Equally, in Hill v. State, supra, the court reasoned that the homicide therein:

> . . . indicates the 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, we conclude as we did in Rogers v. State, (cite omitted) that there is insufficient evidence to support the heightened premeditation necessary to apply this aggravating circumstance.

515 So.2d at 179.

In the instant case, however, Jackson told Joy Shelton immediately after the murder that the reason that she killed the cop was because she was not going back to jail. The record reflects she was armed. In fact, Mabel Coleman testified that when Jackson returned outside for the third time, after her car had been towed, Coleman saw Jackson put the gun in her pants'

pocket (TR 616). Immediately thereafter, Officer Bevel told Jackson they were going to have to go downtown, that she was being placed under arrest and that she should get into the police car (TR 617-618).

In Valle v. State, 581 So.2d 40, 48 (Fla. 1991), this Court, in a very similar case, upheld the CCP factor. The facts were that Valle, stopped for a traffic violation, walked back to his vehicle, while Officer Pena was running a license check, then returned to the patrol car and fired a single shot at the officer, killing him. In affirming the trial court's determination that Valle's conduct was cold, calculated and premeditated, this Court recited the trial court's order:

> Approximately eight minutes elapsed between the initial stop and the murder of Officer Pena. After the defendant heard the information about the car come on the radio, he returned to his car and told mr. Ruiz that he would have to waste the officer. He got the gun and concealed it along the side of his leg and slowly walked back to the car. He fired at Officer Pena from a distance of 1½ to 3 feet from the officer, hitting him in the neck. He purposely said "Officer" in order to get a better shot. He then stepped back and shot at Officer Spell. Although he aimed at his head, Officer Spell was able to quickly turn, causing the bullet to strike him in the back. Approximately 2 to 5 minutes elapsed from the time the defendant left Officer Pena's car to get the gun and slowly walk back to shoot and kill Officer Pena.
>
> The Court finds that these actions establish not only a careful plan to kill Officer Pena to avoid arrest, but demonstrate the heightened premeditation needed to prove this aggravating circumstance. This was,

> without any doubt, an execution-type murder. It was committed without any pretense of moral or legal justification. Officer Pena did nothing to provoke or cause the defendant's actions. This aggravating factor has been proven beyond and to the exclusion of every reasonable doubt. See Jackson v. State, 498 So.2d 406 (Fla. 1986); Eutzy v. State, 458 So.2d 755, 757 (fla. 1984); Jones v. State, 440 So.2d 570, 577 (Fla. 1983).
>
> We believe these facts were sufficient to sustain a finding that the murder was cold, calculated, and premeditated. See also Swafford v. State, 533 So.2d 270 (Fla. 1988), cert. denied, 489 U.S. 1100, 109 S.Ct. 1578, 103 L.Ed.2d 944 (1989); Phillips v. State, 476 So.2d 194 (Fla. 1985).

581 So.2d at 48.

In Hall v. State, ___ So.2d ___ (Fla. 1993), 18 Fla. L. Weekly S63, S65, this Court also upheld cold, calculated and premeditated. There the record revealed that Hall and Ruffin had an intent to steal the victim's car. "To that end, they could have taken the car and simply left her in the parking lot. Instead, however, they abducted, raped, beat and finally killer her." Albeit, in the instant case, the officer was not brutalized like the victim in Hall, the record reflects Jackson could have absconded at any time. She did not. She admitted to the doctors, and the eyewitnesses testified, that Jackson was the one that smashed her car; she was the one that made a false report and she lied to the police officers. Jackson knew she was in trouble; she made statements about not wanting to go back to jail and further told witnesses after the murder that that was the reason why she shot the officer. Jackson armed herself,

returned to the area where her smashed car had been parked. When she saw that her car had been towed, she asked the officer "why" he had done it. Office Bevel told her that she was under arrest. Jackson said she" was not going to go anywhere with him." As he attempted to place her in the police car, she pulled out the .22 caliber weapon she was carrying and shot six bullets into the police officer. Her actions were cold, calculated and premeditated without any moral or legal justification. See Jones v. State, ___ So.2d ___ (Fla. 1992), 18 Fla. L. Weekly S11, S12-S13; Fotopoulos v. State, 608 So.2d 784 (Fla. 1992); Henry v. State, ___ So.2d ___ (Fla. 1992), 18 Fla. L. Weekly S33, S34, and Jackson v. State, 498 So.2d 406 (Fla. 1986), wherein this Court found that the aggravating factor of cold, calculated and premeditated was proven beyond a reasonable doubt. The facts developed by the State at resentencing are no different than those originally presented at the first proceeding. The facts support the trial court's finding that Jackson made no attempt to disarm the police officer or escape without the necessity of deadly force. She shot Office Bevel six times at point blank range and did so as coldly and as premeditatedly as she methodically smashed her car that would not start. As the Court observed:

> Further, we point out that Appellant had the presence of mind while struggling with the victim to devise a method to catch him off guard, i.e., the statement that she had dropped her keys. This record does not show a woman panicking in a frightening situation, but rather a woman determined not to be imprisoned who fashioned her opportunity to escape and acted accordingly.

498 So.2d at 412. See also Swafford v. State, 533 So.2d 270 (Fla. 1988); Phillips v. State, 476 So.2d 194 (Fla. 1985), and Cruse v. State, 588 So.2d 983, 992 (Fla. 1991) (witnesses testified he acted in calm and controlled manner).

B. No evidence of a plan to kill

Jackson also argues that there was no evidence of a plan to kill because the murder was "a spontaneous shooting during a struggle with a police officer to avoid arrest." (Appellant's Brief, at 32). Even assuming for the moment Jackson's plan was just to avoid arrest, one gun shot could have done it. The record reflects she emptied six bullets into the officer's body and this was done following her purposeful conduct of dropping her car keys to distract Officer Bevel as he tried to put her into the car. See Swafford v. State, 533 So.2d 270 (Fla. 1988); Williamson v. State, 511 So.2d 289 (Fla. 1987); Lamb v. State, 532 So.2d 1051 (Fla. 1988), and Eutzy v. State, 458 So.2d 755 (Fla. 1984). Clearly, the plan to kill existed. Valle v. State, supra.

C. Whether there was a pretense of moral or legal justification for the killing

Lastly, Jackson argues that cold, calculated and premeditated does not exist because a pretense of moral or legal justification existed. Citing Banda v. State, 536 So.2d 221 (Fla. 1988), Jackson argues that because Jackson felt threatened by the police officer when he was placing her under arrest, she had a pretense of legal or moral justification for the murder. Such a contention is in error. First of all, Banda is

distinguishable from the instant case because there, the defendant believed that the victim was going to get him. Moreover, in Christian v. State, 550 So.2d 450 (Fla. 1989), the defendant there had some misguided belief that he was going to be killed by the victim. And, in Cannady v. State, 427 So.2d 723 (Fla. 1983), CCP was erroneously found because, the court reasoned, Cannady believed that the victim was "jumping at him."

Sub judice, however, as in Williamson v. State, 511 So.2d 289, 293, the Court distinguished Cannady, supra, and concluded that "Williamson argues that he 'murdered Drew because if he did not, Drew would have killed Omer Williamson and perhaps himself for not repaying a $15.00 drug debt Omer Williamson owed to Drew.' . . . There is no evidence of any threatening acts by Drew prior to the murder; nor is there any evidence that Drew planned to attack either Omer or Williamson. Based on the record before us, we conclude this aggravating factor was proven beyond a reasonable doubt." In Jones v. State, ___ So.2d ___ (Fla. 1992), 18 Fla. L. Weekly S11, S13, the Court observed:

> The record shows that Jones coldly and dispassionly decided to kill the victim in order to steal the truck. There is no merit to Jones' argument that he had a pretense of moral or legal justification for the killings because he perceived the victim as part of a world that was rejecting him. Compare Williamson v. State, 511 So.2d 289 (Fla. 1987) (stabbing fellow inmate where victim had made no threatening acts towards defendant, no pretense of justification), cert. denied, 485 U.S. 929 (1989), with Christian v. State, 550 So.2d 540 (Fla. 1989) (colorable claim of self-defense gave pretense of justification), cert. denied, 494 U.S. 1028 (1990); Banda v. State, 536 So.2d 221 (Fla. 1988) (same), cert. denied, 489 U.S. 1087 (1989). . . . (emphasis added).

Likewise, no credible evidence exists herein that would have given rise to the fact that Andrea Hicks Jackson believed she had a moral or legal justification for the murder. Evidence derived by Dr. Mutter through the hypnotic regression session proved to be "suggestive" in the words of Dr. Miller. Dr. Miller testified that if the facts and circumstances existed as the State's witnesses portrayed, then Jackson's conduct was logical and calculated. Dr. Walker opined that Jackson suffered from battered woman syndrome which was rejected by both Dr. Mutter and Dr. Miller. The underlying facts upon which Dr. Walker premised her conclusion were faulty and were not supported by the actual facts and circumstances surrounding the murder. See Cruse v. State, 588 So.2d 983, 992 (Fla. 1991) (delusions that people were talking about him or attempting to turn him into homosexual do not provide a colorable claim of any kind of moral or legal justification for his lashing out at society).

The trial court correctly concluded that the killing of Officer Bevel was committed in a cold, calculated and premeditated manner without legal or moral justification.

POINT II

WHETHER THE TRIAL COURT ERRED IN FAILING TO PROPERLY FIND, WEIGH AND CONSIDER JACKSON'S MENTAL AND EMOTIONAL CONDITION AT THE TIME OF THE SHOOTING IN MITIGATION

Jackson next takes umbrage with the trial court's findings in mitigation. Specifically, she argues that since all three "mental health experts agreed that Andrea's mental condition at the time of the shooting qualified her for statutory mitigating

circumstances," (Appellant's Brief, at 43), the court, in failing to acknowledge statutory mitigation, violated her constitutional rights. The State would disagree and would submit that the trial court's order is quite clear with regard to what mitigation the trial court concluded was proven by a preponderance of the evidence. The court acknowledged Jackson's difficult childhood which included sexual abuse from her step-father; that she suffered domestic violence and abused drugs and alcohol. As to the two statutory mitigating factors, specifically that the crime was committed while under the influence of extreme mental or emotional disturbance and that Jackson's capacity to appreciate the criminality of her conduct or to conform her conduct to the requirements of law was substantially impaired, the court found the evidence presented negated these statutory mitigating factors. The court reasoned that Jackson engaged in a "course of action inconsistent with extreme mental or emotional disturbance." Further, the court concluded that Jackson's conduct was "not impaired based on flashback or post-traumatic stress disorder; self-ingested use of drugs or alcohol or her history of domestic violence." In sum, the court reasoned that "from a reasonable weight of the evidence that two aggravating factors exist and that while there is substantial evidence in mitigation relating to her background, it is not sufficient to diminish the compelling aggravating circumstances which require the imposition of the death penalty. . . " (TR 382).

Citing to Campbell v. State, 571 So.2d 415 (Fla. 1990), and Nibert v. State, 574 So.2d 1059 (Fla. 1990), Jackson argues that

the evidence in mitigation was substantial and compelling. What Jackson fails to acknowledge is that evidence presented in mitigation was not uncontraverted. Without regurgitating the discrepancy in the doctors' testimony pertaining to Jackson's condition, the State would submit that the trial court followed the Campbell and Nibert rationale. In Nibert, the court said if a reasonable quantum of competent uncontraverted evidence of a mitigating factor is presented, then the trial court must find the mitigating circumstance has been proven. Here, however, the evidence was contraverted - not only by the State's cross-examination of the doctors but, it was contraverted by the physical and eyewitness testimony of those observing the crime. Jackson cannot prevail by asserting that the trial court failed to give adequate consideration to the mitigation presented.

For example, in Lucas v. State, ___ So.2d ___ (Fla. 1992), 18 Fla. L. Weekly S15, S16, this Court observed:

> It is within the trial court's discretion to decide whether a mitigator has been established, and the court's decision will not be reversed merely because an appellant reaches a different conclusion. Sireci v. State, 587 So.2d 450 (Fla. 1991), cert. denied, 112 S.Ct. 1500 (1992). Moreover, whether a mitigator has been established is a question of fact, and a court's findings are presumed correct and will be upheld if supported by the record. Campbell v. State, 571 So.2d 415 (Fla. 1990).

See also Sireci v. State, 587 So.2d 450 (Fla. 1990); Clark v. State, ___ So.2d ___ (Fla. 1992), 18 F.L.W. S17, 18; Hall v. State, ___ So.2d ___ (Fla. 1993), 18 F.L.W. S63, S65, wherein the court observed:

> In considering allegedly mitigating evidence the court must decide if 'the facts alleged in mitigation are supported by the evidence,' those established facts are 'capable of negating the defendant's punishment, i.e., . . . may be considered as extenuating or reducing the degree of moral culpability for the crime committed', and if 'they are of sufficient weight to counterbalance the aggravating factors." Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Campbell v. State, 571 So.2d 415 (Fla. 1990). 'The decision as to whether a mitigating circumstance has been established is within the trial court's discretion.' Preston, slip op. at 16. The judge carefully and conscientiously applied the Rogers standard and resolved the conflicts in the evidence, as was his responsibility. Gunsby v. State, 574 So.2d 1085 (Fla.), cert. denied, 112 S.Ct. 136 (1991). The record supports his conclusion that the mitigators either had not been established or were entitled to little weight. Preston; Ponticelli v. State, 593 So.2d 483 (Fla. 1991), vacated on other grounds, 113 S.Ct. 32 (1992).

The trial court did not err in concluding that the two statutory mitigating factors argued by Jackson were not applicable. Relief should be denied as to this claim.

POINT III

WHETHER THE TRIAL COURT ERRED IN IMPOSING A SENTENCE OF DEATH WHEN SUCH A SENTENCE IS NOT PROPORTIONAL

Jackson argues that the sentence of death imposed is disproportionate and therefore should be reversed. The basis for said claim is that if the cold, calculated and premeditated aggravating factor is struck, only one aggravating factor would remain, that the victim was a police officer. Jackson argues that this factor standing alone "would not support a death sentence where mitigating circumstances are present." (Appellant's Brief, at 45).

While not unmindful that this Court has been reluctant to sustain the death penalty where only one statutory aggravating factor exists, the instant case is the exception to the rule. Assuming without conceding, that only one aggravating factor, to-wit: killing a police officer, exists sub judice, that aggravating factor in and of itself is sufficient to support a death penalty sentence.

The Florida Legislature, in specifically delineating as a statutory aggravating factor the killing of a police officer during the course of his duties, intended to recognize an officer's unique position in civilized society. As the first line of defense against lawlessness and violence, law enforcement officers are charged with the duty of protecting the citizens and enforcing the laws of this State. Because of such duties, law enforcement officers are constantly exposed to great risk of personal injury and death and consequently are entitled to the greatest protection which can be provided through the laws of this State. Not only has the Legislature specifically elevated the killing of a law enforcement officer to a specific aggravating factor, but in a similar fashion, in 1989, it created the Law Enforcement Protection Act, enacting §775.0823, Fla.Stat. This Act established mandatory minimum penalties for persons convicted of murdering a law enforcement officer where the death penalty has not been imposed, providing for a sentence of imprisonment for life without eligibility for release. Clearly, the Legislature has recognized that those who commit such crimes against law enforcement officers do so not only against the law

enforcement officers but, also against the very fabric of our society. In creating the Law Enforcement Protection Act, the Florida Legislature observed that:

> It finds it necessary for the citizens of Florida to send a clear message to the criminal element that Florida will not tolerate the vicious murders, assaults and batteries on its law enforcement.

Where, as here, however, two significant statutory aggravating factors have been proven beyond a reasonable doubt, Jackson's mitigation necessarily pales. As such, the trial court was correct in concluding that death was the appropriate penalty imposed sub judice. The sentence is proportionate. See Valle v. State, 581 So.2d 40 (Fla. 1991); Swafford v. State, supra, and Phillips v. State, supra; Cruse v. State, supra.

POINT IV

WHETHER THE TRIAL COURT ERRED IN REFUSING TO ADMIT INTO EVIDENCE THE VIDEO TAPE OF THE HYPNOTIC REGRESSION DR. MUTTER PERFORMED ON JACKSON AND WHICH BECAME A SIGNIFICANT BASIS FOR HIS EXPERT OPINION ON HER MENTAL CONDITION AT THE TIME OF THE CRIME

Jackson now argues reversible error occurred at resentencing because the trial court granted the State's motion in limine to preclude the admission into evidence of the video tape of the hypnotic regression session performed by Dr. Mutter on Jackson (TR 304). The trial court ruled and the record reflects that Dr. Mutter was permitted to testify about the hypnotic regression session and was allowed to read extensively from the transcripts of the session during his testimony. The sole basis for reversal asserted is that the video tape was not admitted. While at first

blush the State would submit no error occurred with regard to the omission of the video tape being played to the jury, beyond peradventure any error this Court might unearth is harmless beyond a reasonable doubt in light of what actually was brought before the jury at trial. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

First of all, contrary to Jackson's assertion that the video tape was admissible "as evidence the experts relied upon to reach their opinions about her mental state", the video tape was not admissible. The whole premise of expert testimony and opinion is to provide specialized information to the jury that they could otherwise not discern through evidence presented to them. If Jackson is right, and the jury should be permitted to see every step engaged in by an expert in formulating an expert opinion, the expert would never have to testify because the jury could review and formulate an opinion for itself. In Morgan v. State, 537 So.2d 973 (Fla. 1989), the Court, agains receded from Bundy v. State, 471 So.2d 9 (Fla. 1985), in light of Rock v. Arkansas, 483 U.S. 44 (1987), and held:

> The issue is not whether Morgan's hypnotic statements are reliable testimony to prove the truth of the matter asserted. Rather, the question is limited to whether mental health experts can testify about Morgan's sanity if their opinion is based in part on information received from hypnotic statements obtained through a medically approved diagnostic technique.

537 So.2d at 976.

The Court concluded:

> Courts can not establish accepted medical practices; they can only ensure that accepted

> methods are properly utilized. We conclude that, even without the United States Supreme Court's Rock decision, Morgan should have been permitted to introduce conclusions drawn from medically accepted techniques. Here, his mental health experts were effectively barred from using medically accepted procedures to diagnose him. If courts seek medical opinions, they cannot bar the medical professional from using accepted medical methods to reach an opinion.

537 So.2d at 976.

Nowhere in Morgan does the Court countenance the actual playing of the hypnotically refreshed testimony tape, rather, what is being permitted is that doctors in reaching a medical conclusion may use medically accepted techniques.

Jackson further argues that the video tape was admissible to "rebut the State's attacks on the reliability of the hypnotic session and to provide to the jury the best evidence of fulfilling its burden of evaluating the weight and credibility of the expert opinions rendered." Such a contention is equally erroneous. Raw scores without analysis mean nothing. Similarly, a video tape of a hypnotic regression in and of itself means nothing. To a trained expert, however, it may be important in formulating an opinion with regard to an expert's field of endeavor. Nowhere in Morgan v. State, supra, did this Court suggest that the "nuts and bolts" of getting to an expert's opinion could be or must be paraded before a jury. Clearly, it is within the trial court's discretion to ascertain whether said evidence is appropriate or whether there is an alternative means by which the jury can be meaningfully informed as to the import of the evidence being presented.

While not unmindful that video tapes are admissible for a number of purposes, none of the authorities cited by Jackson support the conclusion that the video tape should have been admitted sub judice. To the extent Jackson argues that the video tape was admissible to rebut the State's "charges" that the hypnotic session was flawed, said assertion is equally in error. Again, a jury hearing raw data or raw information has no way of telling or discerning what fact is or is not appropriate. In fact, Jackson's own counsel inquired of Dr. Miller as to whether he was aware and could comment with regard to hypnotic recession procedures. Moreover, it was Dr. Miller who suggested that after viewing the tape, in his professional opinion, the questioning by Dr. Mutter with regard to Jackson's earlier rape was suggestive in nature.

Whatever comfort Jackson chooses to take from the decision in Dowell v. State, 516 So.2d 271 (Fla. 2d DCA 1987), is curious since the court, in Dowell, with great caution affirmed the admission of video taped reenactments and the use of an audio tape recording of part of a hypnotic session on redirect examination to rebut an implied charge of improper influence on a witness. The Court held:

> . . . We conclude that the admission into evidence of a audio tape recording of part of a hypnosis session with that witness, that evidence being admitted on redirect examination an implied charge of improper influence on the witness, was not erroneous, see Thompkins v. State, 502 So.2d 415, 419 (Fla. 1986), especially in view of the trial court's instruction to the jury to consider the witness's testimony with caution. Also, there was testimony of the witness and of the officer who conducted the session that the witness was not hypnotized.

516 So.2d at 274.

Terminally, Jackson argues that "regardless of its admissibility on other grounds, the video tape was admissible in the penalty phase as mitigating evidence". The test for admission of mitigating evidence is relevancy. In the instant case, relevant evidence with regard to Jackson's mental state at the time of the crime was admitted through the testimony of Dr. Mutter who detailed the processes he used to reach his expert conclusions. No error occurred when the trial court denied the admission of the video taped hypnotic regression session.

POINT V

WHETHER THE TRIAL COURT ERRED IN NOT DECLARING THE PREMEDITATION AGGRAVATING CIRCUMSTANCE PROVIDED FOR BY §921.141(5)(i), UNCONSTITUTIONALLY VAGUE OR, ALTERNATIVELY, IN GIVING THE STANDARD PENALTY PHASE JURY INSTRUCTION WHICH FAILS TO APPRISE THE JURY OF THE LIMITING INTERPRETATION THIS COURT HAS GIVEN TO THE CIRCUMSTANCE

Jackson's next argument is two-fold. First, she asserts that the aggravating factor that the crime was committed in a cold, calculated and premeditated manner is unconstitutionally vague; and second, she urges that the standard instruction provided for said aggravating factor "fails to apprise the jury of the limiting interpretation of this factor."

Jackson admits that the caselaw is adverse to her with regard to her instant claim. (Appellant's Brief, at 55). Indeed, in Brown v. State, 565 So.2d 304 (Fla. 1990), and later in Klokoc v. State, 589 So.2d 219, 222 (Fla. 1991), the Court held:

> Regarding the first claim, counsel argues that the death sentence must be reversed because the cold, calculated and premeditated aggravating factor found by the trial court is unconstitutionally vague. Furthermore, Klokoc's counsel asserts that, even if it is constitutional, it is not supported by the evidence since a pretense of moral or legal justification was present for this crime.
>
> We reject the claim that §921.141(5)(i), Florida Statutes, is unconstitutionally vague. See Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988), cert. denied, 489 U.S. 1071, 109 S.Ct. 1355, 103 L.Ed.2d 822 (1989). We also reject the claim that this factor is not supported by the evidence. The evidence in this record justifies this aggravating circumstance.

589 So.2d at 222. See also Fotopoulos v. State, 608 So.2d 784 (Fla. 1992); Cruse v. State, supra.

To the extent Jackson is arguing that the United States Supreme Court, in summarily reversing in Hodges v. Florida, ___ U.S. ___, 113 S.Ct. 33, 121 L.Ed.2d 6 (1992), in light of Espinosa v. Florida, 505 U.S. ___, 112 S.Ct. ___, 120 L.Ed.2d 854 (1992), mandates that this aggravating factor is vague, no such result can be derived from Espinosa. In fact, Espinosa does not speak to the constitutional validity of a given aggravating factor, rather, Espinosa pertains to whether a jury who may be a "co-sentencer", must be properly instructed with regard a given aggravating factor.

In the instant case, the proposed instruction by Jackson did not give a full or correct instruction based on the caselaw as to the meaning of the phrase cold, calculated and premeditated murder without a pretense of moral or legal justification. For example, the proposed instruction set forth in Appellant's Brief

at page 51 and found in (TR 348), provides that a substantial period of reflection and though by defendant before the murder occurs constitutes heightened premeditation. From the caselaw it is clear that a "substantial" period of reflection and thought is uninformative because it tends to confuse and present no clearer picture of what is "intended" by cold, calculated and premeditated. For example, in Rutherford v. State, 545 So.2d 855 (Fla. 1989), the court upheld a death sentence stating that cold, calculated and premeditated is not limited to execution, contract, or witness elimination murders, but may be applied where a careful or "prearranged" design was presented. In Lamb v. State, 532 So.2d 1051 (Fla. 1988), the court affirmed CCP where the procuring of a weapon beforehand supported for a heightened premeditation. In Swafford v. State, 533 So.2d 270 (Fla. 1988), the court recognized that shooting an individual nine times after having to reload the gun constituted "sufficient time" for planning and reflection to support CCP. In Haliburton v. State, 561 So.2d 248 (Fla. 1990), the defendant there told his brother he wanted to see if he could kill someone. Moreover, a pretense of moral or legal justification was rejected in Jones v. State, ___ So.2d ___ (Fla. 1992), 18 Fla. L. Weekly S11, S13, where the defendant asserted that his legal and moral justification for the killings was because he perceived the victim was part of the world that was rejecting him. See also Cruse v. State, supra. Certainly, the instruction submitted was no better than that of the standard jury instruction provided.

Based on the foregoing, the State would submit that the standard jury instruction given sub judice was neither vague nor inappropriate for the cold, calculated and premeditated aggravating factor.

POINT VI

WHETHER THE TRIAL COURT ERRED IN FAILING TO GIVE AN INSTRUCTION TO THE JURY THAT THE AGGRAVATING FACTOR DEFINED BY §§921.141(5)(e), (g) & (j), FLORIDA STATUTES MERGED INTO A SINGLE AGGRAVATING CIRCUMSTANCE UNDER THE FACTS PRESENTED

The jury was instructed on three statutory aggravating factors. Specifically, they were told:

> (1) The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
>
> (2) The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without a pretense of moral or legal justification.
>
> (3) The victim of the crime for which the defendant is to be sentenced was a law enforcement officer engaged in the performance of his official duty.

(TR 1593).

It is respectfully submitted that no merger instruction was necessary sub judice, because the facts of the instant case could have supported §921.141(5)(e), Fla.Stat., and §921.141(5)(j), Fla.Stat., independent of one another. In Valle v. State, 581 So.2d 40, 47 (Fla. 1991), this Court determined that the creation of §921.141(5)(j), Fla.Stat., did not create an ex post facto problem where the aggravating factor that the victim was a law enforcement officer engaged in the performance of this official

duties was applied to a case where the crime occurred prior to said factors enacted. Relying on Combs v. State, 403 So.2d 418 (Fla. 1981), the Court, comparing this "new" factor to the cold, calculated and premeditated factor, prior ex post facto analysis, found:

> . . . The aggravating factor that the victim was a law enforcement officer who was murdered while performing his official duties is not an entirely new factor, and Valle is not disadvantaged by its application. At the time Valle committed his crime, the Legislature had established the aggravating factor or murder to prevent a lawful arrest and murder to hinder the lawful exercise of any governmental function or the enforcement of laws. (cites omitted). By proving the elements of these two factors in this case, the State has essentially proven the elements necessary to prove the murder of a law enforcement officer aggravating factor. In any event, Valle is not disadvantaged because the trial judge merged these three factors into one aggravating factor.

581 So.2d at 47.

Nowhere in the Valle case did the court specifically state that these factors always were merged or that in a given case these factors could not be independently proven and therefore not constitute an "improper doubling." In Castro v. State, 597 So.2d 259 (Fla. 1992), the Court merely clarified its previous decision in Suarez v. State, 481 So.2d 1201 (Fla. 1985), in holding that "when applicable, the jury may be instructed on 'doubled' aggravating circumstances since it may find one but not the other to exist. A limiting instruction properly advises the jury that should it find both aggravating factors present, it must consider the two factors as one, and thus the instruction should have been given." 597 So.2d at 261.

In the instant case, however, the State's theory of why Jackson committed the murder was to avoid arrest. Statements to Joy Shelton immediately after the murder supported the State's theory. The State also proved, however, that the victim, Gary Bevell, was in fact a law enforcement officer killed in the performance of his duties, in trying to arrest Jackson. Beyond peradventure, both aggravating factors were appropriate. This is especially true where, as here, the defendant admitted that she was not going back to jail and that was the basis for the murder, to-wit: to avoid arrest and perfect her escape.

Even assuming for the moment it would have been more appropriate for the the trial court to have given a "merger" instruction, any error that resulted was harmless beyond a reasonable doubt. See Jones v. State, 18 Fla. L. Weekly at S13; Clark v. State, ___ So.2d ___ (Fla. 1992), 18 Fla. L. Weekly S17, S18, and Fotopoulos v. State, 608 So.2d 784 (Fla. 1992).

POINT VII

WHETHER THE TRIAL COURT ERRED IN FINDING AND WEIGHING THE AGGRAVATING CIRCUMSTANCE THAT THE VICTIM WAS A LAW ENFORCEMENT OFFICER PROVIDED FOR IN §921.141(5)(j), SINCE THE OFFENSE OCCURRED PRIOR TO THE EFFECTIVE DATE OF THIS AGGRAVATING CIRCUMSTANCE AND THE APPLICATION HEREIN VIOLATES JACKSON'S RIGHTS UNDER THE EX POST FACTO PROVISIONS OF THE FLORIDA AND THE UNITED STATES CONSTITUTIONS

Recognizing that this Court has resolved this claim adversely to her in Valle v. State, 581 So.2d 40, 47 (Fla. 1991), Jackson reargues the point, asserting that the law enforcement officer aggravating circumstance creates a new aggravating circumstance. The crux of her complaint is that Valle is

incorrect because the reasoning in Valle "overlooks the situation where an officer may be killed in the line of duty where the motive for the killing was neither to disrupt governmental functions or to avoid arrest. Under those facts, only the new aggravating circumstance would be established." (Appellant's Brief, at 65-66) (emphasis added). In fact, Jackson proposes that the killing of Officer Bevel was "not motivated to disrupt governmental function or to avoid arrest, rather, she killed under the mistaken misperception that she was about to be sexually assaulted." (Appellant's Brief, at 66).

The State would submit that this aggravating factor of killing a police officer in the line of duty, in fact does emanate from §§(e) & (g) of §921.141(5), Fla.Stat. As this Court has held in Sireci v. State, 587 So.2d 450 (Fla. 1990), and Hall v. State, ___ So.2d ___ (Fla. 1993), 18 Fla. L. Weekly S63, S65, the instant application does not constitute an ex post facto application in Jackson's case. See Jackson v. State, 498 So.2d 406, at 411, wherein the Court concluded that both §§(5)(e) & (5)(g), applied, the "consolidation of these two aggravating factors does not render the sentence invalid, in that our sentencing statute requires a weighing rather than a mere tabulation of factors in aggravation and mitigation." This is not a numbers game but rather, the focus should be whether the instructions given appropriately reflect evidence in aggravation proven beyond a reasonable doubt. There can be no doubt that the evidence proves beyond a reasonable doubt that the murder of Officer Bevel was to hinder law enforcement and prevent or escape

from arrest. Moreover, there can be little question that the law enforcement officer aggravating factor evolved from existing statutory factors intended to recognize the importance of these circumstances.

CONCLUSION

Based on the foregoing, the State would urge this Court to affirmed the death sentence imposed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI
Assistant Attorney General
Florida Bar No. 158541

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. W.C. McLain, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 26th day of March, 1993.

CAROLYN M. SNURKOWSKI
Assistant Attorney General