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

# INITIAL BRIEF OF APPELLANT

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## STATEMENT OF THE CASE AND FACTS

Procedural Progress of the Case

On June 2, 1983, a Duval County Grand Jury indicted Andrea Hicks Jackson for the first degree murder of Gary Bevel.(R 1-2) Jackson proceeded to a jury trial where she was she was convicted as charged and ultimately sentenced to death for the offense. (R 3-15) This court affirmed Jackson's conviction and sentence on direct appeal on November 13, 1986. Jackson v. State, 498 So.2d 406 (Fla. 1986), cert. denied, 483 US 1010, 107 S.Ct. 3241, 97 L.Ed.2d 746 (1987) Jackson filed a motion for post-conviction relief which the trial court denied. However, this court reversed the denial of the motion and remanded this case for a new sentencing proceeding with a new jury. Jackson v. Dugger, 547 So.2d 1197 (Fla. 1989)

A new penalty phase proceeding before a new jury commenced on November 4, 1991.(Tr 199) After hearing extensive evidence from the State and defense, the jury recommended the death sentence by a vote of 7-5 on November 8, 1991.(Tr 1) Circuit Judge Donald Moran, Jr., sentenced Jackson to death.(R 375-382) The court found two aggravating circumstances: (1) the victim was a law enforcement officer engaged in the performance of his official duties, and (2) the offense was committed in a cold, calculated, and premeditated manner.(R 380-381) In mitigation, the court found as nonstatutory mitigating circumstances, "substantial evidence of mitigation relating to her background" and acknowledged Andrea's history of childhood sexual abuse, domestic violence as an adult and drug and alcohol dependency. (R

381-382) The court rejected the statutory mitigating circumstances concerning extreme mental or emotional disturbance and impaired capacity.(Tr 382)

Jackson was sentenced on February 21, 1992, and she filed her notice of appeal to this court on March 4, 1992.(R 388)

Facts - Penalty Phase and Sentencing

On May 17, 1983, Andrea Jackson drove to her estranged husband's apartment to pick up her children and parked her car on the street. Around 6:00 p.m., several neighbors heard Andrea unsuccessfully attempting to start the car.(Tr 596-597) Then, they observed her breaking the windows out of the car, removing articles from the car, and cursing the automobile as if it were a person.(Tr 511-515, 526-529, 579-581, 596-599) She removed tools, tires, the battery, and other items from the car.(Tr 513-514, 527-528) During this process which lasted over two hours, she went upstairs to her husbands apartment and returned several times. (Tr 526-529, 547-549, 596-598) Andrea was obviously angry because her car would not crank.(Tr 547, 597) Adam Gray, an automobile salesman at Rockett Motors, said that Andrea had brought the car to him the day before with continued trouble.(Tr 681-683) She was upset with the car and told him she was going to "drive the mother-fucking thing off the main street bridge." (Tr 683, 686)

Officer Burton Griffin arrived at the scene pursuant to a disturbance called at approximately 11:00 p.m..(Tr 667) The neighbors observed the arrival of the police officer.(Tr 516,

529, 583, 600-602) Officer Gary Bevel volunteered to assist Griffin.(Tr 668) Andrea told the police officers that someone had beaten the windows out of her car, and she knew who did it.(Tr 669-671) She produced a driver's license and a bill of sale and stated the registration was in the apartment.(Tr 669-671) Griffin said he detected a faint smell of alcohol on Andrea's breath, but he did not believe she was intoxicated.(Tr 671) Griffin said that he smelled alcohol on Andrea's breath even though he was never closer than 1 1/2 or 2 feet from her. (Tr 675) Bevel began to write the report, and when Griffin asked if he needed further assistance, Bevel said that he did not.(Tr 673) Griffin left the scene.(Tr 673-674)

Four neighbors observed a confrontation between Andrea and Officer Bevel.(Tr 518, 536, 584, 615) Gena Roulhac observed Bevel and Andrea talking.(Tr 516) When Andrea walked away from the car, he approached Roulhac's doorway after noticing she and her sister watching.(Tr 516-517) Bevel was a friend of the family's.(Tr 516) He asked if they had seen what had happened and they told him that Andrea had smashed her own car.(Tr 517) He mentioned that he did not believe her story that someone else had vandalized her car.(Tr 517) Roulhac said her sister told her that Andrea was sitting or walking toward the police car.(Tr 518) At that time, Roulhac left the room to use the restroom and she heard shots.(Tr 518) She ran back to the window and saw the police officer but did not see Andrea.(Tr 518-520, 521)

Anna Marie Allen, Gena Roulhac's sister also observed the confrontation between Andrea and Bevel.(Tr 529-578) Allen said that the two police officers were present for about ten minutes before Andrea appeared and talked to them.(Tr 530) She did not hear the conversation at that time.(Tr 530) When Bevel started questioning Andrea about what happened to the car she couldn't hear the conversation.(Tr 530-531) Allen hear no animosity between the Andrea and the officer, just discussion about calling a wrecker for the car.(Tr 531) She said that Andrea did not appear intoxicated to her.(Tr 531-532) Bevel asked Andrea to get the registration or title to her car and she went upstairs and returned with the papers.(Tr 532) Andrea sat in the passenger's side of the patrol car while Bevel wrote a report. (Tr 532) Andrea then went back upstairs to get something else. Bevel approached Allen's house and asked if they had seen what had happened.(Tr 535) Allen said that they saw Andrea smash her car.(Tr 535) Bevel had said that he did not believe Andrea's story about what happened to the car.(Tr 535) Andrea came back downstairs and was walking down the sidewalk to the patrol car.(Tr 536) She started to get into the driver's seat of the patrol car, and Bevel walked toward her, asking what she was doing in the car.(Tr 536-537) Allen heard Bevel state that he was going to arrest her for giving a false police report.(Tr 537) At that time, Andrea starting hitting him.(Tr 537, 555-557) Bevel grabbed Andrea's hands and began walking her toward the patrol car.(Tr 538-539) Andrea continued to struggle with him and said she wasn't going to get into the car.(Tr 539-540,

559-560) Bevel grabbed Andrea with one arm and opened the patrol car door with the other.(Tr 561) He was considerably taller and larger than Andrea.(Tr 560-561) Allen said that he was placing her into the car, not shoving her.(Tr 561) After he sat her down on the seat of the car, Bevel then grabbed Andrea at the knees and was trying to place her into the back seat of the patrol car.(Tr 561-563, 540) Andrea slumped over to the side in the car and said, "Why are you doing this?" She also stated, "Why are you manhandling me like this?".(Tr 563) Allen said this statement occurred just as Bevel grabbed Andrea by the knees to put her the rest of the way into the car.(Tr 564) At about this time, Allen said she heard keys drop.(Tr 565) Andrea said, "You made me drop my damn keys.".(Tr 565, 541) Allen said that Bevel backed up slightly, and she then immediately heard gunshots.(Tr 541-542, 565-567) As Bevel was shot, he fell forward into the car.(Tr 541-542, 567-569) Bevel fell on top of the Andrea in the back seat of the car.(Tr 568-569) Andrea pushed Bevel off of her and fled.(Tr 542-543, 568-569)

Leanderaus Fagg also saw the confrontation with the police officer.(Tr 579-593) When he first observed Andrea and Bevel talking, Andrea acted somewhat hostile and wanted to know where her car had been taken.(Tr 583-584) Bevel informed her that he was arresting her for giving false information and began to place her in the backseat of the patrol car. (Tr 584-585) Andrea resisted.(Tr 584-585) The officer placed Andrea into the backseat, and while she was sitting position with her legs

outside the car, Fagg said he heard Andrea tell the officer that he had made her drop her keys.(Tr 585, 588-589) Bevel paused and stepped back as if to look for keys, and at that time, Fagg heard the gunshots.(Tr 585, 589-591) Andrea then fled from the car.(Tr 593)

Mabel Colman lived in the same apartment building as Sheldon Jackson.(Tr 595) She testified that Andrea went downstairs to her car after Officer Bevel had been on the scene for awhile.(Tr 601-602, 636) Andrea went back upstairs and returned to the officer, apparently with paperwork for the car.(Tr 615, 636-637) She sat in the patrol car while Bevel wrote his report.(Tr 637) When Andrea went back upstairs again, a wrecker towed her car away while she was gone.(Tr 615, 638) When she returned, Andrea asked about her car, and Bevel told that the wrecker had towed it.(Tr 615, 639-640) Andrea went back upstairs for a short period of time. (Tr 616, 641) At that time, Bevel walked down the street to where the Allen's sisters lived.(Tr 640) When Andrea left the building this time, Colman saw her putting a gun in her pants pocket.(Tr 616, 641-642) Colman told her husband about the gun.(Tr 617) However, Colman never told Bevel.(Tr 617) She also did not tell any of the police officers during the subsequent investigation.(Tr 644-649) Bevel told Andrea she was under arrest, and Colman said, at that time, Andrea began striking him and backing away.(Tr 617-618) Colman could see that Andrea was seated in the patrol car and Bevel was telling her to place her feet in the car.(Tr 618-619) Andrea was verbally resisting the officer.(Tr 619)

Colman heard Andrea tell the officer that he made her drop her keys.(Tr 619) She then saw Bevel reach down and she heard gunshots.(Tr 620) After Bevel was shot, he fell forward into the car.(Tr 621-622, 652-656) Colman saw Andrea leave the car and run.(Tr 622-623) Colman telephoned the police.(Tr 621)

Officer John Dean responded to the scene at 12:30 a.m. on the morning of May 18, 1983, and pulled in behind Bevel's patrol car.(Tr 688) It was dark when he arrived, he walked up to the patrol car and found Gary Bevel on his back in the back seat of the car facing the rear seat.(Tr 689) Bevel's legs were protruding out of the car slightly.(Tr 689) Dean pulled Bevel up and checked for pulse and found none.(Tr 689) Bevel's weapons were still in his holsters, one in his side holster and a second weapon on an ankle holster.(Tr 690-691) Bevel was not lying on the ground at the time he arrived.(Tr 691)

Thomas McCrone, a paramedic, arrived at the scene within four minutes of receiving a call.(Tr 692, 696) He found Bevel, lying in the backseat of the patrol, car suffering from head wounds.(Tr 693-694) Bevel still had a pulse and labored breathing.(Tr 694-695) McCrone stated that within a few seconds after Bevel was attached to a monitor, the heart beat stopped.(Tr 695-696) Her stated that Bevel was unconscious the entire time.(Tr 696-698)

John Bradley, a homicide detective, testified about various items recovered from the crime scene.(Tr 455) Bevel's cap was found with a bullet hole through the brim.(Tr 467) Blood was found on the seat of the car, the floorboard and the

door threshold.(Tr 472) A bullet was also recovered from the threshold area of the car. The location of the shot indicated that it would have come from inside the car going outside the car.(Tr 473) Bevel's reports and paperwork were also recovered.(Tr 476-487)

Bonafacio Floro, the Deputy Chief Medical Examiner, performed an autopsy on Gary Bevel.(Tr 699-702) He found six gunshot wounds: two to the chest area and four to the head.(Tr 702-703) The two gunshot wounds to the chest -- one in the right shoulder going downward to the armpit and exiting the armpit and one entering at the top of the shoulder blade and stopping just underneath the shoulder blade -- would not have been fatal. (Tr 703) One gunshot wound, starting at the right eyebrow and going downward toward the cheekbone, would not have been fatal.(Tr 703) The other three gunshot wounds which entered the top of the head, were fatal wounds. (Tr 703-705) Floro concluded that all the gunshot wounds to the head had stippling indicating near contact wounds.(Tr 705) The firearm would have been within two inches of the wound at the time of the shot.(Tr 705) Floro concluded that the bullet hole in the hat was consistent with the gunshot wound to the upper right eyebrow area.(Tr 706) Floro testified that the victim would have lost consciousness within 60 seconds and would not have regained consciousness.(Tr 717-718) The bullets recovered from the victim were .22 caliber.(Tr 468-469, 761-768)

After Andrea left the scene, she caught a ride with a passing motorist.(Tr 986) David Lee and his friend Randy

Nelson were returning home between 12:00 and 1:30 a.m..(Tr 987) Lee observed Andrea waving as they passed.(Tr 988) Her shirt was open exposing her bra and her hair was in disarray.(Tr 988) Lee thought she had perhaps been molested and left on the roadway.(Tr 989) He slowed down, he and Nelson bickered a bit about stopping, but Lee stopped.(Tr 989) Andrea jogged to his truck and asked for a ride to the Sherwood area.(Tr 989) Lee said that Andrea appeared hysterical and excited.(Tr 990) He also smelled alcohol and she was hesitant and stumbled getting into the truck.(Tr 990) The smell of alcohol was rather heavy. (Tr 990) Lee thought she was intoxicated.(Tr 994) Andrea also appeared nervous and scared.(Tr 991) As they were driving, Andrea asked Lee to stop when she saw someone pass in a car.(Tr 991) She told him the person was her sister.(Tr 991-992) Lee stopped his truck, and Andrea got into the car with the woman. (Tr 992) Later, Lee heard the report about a policeman having been shot and recognized Andrea in the television broadcast.(Tr 992)

Joy Shelton, Andrea's friend, testified that Andrea called her in the early morning hours of May 17th and asked her to pick her up on the 20th Street expressway.(Tr 1027-1029) Joy could tell that Andrea was high or drunk.(Tr 1028) Andrea told her that her car had broken down.(Tr 1028) Before Joy could reach the expressway, someone in a passing truck stopped her car, and Andrea got out of the truck and entered her car.(Tr 1030-1031) She noticed blood on Andrea -- on her blouse and on her jeans.(Tr 1031-1032) Andrea was excited trying to tell her

what had happened.(Tr 1032-1033) She said she had killed a policeman.(Tr 1033) Andrea told Joy that the policeman was trying to arrest her, he was putting her in the backseat of the car, and got on top of her and she shot him.(Tr 1033) They drove to Joy's residence where she lived with her roommate, Shirley Freeman.(Tr 1034) Shirley washed Andrea's clothes.(Tr 1035) Andrea took a shower.(Tr 1037) Andrea and Shirley drank some vodka.(Tr 1037) Shirley called the hospital where she learned that the police officer was dead.(Tr 1038) Andrea kind of went crazy and started screaming and was extremely upset.(Tr 1038) Andrea told Joy that she thought the police officer was trying to rape her.(Tr 1038) She said that the police officer was on top of her and she thought he was trying to rape her.(Tr 1039) Andrea said she did not want to go to jail and the officer told her he was going to take her to jail.(Tr 1039) Joy gave Andrea some money and Shirley called her a taxicab.(Tr 1040)

Shirley Freeman said that Andrea came to their house in the early morning hours of May 17, 1983.(Tr 733-744) She washed Andrea's clothes to get rid of the blood.(Tr 735) Andrea told her that she had shot a policeman because she was not going back to jail.(Tr 735) Andrea also mentioned about someone having tried to rape her in the past.(Tr 740) Andrea was hysterical when she was talking about having shot the policeman.(Tr 739) Andrea also asked Shirley to call the hospital to find out about the officer.(Tr 729) When she learned the officer was dead, Andrea cried and talked about how

sorry she was.(Tr 739-740) Shirley was of the opinion that Andrea was not high that time, although she knew she had been drinking.(Tr 736-737) Andrea had a pistol with her.(Tr 736) Shirley called a taxicab for Andrea, and Andrea left with the gun.(Tr 736)

Carl Lee was the taxicab driver who picked up Andrea.(Tr 753-755) She asked to go to the Greyhound bus station.(Tr 755) She appeared sleepy as if she had just awakened or she was high.(Tr 760) He said Andrea did not appear normal at the door of the car, and he thought she might be drunk or high.(Tr 760)

Mabel Colman, who lived in the same apartment building as Shelton Jackson, saw Andrea return to the apartments around daylight on May 17, 1983.(Tr 623) Andrea came up the back steps of the apartment and knocked on Sheldon's door.(Tr 624) He opened the door and let her in.(Tr 624) Colman telephoned the police.(Tr 625, 657) Colman said when the police arrested her, Andrea appeared upset, denied killing anybody, and came down the stairs dragging a big teddy bear. (Tr 625, 657-658)

Police Sgt. David Diperna and Officer George Barge actually made the arrest of Andrea.(Tr 776-790, 996-1023) Diperna observed Andrea in the backyard of the apartment complex and yelled for her to halt.(Tr 780-781) She ran up the stairs of the apartment.(Tr 781-782) Diperna had Officers Dean and Barge surround the outside of the apartment.(Tr 782) Barge and Diperna went up the back stairs of the apartment.(Tr 783-784, 999-1000) Diperna was talking to Sheldon Jackson who told him that Andrea was not upstairs.(Tr 783) Barge passed them.(Tr

783-784, 1000-1001) Barge scanned the porch area and saw Andrea lying down in a fetal position hiding behind a clothes hamper.(Tr 1015-1016) Barge pushed Sheldon out of his way.(Tr 1017) He jumped toward Andrea, landing on his feet but planting his knees as hard as he could into the middle of her back. (Tr 1017) Barge stated that he was 6'2" and weighed 225 pounds. (Tr 1017) He grabbed Andrea's hands, determined that she did not have a gun, and proceeded to subdue her, handcuff her and arrest her.(Tr 1018) Barge said that Andrea began fighting intensely and he hit her in order to stun her.(Tr 1018) Barge and Diperna finally subdued Andrea, handcuffed her and carried her downstairs.(Tr 1018-1020) During that time, she was screaming that she did not kill a policeman.(Tr 1019) She suffered scrapes and bruises as a result of the struggle. (Tr 1019) Barge detected the odor of alcohol on Andrea when he placed her in the patrol car.(Tr 1021) His opinion was that her faculties were not impaired.(Tr 1022)

Detective John Bradley interviewed Andrea in the homicide office of the police department.(Tr 495-497) Andrea complained that her knee and abdomen hurt.(Tr 496-497) Bradley did not know how she had been injured.(Tr 496-497) He testified that she was under the influence of alcohol, but he did not know she was intoxicated to the point of not knowing what she was doing. He could smell alcohol.(Tr 498) Bradley had Andrea taken to University Hospital to be checked.(Tr 498)

Andrea consumed a quantity of drugs and alcohol on the day of the shooting. Edith Croft, Sheldon Jackson's sister, testi-

fied that she and Andrea used drugs and alcohol together frequently.(Tr 1074-1080) They used heroin, T's and blues, marijuana, and lots of alcohol.(Tr 1078) T's and blues were pink and blue pills that you crush, mixed together and shoot interveinously.(Tr 1078) Croft said that they would start using drugs early in the morning.(Tr 1080) They would use T's and blues to get started in the morning and then drink alcohol and smoke marijuana the rest of the day.(Tr 1080) On the day of the homicide, she and Andrea did a great deal of drugs and alcohol.(Tr 1081) As was their pattern, they started early in the morning about 7:00 to 8:00.(Tr 1081-1082) The two of them used 30 or more T's and blues, drank 2 or 3 fifths of liquor and smoked marijuana.(Tr 1082-1083) They parted company in the late afternoon or early evening.(Tr 1084-1085) Croft was present at Sheldon's apartment at the time Andrea was arrested.(Tr 1086) She saw Andrea hiding on the porch before the policeman came and said that she was "messed up"; she was still "glowing". (Tr 1086-1087) Richard Washington, another friend of Andrea's, drank alcohol with Andrea around 10:00 or 10:30 a.m. on May 16, 1983. She had two drinks with him.(Tr 1052) He said she was high when she came into the bar.(Tr 1052) She left about 1:30 p.m..(Tr 1054-1056)

The medical reports of the screening done by the registered nurse at the jail after Andrea's arrest indicated that Andrea admitted to heroin addiction and other drug use including cocaine.(Tr 1109) During the interview, Andrea appeared uncooperative and hostile and also sleepy.(Tr 1111)

Andrea had also reported having blackouts and headaches when she drinks and a previous attempted suicide.(Tr 1113) Andrea reported that when she drinks she cannot control her actions. (Tr 1114) At the time of the medical screening, the nurse noted that Andrea's pupils were dilated and reacted very little to light.(Tr 1114) The medical records indicated that Andrea had scars and needle marks on her left arm.(Tr 1115-1117)

Detective Bradley stated that after Andrea's arrest, syringes were seized from the scene.(Tr 499-500) Laboratory testing on these syringes and a small pill container found showed trace samples of Pentazocin, which is an ingredient in Talwin.(Tr 1393-1395) Talwin was one of the ingredients in the street drug T's and blues.(Tr 1395)

On January 29, 1988, Dr. Charles Mutter, a forensic psychiatrist with a specialty in medical hypnosis, was asked to do a hypnotic regression on Andrea.(Tr 801-802) He was asked to aid in obtaining information from Andrea's her memory of what happened.(Tr 803, 858) The interview and hypnotic session was video-taped.(Tr 865) Defense counsel asked that the videotape be introduced into evidence along with a transcript of the tape, but the trial court denied the request.(Tr 891-893)

Initially, Mutter went through Andrea's background and personal history and her memory of the events surrounding the shooting.(Tr 865-881) She was the oldest of four children. She had a tenth grade education with some vocational training, was married at the age of 20 and had two sons.(Tr 871-872) She had a history of migraine headaches and an extensive drug and

alcohol abuse history including marijuana, LSD, mescaline, window pane, quaaludes.(Tr 872) He found that Andrea is generally a person who likes to avoid problems and conflicts. She would have temper tantrums and act out against things, but not people.(Tr 874)

Mutter explored with Andrea what she remembered about the events on May 17, 1983.(Tr 876) She said she was under the influence of alcohol that day and had taken a number of pills. (Tr 878) Her memory of the events were sketchy.(Tr 877-879) She remembered problems with her car, she remembered smashing the car, she also remembered talking to the police officer and reading a report.(Tr 878) She remembered the confrontation with the police officer and knew that she had shot someone but she didn't know why. She had no conscious memory of pulling the trigger.(Tr 878-879) She knew she was high at the time and in a shock-like state.(Tr 880-881)

In order to aid Andrea in remembering the circumstances around the shooting, Mutter hypnotized her.(Tr 883-889) Once under the hypnosis, Mutter took Andrea back to the time of the shooting and asked her to describe the events.(Tr 895-896) She described wanting to get high that day and drinking beer, gin, and Chevis Regal.(Tr 896-897) She also described getting quaaludes and some T's and blues.(Tr 897) She also talked about getting black beauties, which are amphetamines.(Tr 897) At one point, she talked about shooting drugs, T's and Blues, with Edith.(Tr 898) She describes her car not starting and becoming angry and smashing the windows.(Tr 898) She

remembered a policeman arriving and the car being towed.(Tr 898) She talks about going upstairs to the apartment and returning. (Tr 898-899) She said the policeman asked her what she was doing with the in his car.(Tr 899) She said she was reading the police report.(Tr 899) The police officer said he was going to arrest her for lying about what happened to the car. (Tr 899) She got out of the police car and began to walk away, and the police officer grabbed her.(Tr 899) She felt him try- ing to drag her around the car.(Tr 900) She kept saying, "Get your hands off of me."(Tr 900) She remembered telling him to let her go.(Tr 900) She felt him hitting her on the shoulder. (Tr 900) She felt him grab her around the neck and open the door trying to get her in the car.(Tr 900) She kept saying, "He won't let me go." (Tr 901) Her keys fall, and she remembered telling the officer that he made her drop her keys.(Tr 901) She could see him leaning over her.(Tr 901) She said he fell and she felt something warm all over her. Andrea's said, "He's on top of me." (Tr 901) She remembered sliding from under him and running to call Joy.(Tr 901) Mutter pressed her for more information about the gunshot.(Tr 902) He took her back to the point in time where the officer was wrestling with her and she dropped her keys.(Tr 903) She remembered hearing her keys drop.(Tr 903-904) She remembers being on her back with him on top of her, and sliding out from under him.(Tr 904- 905) She remembered his hands on her, around her neck; he was twisting her hand.(Tr 905-906) She remembered him falling on her and feeling something warm.(Tr 907) She remembers

running with the gun in her hand.(Tr 907) She remembers the buttons on her shirt popping off.(Tr 912-913) She remembers him tearing at her clothes and trying to put her hands together. (Tr 913) He was trying to hold her down and she did not know why.(Tr 913) She perceived that he was trying to rape her.(Tr 913) She felt a pistol, she pulled it out and started to shoot.(Tr 913-914) She was scared, he was on top of her, she had the gun.(Tr 914) Mutter asked if she remembers being raped before.(Tr 914) She said yes and started crying.(Tr 914) She stated her stepdaddy raped her when she was ten.(Tr 914) She thought the officer was trying to rape her because his hands were on her and he was tearing at her clothes.(Tr 915) She remembers yelling at him to get off of her but he would not.(Tr 915) Mutter ended the hypnotic session at that point. (Tr 917)

Mutter concluded that Andrea knew what she did; she knew it was wrong; she felt very guilty about what she had done and did not want to remember it.(Tr 918) It was a very painful, traumatic event for her.(Tr 918) He stated that the manner in which the arrest occurred gave her a flashback of when she was ten years old and being raped.(Tr 919) Even though the police officer was not attempting to rape her, Andrea perceived that this was occurring because of her past childhood trauma -- being raped.(Tr 919) She was under extreme duress and reacted with an extreme panic reaction.(Tr 919-921) Mutter explained that Andrea suffered from post-traumatic stress disorder.(Tr 921) He said of women who are raped, 99.9% of the them develop

this condition.(Tr 921) They experience a variety of symptoms including anxieties, depression, phobic avoidance, nightmares, sleep disturbances; some are unable to function or even go outside of their homes.(Tr 922-923) They also develop startle reactions, which means a sudden sound behind them causes them to jump.(Tr 923) They have flashbacks where the individual experiences some situation that reminds them of a traumatic event spontaneously.(Tr 923) Mutter was of the opinion that Andrea was merely responding to a flashback when she shot the officer.(Tr 924-925) It was a spontaneous, not-thought-out type of action.(Tr 925) She was in a state of panic.(Tr 925) He indicated that she used drugs and alcohol to escape living and forget her problems.(Tr 926) She had suicidal thoughts and was under chronic stress.(Tr 926) Her pattern of behavior of was to avoid conflicts.(Tr 926) She was acting irrationally, but she was not insane.(Tr 926-927)

On the day of the shooting, Andrea's alcohol and drug use diminished her capacity.(Tr 929) Andrea said that she was carrying a gun that day because of the bad relationship with her estranged husband.(Tr 930) She was afraid that he would assault her.(Tr 930) She went to Sheldon's apartment that day to get her children.(Tr 930-931)

Mutter was of the opinion that Andrea qualified for both the statutory mitigating circumstances, e.i., her capacity to appreciate the criminality of her conduct or to conform her conduct to the requirements of the law was substantially impaired and that the crime was committed while she was under

the influence of an extreme mental or emotional disturbance.(Tr 932-933) Mutter explained that Andrea's comment that she shot the officer because she did not want to go to jail is indicative of an answer that is perhaps made up when the person does not really know why he or she behaved in a certain manner.(Tr 979) Acknowledging that the blouse Andrea was wearing that day had the buttons, Mutter concluded that Andrea may have perceived that the buttons popped open, even they did not actually pop off.(Tr 983-984)

Dr. Ernest Miller, a psychiatrist on the faculty of the University of Florida, examined Andrea in 1990.(Tr 1119-1124) He reviewed depositions and various reports including the hypnotic regression conducted by Dr. Mutter.(Tr 1124) Miller concluded that at the time of the shooting, Andrea was in an highly agitated, emotional state and was using lower levels of thinking ability.(Tr 1125) He explained that someone who is emotionally involved and also under the influence of alcohol or drugs, tends to revert to more primitive forms of reasoning.(Tr 1126) Miller also found that Andrea's sexual abuse as a child laid the foundation for personality problems and emotional blocks that rendered her hostile and aggressive at times.(Tr 1126-1127) This also was compounded by her use of alcohol and a wide range of drugs by the age of 13.(Tr 1127) At one point in her life, she used PCP, LSD, T's and blues, marijuana, downs, speed, as well as the alcohol.(Tr 1127-1128) The chronic use of drugs and alcohol changes the person's ability to perceive and may reach hallucinatory levels.(Tr 1128) Miller

explained that T's and blues are a combination of drugs used on the street. It's a antihistamine and a synthetic pain killer mixed together.(Tr 1129-1130) It produces a high similar to intraveinous use of heroin.(Tr 1130) People using this type of drug develop disorders of perception and thinking.(Tr 1130) They also develop paranoid ideations.(Tr 1130-1131) The behavior of a person on these drugs depends on the level of tolerance that has been built up.(Tr 1131-1132) He noted that a medical report and screening of Andrea shortly after her arrest indicated dilated pupils with poor reaction to light.(Tr 1160-1161) This indicated the presence of a central nervous systems acting drugged.(Tr 1161-1162)

Miller was asked his opinion as to whether Andrea could have committed the murder in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.(Tr 1135) He responded that that was unlikely due to the emotional level she was operating on at the time of the crime. (Tr 1135) He concluded there was nothing to indicate she had devised a plan.(Tr 1136) Furthermore, he felt that the toxic condition she was in rendered her unable to function at the intellectual level of thought necessary to premeditate murder. (Tr 1136-1137) Miller was of the opinion that Andrea may have misperceived what was happening at the time of her arrest and thought that the officer was trying to rape her.(Tr 1137-1138) Miller was also of the opinion that the mitigating factors of substantially impaired capacity and of extreme mental or emotional disturbance were applicable. (Tr 1138-1139)

Dr. Lenora Walker, a clinic forensic psychologist specializing in domestic and family violence and battered women, examined Andrea and testified.(Tr 1170-1368) Walker first examined Andrea in March of 1989 and concluded that she suffered from post-traumatic stress disorder and also exhibited symptoms of battered woman syndrome.(Tr 1236) She testified extensively about the symptoms and effects of post-traumatic stress disorder, which is quite common for victims of childhood sexual abuse.(Tr 1187-1231, 1237-1246) Walker examined Andrea again on April 19, 1991.(Tr 1246-1247) She also viewed the videotape of the hypnotic regression and examined various police reports, depositions, and reports of other experts.(Tr 1247-1248) She interviewed some family members, including Andrea's estranged husband, Sheldon Jackson.(Tr 1248) Walker's final diagnosis was that Andrea suffered from post-traumatic stress disorder, battered woman syndrome and rape trauma syndrome. (Tr 1236-1308)

Dr. Walker described Andrea's childhood history.(Tr 1250) Andrea was the oldest of four children.(Tr 1250) She never knew or lived with her natural father.(Tr 1251) Her mother began living with Ed Brown and had three other children.(Tr 1251) Andrea was about 4 or 5 years-old when Eddie Brown came into her life.(Tr 1251) She witnessed physical abuse between Brown and her mother and some of the children.(Tr 1251) When Andrea was about 8 or 9 years-old, Brown began sexually abusing her.(Tr 1252) He began fondling her, and at about age 10 or 11, he raped her.(Tr 1252) He continued to rape her two or

three times a week until she was 15 or 16 years-old.(Tr 1252-1254) When Andrea was 9 years old, she reported being sexually abused by another playmate, although that report was dismissed because they found no medical evidence of a sexual battery at that time.(Tr 1252) Walker explained that a child might make up a report about abuse occurring in another location in trying to tell her mother that something is happening at home.(Tr 1252) Andrea reported that the rapes occurred at various locations around the house, sometimes in Brown's bedroom, sometimes in her bedroom, sometimes in other areas around the home.(Tr 1254) The first incident was extremely traumatic for her.(Tr 1255-1256) She described the event to Walker.(Tr 1256-1260) As Andrea retrieved those memories, she also retrieved the traumatic feelings which Walker noted as she related the story. (Tr 1257-1258) Andrea said that Brown took her into his bedroom, had her lay down.(Tr 1256-1257) Andrea expected that he would fondle her again, touching her breast and vagina with his fingers.(Tr 1257) Instead, he took off her pants, laid a towel on the bed, put her on the towel, put a pillow over her face, and got on top of her.(Tr 1257) He inserted his penis into her vagina.(Tr 1257) Andrea said she did not know what was happening; she could not see because the pillow was over her face to keep her from seeing anything and to muffle her screams.(Tr 1257) She remembers the extreme pain, and when Brown let her up, she noted "white stuff" all over her legs.(Tr 1257) As she reported this story to Walker, she also said there was Vaseline on her.(Tr 1258) At the moment she reported it to Walker, she

apparently for the first time realized that the Vaseline had been put on her to aid Brown in inserting his penis.(Tr 1258)

Andrea said that she was sometimes raped in her bed, and she had a spot on the wall she would concentrate on so that she would not feel the pain.(Tr 1259) She said she was unable to sleep facing that wall, even when Brown was not in the bedroom. (Tr 1259) She remembered the pain of being forced into intercourse when she saw the wall.(Tr 1259) She also had to share a bed with her brother and he would be angry when she would turn away from the wall toward him.(Tr 1259-1260) Andrea believed she could not tell her mother or resist the rapes.(Tr 1260) Andrea coped with the rapes in different ways.(Tr 1263) When she was 11 or 12 years-old, she tried to become real involved in school and athletics. However, she had to give up the basketball team because they did not have the money for her to go on the trips.(Tr 1263) She began drinking alcohol at the age of 9 years.(Tr 1264) Alcohol was a way to numb her feelings.(Tr 1264) Andrea also began to develop physiological reactions such as migraine headaches and vaginal infections, which could have been caused by sexual activity with Brown.(Tr 1265) Walker explained that women and children who are abused develop an ability to control their feelings in order to block the pain.(Tr 1266) Andrea's drug and alcohol use escalated.(Tr 1268) Before she left home at the age of 15 or 16, Andrea had also been raped two other times by different individuals.(Tr 1269) She finally left home to live with Sheldon Jackson, whom she later married.(Tr 1270)

She and Sheldon had a tumultuous relationship. (Tr 1271-1275) He was violent and battered her.(Tr 1271-1273) There was at least one incident where he saw her getting a ride back to the apartment in a man's truck.(Tr 1278) Sheldon stopped the truck, drug her out of the truck and beat her up, dragged her back to the apartment and left her unconscious and bleeding on the sofa.(Tr 1278) Andrea required over 15 stitches to close the wounds.(Tr 1279) Sheldon threatened her, verbally abused her as well as physically abused her.(Tr 1279-1280) There was also sexual abuse within the marriage.(Tr 1277) He was physically abusive during sex with her.(Tr 1277) Sometimes he would push her into the backseat of the car for sex.(Tr 1277) This was similar to the manner in which Andrea had been raped on another occasion.(Tr 1277) Andrea would flashback to some of those traumatic events.(Tr 1278) Andrea attempted to leave on several occasions but would usually go back to Sheldon.(Tr 1280-1281) Prior to 1982, Andrea obtained her GED and attempted to learn a trade to support herself.(Tr 1281) She had separated from Sheldon at the time of the shooting.(Tr 1286)

Walker also gave her opinion of Andrea's mental state at the time she shot Bevel. (Tr 1286-1310) She said that Andrea's account of the events during the hypnotic session was consistent with her mental health history. (Tr 1308-1309) Walker said Andrea had a flashback about a time of sexaul abuse during the struggle with Bevel, and she perceived this struggle with a man as an attempted rape. (Tr 1309) Andrea was unable, in

Walker's opinion, to premeditate the murder to the degree necessary for the premeditation aggravating circumstance. (Tr 1310-1311) Furthermore, Walker concluded that Andrea suffered from an extreme mental or emotional disturbance at the time of the crime and her capacity to appreciate the criminality of her conduct or to conform her conduct was substantially impaired. (Tr 1311-1312) Finally, Walker also concluded that Andrea was under the influence of various drugs and alcohol at the time of the shooting. (Tr 1311-1312)

## SUMMARY OF ARGUMENT

1. The trial judge should not have found and considered the cold, calculated and premeditated aggravating circumstances. The State and the defense had differing theories about why Andrea shot Officer Bevel. Defense experts who examined Andrea concluded she suffered post-traumatic stress disorder as the result of childhood sexual abuse from her stepfather and two rapes which occurring when she was a teenager. She also suffered from battered woman syndrome. At the time of the shooting, Andrea was under the influence of drugs and alcohol, had a flashback and misperceived the struggle with Officer Bevel as an attempted rape. She experienced a panic reaction and shot the officer. The prosecution contended that Andrea merely shot the officer, while he was physically placing her into the patrol car, to prevent his arresting her for making a false report of a crime. Under either view of the evidence, the premeditation aggravating factor was not applicable.

2. The three mental health experts who examined Jackson were of the opinion that her mental state at the time of the crime qualified her for the two statutory mental mitigating circumstances. She suffered from an extreme mental or emotional disturbance and her capacity to appreciate the criminality of her actions was substantially impaired. Secs. 921.141(6)(b) & (f) Fla. Stat. The opinions were consistent with one another and unrebutted. The trial court refused to find the two statutory mental mitigating circumstances. Furthermore, he failed to adequately consider and weigh the

nonstatutory mental mitigation he did find established by the evidence. In failing to properly find, weigh and consider the unrebutted mental mitigation, the trial court violated Andrea Jackson's rights under the Florida and United States Constitutions.

3. Andrea Jackson's death sentence is disproportionate. The premeditation aggravating circumstance was improperly found leaving only one aggravating circumstance. This Court has held that one aggravating circumstance will not support a death sentence where mitigating circumstances are present. Significant mitigation exists, and Andrea Jackson's death sentence is improperly imposed.

4. The trial court improperly excluded the videotape of the hypnotic session performed with Andrea Jackson. First, the videotape was admissible as evidence the experts relied upon to reach their opinions about Andrea's mental state. Second, the videotape was admissible to rebut the State's attacks on the reliability of the hypnotic session and to provide to the jury the best evidence for fulfilling its burden of evaluating the weight and credibility of the expert opinions rendered. Third, the videotape was admissible as evidence in mitigation. Ruling the video inadmissible, the trial court denied Jackson her due process rights to present a defense and, consequently, her death sentence violates the Eighth and Fourteenth Amendments of the United States Constitution and Article I Sections 9, 16 and 17 of the Florida Constitution.

5. Jackson asked the court to declare the premeditation aggravating circumstance provided for in Section 921.141(5)(i) Florida Statutes unconstitutionally vague and inapplicable to her case. The court denied the motion. Additionally, the court denied the defense requested a special jury instruction which incorporated the limiting interpretation this Court has given to the statutory language of the premeditation aggravating circumstance. Instead, the court used the standard jury instruction which merely tracks the language of the statute. As a result, the jury was instructed on an unconstitutionally vague aggravating circumstance in violation of the United States and Florida Constitutions. Amends. VIII, XIV U.S. Const.; Art. I, Secs. 9, 16, 17 Fla. Const.

6. During the penalty phase jury instruction charge conference, the State requested jury instructions on three aggravating circumstances on the basis of the shooting of the police officer -- the crime was committed to disrupt the governmental function of law enforcement, the crime was committed to avoid arrest, and the homicide victim was a law enforcement officer. Jackson argued that only one aggravating circumstance was applicable since these three circumstances merged under the facts of the case. The court ruled that the disruption of governmental function aggravating factor merged with the avoiding arrest circumstance. However, the court refused to make the same ruling about the avoiding arrest and law enforcement victim circumstances. The court also failed to instruct the jury on the law about the circumstances merging when based on

the same facts, and finding two aggravating circumstances would be an improper doubling. The trial court's failure to instruct the jury on the limitation on doubling aggravating circumstances tainted the sentencing process and violated Jackson's rights under the Eighth and Fourteenth Amendments and Article I, Sections 9, 16, 17 Fla. Const.

7. Jackson was convicted and originally sentenced for the murder in this case in 1984. The offense was committed in 1983. In 1987, the legislature amended Section 921.141 Florida Statutes to add a new aggravating circumstance for the murder of a law enforcement officer while performing his official duties. Sec. 921.141(5)(j) Fla. Stat. Even though the new aggravating circumstance was added after the commission of the offense and after Jackson's conviction and original sentence, the trial court applied the circumstance to this case. This ex post facto application of the law enforcement officer aggravating circumstance renders Jackson's death sentence unconstitutional. Art. I, Sec. 10 and Art. X, Sec. 9 Fla. Const.; Art. I, Sec. 9 & 10 U.S. Const.

## ARGUMENT

### ISSUE I

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

The State and the defense had differing theories about why Andrea shot Officer Bevel. Defense experts who examined Andrea concluded she suffered post-traumatic stress disorder as the result of childhood sexual abuse from her stepfather and two rapes which occurring when she was a teenager. She also suffered from battered woman syndrome. At the time of the shooting, Andrea was under the influence of drugs and alcohol, had a flashback and misperceived the struggle with Officer Bevel as an attempted rape. She experienced a panic reaction and shot the officer. The prosecution contended that Andrea merely shot the officer, while he was physically placing her into the patrol car, to prevent his arresting her for making a false report of a crime. However, under either view of the evidence, the premeditation aggravating factor was not applicable.

In finding the CCP factor, the trial judge relied on the States view of the case and stated:

> 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 unsuspecting 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 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 406 (Fla. 1987)

(R 381) Contrary to the judge's finding, the required heightened degree of premeditation was not proven beyond a reasonable doubt. This aggravating circumstance should not have been considered in sentencing.

The trial court's order cited this Court's first opinion in this case in which CCP was approved. Jackson v. State, 498 So.2d 406, 412 (Fla. 1986).(R 381) In fact, the court's order is identical to the order entered at the first sentencing with the additions of some of the comments this Court made in approving the CCP factor. Ibid. However, the trial Court's reliance on this Court's decision concerning the prior sentencing is misplaced. First, the sentence imposed pursuant to the new sentencing proceeding is the only sentence under review; the prior sentencing is irrelevant to these new sentencing proceedings. Lucas v. State, 417 So.2d 250, 251 (Fla. 1982) Second, this Court's first decision in this case was more than six months before this Court significantly narrowed the interpretation given to the premeditation factor in Rogers v. State, 511 So.2d 526 (Fla. 1987) While this Court has held that Rogers is not to be given retroactive effect, Eutsy v. State,

541 So.2d 1143, 1146-1147 (Fla. 1989), Rogers must be applied now to review the new sentence before this Court.

There is no evidence of a plan to kill. As this Court held in Rogers, the crime must be calculated, which involves a plan or prearranged design to kill. 511 So.2d at 533. The premeditation aggravating factor provided for in Section 921.141(5)(i), Florida Statutes, requires more than the premeditation element for first degree murder. See, e.g., Hill v. State, 515 So.2d 176 (Fla. 1987); Rogers v. State, 511 So.2d 526 (Fla. 1987); Floyd v. State, 497 So.2d 1211 (Fla 1986); Preston v. State, 444 So.2d. 939 (Fla. 1984); Jent v. State, 408 So.2d 1024 (Fla. 1981) The evidence must prove beyond a reasonable doubt that a heightened form of premeditation existed -- one exhibiting a cold, calculated manner without any pretense of moral or legal justification. Ibid. "This aggravating factor is reserved primarily for execution or contract murders or witness-elimination killings." Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987) There must be "...a careful plan or pre-arranged design to kill...." Rogers, 511 So.2d at 533. Such a plan to kill exhibiting the heightened premeditation required under Rogers simply does not exist.

Giving the State's interpretation to the evidence showed a spontaneous shooting during a struggle with a police officer to avoid arrest. This Court has previously held that murders of police officers committed in this manner and for this reason are not CCP. Rivera v. State, 545 So.2d 864 (Fla. 1989); Hill v. State, 515 So.2d 176 (Fla. 1987) In Rivera, the defendant

and his brother travelled to a shopping mall where the defendant's brother purchased a pistol. The two men then ransacked a storage area of a store adjacent to the mall. Two policemen, acting on information from customers, stopped the defendant and his brother in the parking lot for questioning. The defendant grabbed a bag containing the pistol from his brother and the men fled in different directions. One officer chased the defendant into the mall and caught him as he tried to escape through doors which could not be opened. The defendant struggled with the officer and shot him with his own gun. According to witnesses, the defendant shot the officer while he was on his knees with his arms raised. In rejecting CCP as an aggravating circumstance, this Court wrote,

> The evidence in this case indicates that this killing was of spontaneous design. Officer Miyares was shot during a struggle after he chased and cornered Rivera in the main part of the mall. Had Rivera intended to kill the officer, he could have easily done so from the start when he had in his possession the semiautomatic weapon that he snatched from his brother prior to the chase. While there was no moral or legal justification for the killing, we are not persuaded that the facts of this crime rise to the level of heightened premeditation necessary to sustain this finding. Therefore, we reverse the trial court's finding that the murder was cold, calculated, and premeditated.

545 So.2d at 865-866. Even viewing the facts as the State contends them to be, the shooting of Officer Bevel was no more a murder of heightened premeditation than the murder in Rivera. Under the State's theory, Andrea shot the officer during a struggle after he had managed to place her in the patrol car.

Like the defendant in Rivera, Andrea was also armed throughout the confrontation and could have shot Officer Bevel prior to that time if that had been her intent. Just as in Rivera, Andrea's shooting of the officer was spontaneous act, not a planned and calculated one.

In another case where the defendant killed a police officer as he and his accomplice attempted an escape from a robbery scene, this Court also rejected the premeditation aggravating circumstance. Hill v. State, 515 So.2d 176 (Fla. 1987). Hill and his accomplice ran in different directions when confronted at the scene of the robbery. Officers apprehended the accomplice at the front door. Hill came up behind the two officers and shot both of them in the back, killing one. This Court held the premeditation aggravating circumstance inapplicable:

> 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, we conclude as we did in Rogers v. State, 511 So.2d 526 (Fla. 1987), that there is insufficient evidence to support the heightened premeditation necessary to apply this aggravating circumstance.

515 So.2d at 179. Again, the homicide in the case now before the Court reflected no more planning than did the the homicide of the officer in Hill.

Assuming that Andrea emotional state was simply anger at being arrested, a murder committed during a rage still does not fall within the parameters of the CCP aggravating circumstance. See, Thompson v. State, 565 So.2d 1311 (Fla. 1990); Porter v. State, 564 So.2d 1060 (Fla. 1990); Mitchell v. State, 527 So.2d 179 (Fla. 1988). Additionally, Andrea's capacity to premeditate and reflect on her actions were also impaired by her use of drugs and alcohol. The influence of drugs or alcohol negates the ability to plan or premeditate a murder to the degree required for the CCP circumstance. See, e.g., Clark v. State, Case. No. 77,156 (Fla. Oct. 22, 1992); Penn v. State, 574 So.2d 1079 (Fla. 1991).

The trial judge also referred to the fact of multiple shots. However, on several occasions, this Court has rejected the premeditation circumstance even though the victim suffered several gunshot wounds. E.g., Farinas v. State, 569 So.2d 425 (Fla. 1990) (victim shot three times, defendant had to unjam his gun three times before firing the last two fatal shots); Caruthers v. State, 465 So.2d 496 (Fla. 1985) (victim shot three times); Blanco v. State, 452 So.2d 520 (Fla. 1984) (victim shot seven times) Even homicides where a defendant reloads a firearm during the shooting does not necessarily qualify the homicide for the premeditation factor. Hamilton v. State, 547 So.2d 864 (Fla. 1989) Consequently, the multiple shots fired here, in quick succession, does not characterize the homicide as CCP.

Andrea's state of mind at the time of the shooting was the focal point of the defense's case. Likewise, the focus of the CCP factor is on the mental state of the perpetrator. See, Mason v. State, 438 So.2d 374 (Fla. 1983); Michael v. State, 437 So.2d 138 (Fla. 1983). Her mental and emotional condition explains the real reason for the tragic shooting of Officer Bevel. And, as all the mental health experts who examined Andrea concluded, her actions were not planned or calculated and did not qualify for the CCP aggravating circumstance. (Tr 924-925, 1135-1138, 1310-1311) Drs. Mutter, Miller, and Walker concluded that Andrea had a flashback about prior sexual abuse, misperceived Bevel's actions and reacted to defend herself. (Tr 924-925, 1135-1138, 1310-1311) She did not plan or calculate the murder.

This aggravating circumstance does not apply to murders where the perpetrator had a pretense of moral or legal justification for the killing. Sec. 921.141(5)(i) Fla. Stat. At the very least, Andrea's actions had a pretense of moral or legal justification. Her perception of the circumstances surrounding Bevel's actions in arresting her was that she was about to be raped. This Court has found a pretense of moral or legal justification in much less compelling cases. For example, in Banda v. State, 536 So.2d 221 (Fla. 1988), this Court reversed the finding of CCP where the defendant shot his victim because he had threatened to kill him. The only evidence of the threat was the defendant statement, "[T]he guy threatened to kill me

so I figured I better get him first." Ibid., at 223. This Court rejected CCP stating:

> Upon this record, we thus must hold that appellant established a reasonable doubt as to the "no pretense of justification" element. The state's own theory of prosecution -- that appellant plotted to kill the victim to prevent the victim from killing him -- underscores this conclusion. Together with the uncontroverted evidence establishing the victim's violent propensities, we find that appellant acted with at least a pretense of moral or legal justification. That is, a colorable claim exists that this murder was motivated out of self-defense, albeit in a form clearly insufficient to reduce the degree of the crime.

Ibid., at 225. In Christian v. State, 550 So.2d 450 (Fla. 1989), the defendant and the victim were prisoners at Florida State Prison. Defendant caught victim cheating at cards and under the inmate "code" took victim's entire wager. Victim later attacked defendant knocking him unconscious with a forty-pound curling iron bar. Other inmates kept victim from killing defendant at that time. Over three week period, victim continued to threaten defendant. Defendant finally attacked victim as he was being escorted in handcuffs by two unarmed guards. Defendant had a knife and stabbed victim several times before throwing him off a third-floor deck. Rejecting the trial court's finding of CCP, this Court said,

> In the present case, we find ample evidence showing that Christian had at least a "pretense" of moral or legal justification. As in Banda, this record discloses at least a colorable claim that the murder "was motivated out of self-defense," although in a form legally insufficient to serve as a defense to the crime.

550 So.2d at 452. In Cannady v. State, 427 So.2d 723 (Fla. 1983), this Court rejected the trial court's finding of the CCP factor. The defendant had shot his robbery victim after driving him to a remote wooded area. In his confession, the defendant said he did not mean to kill the victim and shot only after the victim "jumped at him." 427 So.2d at 730. This Court concluded that this established a pretense of a moral or legal justification for the shooting. Ibid.

The CCP aggravating circumstance was not supported by the evidence. Andrea Jackson's death sentence has been imposed in violation of the Florida and United States Constitutions. Art. I, Secs. 9, 16, 17 Fla. Const.; Amend. VIII, XIV U.S. Const. She urges this Court to reverse her sentence.

ISSUE II

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

Each of the three mental health experts who testified concluded that Andrea's mental state at the time of the crime qualified her for the two statutory mental mitigating circumstances. (Tr 932-933, 1138-1139, 1310-1312) Secs. 921.141(6)(b) & (f) Fla. Stat. The opinions of Drs. Mutter, Miller, and Walker were consistent with one another, and the State could not rebut them. In fact, Miller, who testified for the defense, had originally been appointed as the State's expert. (Tr 1123) Although the opinions of these experts went unrebutted, the trial court refused to find the two statutory mental mitigating circumstances. (R 382) Furthermore, he failed to adequately consider and weigh the nonstatutory mental mitigation he did find established by the evidence. Regarding the mental mitigation presented, the trial judge wrote,

> It was established by a preponderance of the evidence that the Defendant had a difficult childhood that included sexual abuse from a stepfather.
>
> 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 just got meaner."
>
> 2) The capacity of the Defendant to appreciate the criminality of her conduct or to conform her conduct to the requirements of the law was substantially impaired.
>
> The defense argues this factor applies due the 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.
>
> WHEREFORE, it is clear from a reasonable 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 as to the Defendant, Andrea Hicks Jackson.

(R 381-382)

The trial judge was not free to reject the existence of these mental mitigating circumstances proven by substantial evidence which the State could not rebut. See, Parker v. Dugger, 498 US ___, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991). Failure to weigh these two statutory mitigating circumstances skewed the sentencing decision and rendered the death sentence unconstitutional. Amends. V, VI, VIII, XIV U.S. Const.; Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982);

Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2958, 57 L.Ed.2d 973 (1978).

In Rogers v. State, 511 So.2d 526 (Fla. 1987), this Court acknowledged the command of Lockett and Eddings and defined the trial judge's duty to find and consider mitigating evidence:

> ...we find that the trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding had been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

511 So.2d at 534.

Later, in Campbell v. State, 571 So.2d 415 (Fla. 1990), this Court clarified the trial judge's responsibility to find mitigating circumstances when supported by the evidence. This Court wrote,

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of non-statutory factors, it is truly of a mitigating nature. See, Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). The court must find as a mitigating circumstance each proposed factor that has been reasonably established by the evidence and is mitigating in nature ....The court next must weigh the aggravating circumstances against the mitigating

> and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight.

Campbell, at 419-420. (footnotes omitted) A short time later this Court reiterated this point in Nibert v. State, 574 So.2d 1059 (Fla. 1990):

> A mitigating circumstance must be "reasonably established by the evidence." Campbell v. State, No. 72,622, slip op. at 9 (Fla. June 14, 1990); Fla. Std. Jury Instr. (Crim) at 81; see, also, Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), cert., denied, 484 U.S. 1020 (1988). "[W]here uncontroverted evidence of a mitigating factor has been presented, a reasonable quantum of competent proof is required before the factor can be said to have been established." Campbell, slip op. at 9 n.5. Thus, when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved....

Nibert, at 1061-1062.

Finally, this court in Santos v. State, 591 So.2d 160 (Fla. 1991), reaffirmed Rogers and Campbell, adding that "Mitigating evidence must at least be weighted in the balance if the record discloses it to be both believable and uncontroverted, particularly where it is derived from unrefuted factual evidence." 16 FLW at S634. More significantly, this Court, citing the mandate of the United States Supreme Court in Parker v. Dugger, indicated its willingness to examine the record to find mitigation the trial court had ignored:

> The requirements announced in Rogers and continued in Campbell were underscored by the recent opinion of the United States Supreme Court in Parker v. Dugger, 111 S.Ct. 731 (1991). There, the majority stated that it was not bound by this Court's erroneous statement that no mitigating factors existed. Delving deeply into the record, the Parker Court found substantial, uncontroverted mitigating evidence. Based on this finding, the Parker Court then reversed and remanded for a new consideration that more fully weighs the available mitigating evidence. Clearly, the United States Supreme Court is prepared to conduct its own review of the record to determine whether mitigating evidence has been improperly ignored.

591 So.2d at 164.

The mitigation presented in this case was substantial and compelling. As noted earlier, all three mental health experts agreed that Andrea's mental condition at the time of the shooting qualified her for the statutory mitigating circumstances. Post-Traumatic Stress disorder has been acknowledged as mitigating circumstances in other cases. See, Clark v. State, Case No. 77,156 (Fla. 1992); Masterson v. State, 516 So.2d 256 (Fla. 1987). Suffering sexual abuse as a child is also a compelling factor. Clark. The excessive use of alcohol or drugs at time of the murder was mitigating. E.g., Clark v. State; Nibert v. State, 574 So.2d 1059 (Fla. 1990); Ross v. State, 474 So.2d 1170 (Fla. 1985). Chronic alcoholism and drug dependency is also mitigating. Clark, Ross. Andrea suffered from all of these mental disturbances a the time she killed Officer Bevel. Furthermore, Andrea demonstrated remorse upon learning she had

killed the officer. Morris v. State, 557 So.2d 27 (Fla. 1990); Pope v. State, 447 So.2d 1073 (Fla. 1983).

In failing to properly find, weigh and consider the unrebutted mental mitigation, the trial court violated Andrea Jackson's rights under the Florida and United States Constitutions. Art. I, Secs. 9, 16, 17 Fla. Const.; Amend. VIII, XIV U.S. Const. As a result, the death sentence imposed is unconstitutional and must be reversed.

ISSUE III

THE TRIAL COURT ERRED IN IMPOSING A SENTENCE OF DEATH SINCE SUCH A SENTENCE IS NOT PROPORTIONAL.

Andrea Jackson's death sentence is disproportionate and must be reversed. Since the premeditation aggravating circumstance was improperly found (See Issue I, supra.), this case is, at best, one involving a single aggravating circumstance -- the law enforcement officer victim circumstance.[1] The victim's status as a policeman, standing alone, cannot justify a death sentence. See, Songer v. State, 544 So.2d 1010 (Fla. 1989). This Court has consistently held that one aggravating circumstance will not support a death sentence where mitigating circumstances are present. E.g., Clark v. State, Case No. 77,156 (Fla. October 22, 1992); McKinney v. State, 579 So.2d 80, 85 (Fla. 1991); Nibert v. State, 574 So.2d 1059, 1063 (Fla. 1990); Songer v. State, 544 So.2d at 1011; Smalley v. State, 546 So.2d 720, 723 (Fla. 1989); Rembert v. State, 445 So.2d 337 (Fla. 1984). Compelling mitigating evidence was presented in this case. (See Issue II, supra.) Just as in those cases, Andrea Jackson's death sentence is improperly imposed.

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[1]This argument assumes that this Court will adhere to its previous decision in Valle v. State which holds that the law officer victim circumstance is not applied ex post facto in cases such as the one here. Should this Court choose to recede from Valle, as Jackson requests in Issue VII, this would eliminate all the aggravating circumstances.

## ISSUE IV

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

The State filed a Motion In Limine to preclude the admission into evidence of the videotape of the hypnosis session Dr. Mutter performed on Andrea. (R 302) After argument, the court granted the motion. (R 304, Tr 174-196) Judge Moran ruled that Mutter could testify about the hypnotic regression since it was an essential basis for his opinion on Andrea's mental state at the time of the crime. Mutter was also allowed to read extensively from the transcript of the session during his testimony. (Tr 174-196) However, the court ruled the the videotape itself was irrelevant and inadmissible for any purpose. (Tr 174-196) The court also ruled that the tape could not be admitted even if the State attacked the reliability of procedures used in the hypnosis session. (Tr 174-196) Jackson filed a motion asking the court to reconsider the admissibility of the videotape which the court denied..(R 319-333, Tr 422-423) She also renewed her request at trial. (Tr 892-893)

During the trial, Mutter testified, referred to the hypnotic regression and read portions of the transcript of the session to the jury. (Tr 893-917)(exerts from Mutter's testimony are attached to this brief as an appendix) On cross-examination, the State attacked the reliability of the hypnosis procedures and questioned Mutter as to whether Andrea was lying

during the hypnotic regression. (Tr 941-944, 954-960) Later, during his closing argument to the jury, the prosecutor again attacked the reliability of the hypnosis. (Tr 1511-1516) Finally, the court instructed the jury that it was its role to assess the reliability of expert testimony presented based in part on an examination of the foundation for the experts' opinion. (Tr 1592)

In ruling that the videotape of the hypnotic regression was inadmissible, the trial court denied Jackson her due process rights to present a defense and, consequently, her death sentence violates the Eighth and Fourteenth Amendments of the United States Constitution and Article I Sections 9, 16 and 17 of the Florida Constitution. First, the videotape was admissible as evidence the experts relied upon to reach their opinions about Andrea's mental state. Morgan v. State, 537 So.2d 937 (Fla. 1989). Second, the videotape was admissible to rebut the State's attacks on the reliability of the hypnotic session and to provide to the jury the best evidence for fulfilling its burden of evaluating the weight and credibility of the expert opinions rendered. Brown v. State, 426 So.2d 76, 92-93 (Fla. 1st DCA 1983) Third, the videotape was admissible as evidence in mitigation. See, Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

This Court addressed a similar issue in Morgan. The defendant in that case relied on an insanity defense at trial. Before the defense experts testified, the State moved to

exclude their testimony because they had partially relied on statements the defendant made while under hypnosis to reach their opinions on the sanity issue. Relying on this Court's decision ruling hypnotically refreshed testimony per se inadmissible, Bundy v. State, 471 So.2d 9 (Fla. 1985), the trial court excluded the experts from testifying. Reversing the case for a new trial, this Court concluded that Rock v. Arkansas, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987), which held that Arkansas' per se rule of exclusion could not be applied to the testimony of a defendant who had undergone hypnosis, controlled. Even though Rock involved the actual testimony of the defendant rather than a defendant's statements to mental health experts, this Court found no distinction and held that Rock mandated an exception to the per se rule of exclusion:

> Rock mandates that we recede from the Bundy II rule to the extent it affects a defendant's testimony or statements made to experts by a defendant in preparation of a defense.

Morgan, 537 So.2d at 976. In fact, this Court concluded that the expert's testimony would be permissible without the Rock decision, since the hypnosis used was an accepted medical practice for aiding the experts reach their opinions.

Although the trial court here followed Morgan to a point, the court still excluded the best evidence of the defendant's statement to Dr. Mutter -- the videotape. Mutter was allowed to read portions of the transcript of the statement Andrea made under hypnosis, but neither the videotape or a transcript of the tape was allowed in evidence. Initially, the videotape was

admissible simply because it was the best evidence of the defendant's statement which was relevant and admissible under Morgan. Videotapes are admissible on a similar basis as still photographs to aid the jury on a variety of subjects. See, State v. Lewis, 543 So.2d 760 (Fla. 2d DCA 1989)(video of luminal test on carpet by law enforcement officer); Dowell v. State, 516 So.2d 273 (Fla. 2d DCA 1987)(video of crime reenactment admitted); Paramore v. State, 229 So.2d 855 (Fla. 1969). Videotapes and audiotapes of defendants' statements to law enforcement are admissible and, absent compelling reason, are played in their entirety when introduced at trial. See, Correll v. State, 523 So.2d 562, 566 (Fla. 1988); Paramore; Morrison v. State, 546 So.2d 102 (Fla. 4th DCA 1989). If this videotape had been of the defendant's confession given to the police, the tape would have been admitted and played in its entirety. Ibid. Consequently, the trial court's drawing a distinction between allowing Mutter to testify freely about the content of the videotape and actually playing the tape for the jury is without foundation.

The videotape was also admissible to rebut the State's charges the hypnotic session was flawed. Questioning whether Mutter or the two other persons present at the session improperly suggested answers, the State opened the door to the admission of the tape in order to answer these allegations. Videotaping of hypnotic sessions is the accepted and preferred procedure to preserve the session for the finder of fact to evaluate the credibility of the hypnosis. See, Brown v. State,

426 So.2d 76, (and authorities cited therein); Dowell, 516 So.2d at 274 (audiotape of hypnotic session admitted to rebut implied charge of improper influence). The prosecutor, through his questioning and argument to the jury invited the jury to make such a credibility evaluation. Additionally, the court's instruction on expert witnesses again told the jury to look at the credibility of the basis for the expert's opinion. Preventing the defense from using the videotape deprived the jury to the evidence necessary to make the credibility determinations the prosecution and court directed the jury to perform. Brown; Dowell.

Regardless of its admissibility on other grounds, the videotape was admissible in the penalty phase as mitigating evidence. Any relevant evidence which tends to mitigate must be admitted and considered. Art. I, Secs. 9, 17 Fla. Const.; Amend. VIII, XIV U.S. Const.; Lockett; Eddings. In Florida, the rules of evidence are relaxed and hearsay is admissible. Sec. 921.141(1) Fla. Stat. On this basis, alone, the videotape was admissible.

The trial court erred in excluding the videotape. Jackson asks this Court to reverse her death sentence for a new penalty phase trial where this relevant evidence can be presented to the jury.

ISSUE V

THE TRIAL COURT ERRED IN NOT DECLARING THE PREMEDITATION AGGRAVATING CIRCUMSTANCE PROVIDED FOR BY SECTION 921.141(5)(i) FLORIDA STATUTES 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.

Prior to her penalty phase trial, Jackson moved the court to declare the premeditation aggravating circumstance provided for in Section 921.141(5)(i) Florida Statutes unconstitutionally vague and inapplicable to her case. (R 78) The court denied the motion. (R 226) During the jury instruction charge conference, the defense requested a special jury instruction which incorporated the limiting interpretation this Court has given to the statutory language of the premeditation aggravating circumstance. (R 348, Tr 1460-1462) The requested instruction read,

> The phrase "cold, calculated and premeditated" refers to a higher degree of premeditation that that which is normally present in a premeditated murder. This aggravating factor applies only when the facts show a calculation before the murder that includes a careful plan or prearranged design to kill, or a substantial period of reflection and thought by a defendant before the murder.
>
> A pretense of moral or legal justification is any claim of justification or excuse that, although insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.

(R 348) However, the court denied the request (R 348, Tr 1460-1462) and used the standard jury instruction to instruct the jury as follows:

> ...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.

(Tr 1593) As a result, the jury was instructed on an unconstitutionally vague aggravating circumstance in violation of the United States and Florida Constitutions. Amends. VIII, XIV U.S. Const.; Art. I, Secs. 9, 16, 17 Fla. Const.

The statutory language of the premeditation aggravating circumstance is not sufficient to inform the jury of what it must find in determining the presence or absence of this factor. It is well established that he Eighth and Fourteenth Amendments prohibit the imposition of the death penalty "under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." Godfrey v. Georgia, 446 U.S. 420, 427, 100 S.Ct. 1759, 64 L.Ed.2d 392, 406 (1980). The state "must channel the sentencer's discretion by `clear and objective standards' that provide `specific and detailed guidance,' and that `make rationally reviewable the process for imposing a sentence of death.'" Ibid., 446 U.S. at 428, 64 L.Ed.2d at 406 (footnotes omitted) "[T]he channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright,

486 U.S. 356, 362, 108 S.Ct. 1853, 100 L.Ed.2d 372, 380 (1988). As a consequence, when the jury is the sentencer, "It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face." Walton v. Arizona, 497 U.S. ___, 110 S.Ct. 3047, 111 L.Ed.2d 511, 528 (1990). Florida juries are a "constituent part" of the capital sentencing authority and must be correctly instructed on the aggravating circumstances. Sochor v. Florida, 504 U.S. ___, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992); Espinosa v. Florida, 505 U.S. ___, 112 S.Ct. ___, 120 L.Ed.2d 854 (1992).

In Godfrey, the United State Supreme Court ruled that the death penalty could not be imposed solely on the basis of an aggravating factor providing that the offense was "outrageously or wantonly vile, horrible, and inhuman." The Court found there was "nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of a death sentence.". 446 US at 428-429, 64 L.Ed.2d at 406. Similarly, in Maynard the Court found that Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance was too vague and overbroad to sufficiently guide the sentencing jury's discretion. Moreover, the defect was not cured by the state appellate court's finding that specific facts supported the aggravating factor. 486 US at 363-364, 100 L.Ed.2d at 382. In Sochor and Espinosa, the Court held Florida's "heinous, atrocious or cruel" aggravating factor instruction likewise vague and constitutionally insufficient. The CCP factor in Florida suffers from the same fatal flaw as

the instructions condemned in Godrey, Maynard, Sochor and Espinosa.

This Court has implicitly recognized that the cold, calculated, and premeditated aggravating circumstance and the standard jury instruction are too vague to guide the sentencer's determination of whether the factor applies and adopted a number of limiting constructions of the statutory circumstance. Initially, this Court determined that this circumstance applied to "those murders which are characterized as executions or contract murders, although that description is not intended to be all-inclusive." McCray v. State, 416 So.2d 804, 807 (Fla. 1982) Second, this Court ruled that this factor requires a finding of "heightened premeditation" -- contract or execution-style murders. Scull v. State, 533 So.2d 1137, 1142 (Fla. 1988); Hamblen v. State, 527 So.2d 800, 805 (Fla. 1988). Third, this court has required evidence of "calculation", defined to mean "a careful plan or prearranged design." Rivera v. State, 545 So.2d 864, 865 (Fla. 1989); Rutherford v. State, 545 So.2d 853, 856 (Fla. 1989); Schafer v. State, 537 So.2d 988, 991 (Fla. 1989); Rogers v. State, 511 So.2d 526, 533 (Fla. 1987). Sometimes this Court has equated "heightened premeditation" with "calculation" or a "plan or prearranged design,". Farinas v. State, 569 So.2d 425, 431 (Fla. 1990); Thompson v. State, 565 So.2d 1311, 1317-1318 (Fla 1990); Perry v. State, 522 So.2d 817, 820 (Fla. 1988). Fourth, this Court has defined the statutory term "pretense of moral or legal justification" to mean "any claim of justification or excuse, which, although

short of a defense to murder, rebuts the otherwise cold and calculating nature of the homicide." Cruse v. State, 588 So.2d 983, 992 (Fla. 1991); Banda v. State, 536 So.2d 221, 225 (Fla. 1988).

These limiting constructions of the premeditated aggravating circumstance illustrates the factor's vagueness. If the limiting constructions save the constitutionality of statutory aggravating circumstance, they have not been used to alleviate the vagueness of the standard jury instruction. The jury is given no guidance when asked to apply this circumstance. The jurors are never informed of the requirement of heightened premeditation, the requirement of calculation as defined to mean a careful plan or prearranged design, nor the meaning of the statutory phrase "without any pretense of moral or legal justification." As a result, the jury is left to its own devices concerning the application of this aggravating factor and may well find it applicable to any premeditated murder.

Jackson is aware the this Court's rejected a claim that Florida's cold, calculated and premeditated jury instruction was unconstitutionally vague in Brown v. State, 565 So.2d 304 (Fla. 1990). This Court reasoned that Maynard v. Cartwright did not apply in Florida and did not apply to the cold, calculated, and premeditated circumstance. 565 So.2d at 308, citing Smalley v. State, 546 So.2d 720 (Fla. 1989), for the proposition that Maynard does not apply in Florida. 565 So.2d at 308. The rationale in Smalley was that Maynard does not apply because the final sentencing decision in Florida is made by the

trial judge, whose findings are subject to the application of a narrowing construction upon appellate review. 546 So.2d at 722. However, this rationale has been invalidated by the recent decision in Espinosa v. Florida (reversing, Espinosa v. State, 589 So.2d 887 (Fla. 1991). In Espinosa, this Court relied upon the Smalley rationale to reject the defendant's claim that the heinous, atrocious, or cruel jury instruction was unconstitutionally vague. 589 So.2d at 894. Reversing Espinosa, the United States Supreme Court ruled that the jury's consideration of an invalid aggravating circumstance resulted in "the indirect weighing of an invalid factor" by the sentencing judge who was required to give "great weight" to the jury's sentencing recommendation. 120 L.Ed.2d at 859. Thus, the jury's consideration of an invalid aggravating factor unde the Florida capital sentencing procedure created "the same potential for arbitrariness as the direct weighing of an invalid factor." Ibid.

The United States Supreme Court has applied Espinosa to Florida's cold, calculated and premeditated aggravating circumstance when it remanded this Court's decision in Hodges v. State, 595 So.2d 929 (Fla. 1992). Hodges v. Florida, ___ U.S. ___, 113 S.Ct. 33, 121 L.Ed.2d 6 (1992). In Hodges, the this Court summarily rejected a claim that the standard jury instruction on the aggravating circumstance that the crime "was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification" is unconstitutionally vague relying on Brown and Smalley. The

United States Supreme Court has acknowledged the flaws in the CCP instruction and this Court's reasoning in Brown by its remand in Hodges.

The Florida standard jury instruction on the cold, calculated, and premeditated aggravating circumstance is too vague to guide the jury in determining its sentencing recommendation. It must be presumed that the jury relied upon an invalid aggravating circumstance. Espinosa v. Florida. It must also be presumed that the trial court gave great weight to the jury's recommendation of death. Ibid. Thus, the trial court indirectly weighed the invalid circumstance and violated the Eighth and Fourteenth Amendments. Ibid. This Court must now reverse Jackson's death sentence.

ISSUE VI

THE TRIAL COURT ERRED IN FAILING TO GIVE AN INSTRUCTION TO THE JURY THAT THE AGGRAVATING FACTORS DEFINED BY SECTIONS 921.141(5)(e)(g) & (j) FLORIDA STATUTES MERGE INTO A SINGLE AGGRAVATING CIRCUMSTANCE UNDER THE FACTS PRESENTED.

During the penalty phase jury instruction charge conference, the State requested jury instructions on three aggravating circumstances on the basis of the shooting of the police officer -- the crime was committed to disrupt the governmental function of law enforcement, Sec. 921.141(5)(g) Fla. Stat.; the crime was committed to avoid arrest, ibid. at (5)(e); and the homicide victim was a law enforcement officer, ibid. at (5)(j) (Tr 1464-1471) Jackson argued that only one aggravating circumstance was applicable since these three circumstances merged under the facts of the case. (Tr 1464-1471) The court ruled that the disruption of governmental function aggravating factor merged with the avoiding arrest circumstance. (Tr 1464-1471) However, the court refused to make the same ruling about the avoiding arrest and law enforcement victim circumstances. (Tr 1464-1471) Jackson urged the court to instruct the jury on the law about the circumstances merging when based on the same facts, and finding two aggravating circumstances would be an improper doubling. (Tr 1464-1471) Later, at sentencing, the trial court found only the aggravating circumstance that the victim was a law enforcement officer.(R 380-381)

In Valle v. State, 581 So.2d 40 (Fla. 1991), this Court, in addressing an ex post facto argument concerning the law

enforcement officer aggravating circumstance, discussed how this circumstance merged with the disrupting law enforcement factor and the avoiding arrest factor. Noting that the trial judge merged the three in his findings, this Court concluded that the Valle was not disadvantaged:

> Similarly, in this case 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 byh its application. At the time Valle committed this crime the legislature had established the aggravating factors of murder to prevent lawful arrest and murder to hinder the lawful exercise of any governmental function or the enforcement of laws. Secs. 921.141(5)(e), (g), Fla. Stat. (1977) 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.

This Court mentioned, in footnote 9 in Valle, that the trial judge in that case did not err in not instructing the the jury to merge the three law enforcement aggravating factors, citing Suarez v. State, 481 So.2d 1201 (Fla. 1985). Ibid. Suarez held that the trial court did not err in refusing to instruct the jury on both pecuniary gain and robbery factors, even though these factually merged, because the trial judge did not give the factors double weight. However, as later explained in Castro v. State, 597 So.2d 259 (Fla. 1992), the jury must be instructed on the law limiting the double consideration

of aggravating circumstances supported by the same factual aspect of the case. The jury is free to find one of the three circumstances, but must be instructed that all three cannot be found and weighed. Castro. Clarifying Suarez, this Court in Castro wrote:

> The court refused the instruction [limiting the double consideration of aggravating factors] on the authority of Suarez. However, Suarez did not involve a limiting instruction, but only the question of whether in that case it was reversible error when the jury was 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.

Failure to instruct on the law concerning improper doubling of aggravating circumstances based on the same factual aspect of the case renders Jackson's death sentence in violation of the Eighth and Fourteenth Amendments and Articles I, Sections 9, 16 and 17 of the Florida Constitution. The jury is a constituent part of the capital sentencer and, therefore, it must be adequately instructed on the legal limitations of aggravating circumstances. See, Espinosa v. Florida, 505 U.S. ___, 112 S.Ct. ___, 120 L.Ed.2d 854 (1992); Sochor v. Florida, 504 U.S. ___, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992) Although the trial judge was aware of the prohibition against improper doubling of aggravating circumstances and applied the law to find only one circumstance, the jury was not instructed to

apply that same law. Since the assumption must be that the jury found the aggravating circumstances instructed upon and supported by the evidence, and since the jury was not apprised of the improper doubling standard, the resultant jury recommendation is flawed. The recommendation was based on the improper consideration of two rather than one aggravating circumstance.

The trial court's later application of the improper doubling standard does not cure the error. By relying on the jury recommendation, which was based on improperly doubling aggravating circumstances, the trial court indirectly weighed improperly doubled aggravating circumstances. As the United States Supreme Court in Espinosa said,

> It is true that, in this case, the trial court did not directly weigh any invalid aggravating circumstances. But, we must presume that the jury did so, see Mills v. Maryland, 486 U.S. 367, 376-377, 108 S.Ct. 1860, 100 L.Ed.2d (1988), just as we must further presume that the trial court followed Florida law, cf. Walton v. Arizona, 497 U.S. 639, 653, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), and gave "great weight" to the resultant recommendation. By giving "great weight" to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found. This kind of indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor, cf. Baldwin v. Alabama, 472 U.S. 372, 105 S.Ct. 2727, 86 L.Ed.2d 300 (1985), and the result, therefore, was error.

120 L.Ed.2d at 859. The same kind of indirect weighing occurred in this case.

The trial court's failure to instruct the jury on the limitation on doubling aggravating circumstances tainted the sentencing process and violated Jackson's rights under the Eighth and Fourteenth Amendments and Article I, Sections 9, 16, 17 Fla. Const. She urges this Court to reverse her death sentence.

ISSUE VII

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

Andrea Jackson was convicted and originally sentenced for the murder in this case in 1984. (R 3-15) The offense was committed in 1983. (R 1-2) In 1987, the legislature amended Section 921.141 Florida Statutes to add a new aggravating circumstance for the murder of a law enforcement officer while performing his official duties. Sec. 921.141(5)(j) Fla. Stat. Even though the new aggravating circumstance was added after the commission of the offense and after Jackson's conviction and original sentence, the trial court applied the circumstance to this case. The jury was instructed on the circumstance (Tr 1593) and the court found the circumstance in its sentencing order. (R 380-381) This ex post facto application of the law enforcement officer aggravating circumstance renders Jackson's death sentence unconstitutional. Art. I, Sec. 10 and Art. X, Sec. 9 Fla. Const.; Art. I, Sec. 9 & 10 U.S. Const. Jackson recognizes that this Court has previously rejected arguments concerning the ex post facto application of this aggravating factor. Valle v. State, 581 So.2d 40, 47 (Fla. 1991) However, she urges this Court to reconsider this decision.

In Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987), the Supreme Court established the test for determining whether a statute is ex post facto. In doing so, the Court harmonized two prior court decisions, Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), and Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 1960, 67 L.Ed.2d 17 (1981), which also involved the retroactive application of the law:

> As was stated in Weaver, to fall within the ex post facto prohibition, two critical elements must be present: First, the law "must be retrospective, that is, it must apply to events occurring before its enactment" and second, it must disadvantage the offender affected by it. Ibid., at 29. We have also held in Dobbert v. Florida, 432 U.S. 282, that no ex post facto violation occurs if a change does not alter "substantial person rights," but merely changes "modes of procedure which do not affect matters of substance." Ibid. at 293.

Miller, supra, 101 S.Ct. at 2451.

The relevant "event" here was the crime that occurred in 1983, well before the legislature enacted Sec. 921.141(5)(j) in 1987. As Miller explained, retrospectivity concerns whether a new statute changes the "legal consequence of acts completed before its effective date." Miller v. Florida, 107 S.Ct. at 2451 (citations omitted) The relevant "legal consequences" include the effect legislative changes have on the defendant's sentence. See Miller v. Florida, 107 S.Ct. at 2451.

In the instant case, Section 921.141(5)(j), Florida Statutes (1987) is a penal or criminal statute since it deals with the quantum of punishment that may be imposed upon a

person convicted of a capital felony. Section 921.141(5)(j) also operates retrospectively because it changes the legal consequences of acts completed before the effective date. The change in the sentencing statute allowed the trial judge to consider an additional aggravating factor that could increase the punishment from life imprisonment to death under Florida's sentencing scheme of weighing and balancing aggravating and mitigating factors. Finally, the addition of a new aggravating factor could readily disadvantage a capital defendant on trial for his life. Under Florida's capital sentencing scheme, the trial judge and sentencing jury must weigh and balance all aggravating and mitigating. Consequently, the presence or absence of an aggravating factor could be outcome determinative. Accordingly, this Court should hold that Section 921.141(5)(j), Florida Statutes (1987), adding an additional aggravating factor to Florida's capital sentencing scheme, is unconstitutional as applied to Jackson whose crime occurred before the statute's effective date.

Jackson is aware that this Court in Valle held that the creation of the law enforcement officer aggravating circumstance did not add a completely new aggravating circumstance, since the circumstances concerning disruption of governmental function and avoiding arrest often include the element of the victim being a law enforcement officer. Sec. 921.141(5)(e) & (g) Fla. Stat.; 581 So.2d at 47. This reasoning, however, 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. Indeed, in this case, Andrea Jackson's killing of Officer Bevel was not motivated to disrupt governmental functions or to avoid arrest. Rather, she killed under the mistaken misperception that she was about to be sexually assaulted. The trial judge, here, found only the law enforcement victim aggravating circumstance.(R 380-381)

As an independent basis for reversal, the retroactive application of the new aggravating factor violated the Florida Constitution. Article X, Section 9 of the Florida Constitution provides:

> Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.

This provision, unlike the ex post facto provision of the federal constitution, does not require that the change in the law disadvantage the defendant. As this Court said in Raines v. State, 42 Fla. 141, 28 So. 57, 58 (Fla. 1900):

> The effect of this constitutional provision is to give all criminal legislation a prospective effectiveness.

In Castle v. State, 330 So.2d 10 (Fla. 1977) this court denied Castle's claim that a legislative reduction of the punishment for distributing flammable substances with the intent to burn applied to him. At the time Castle committed the charged offense, the prison sentence for that crime was ten years. When he went to trial, it was five years. This court adopted the reasoning of the district court, Castle v. State, 305 So.2d

794, 797 (Fla. 4th DCA 1975), and held that the defendant remained subject to the ten-year sentence provided for by the earlier statute because criminal legislation has prospective effect only under Article X, Section 9 of the Florida Constitution. This provision of the Florida Constitution also prevents the prospective application of Section 921.141(5)(j), Florida Statutes.

In conclusion, the law enforcement aggravating factor should not have been applied in Jackson's case. Her death sentence has been imposed in an unconstitutional manner and must be reversed.

## CONCLUSION

For the reasons presented in this brief, Andrea Jackson asks this Court to reverse her sentence of death with directions to the trial court to impose a sentence of life imprisonment.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by hand-delivery to Ms. Carolyn Snurkowski, Assistant Attorney General, Criminal Appeals Division, The Capital, Florida, 32301; and a copy has been mailed to appellant, Ms. Andrea Hicks Jackson, DOC #279567, D.R. #4, Broward Correctional Inst., Post Office Box 8540, Pembroke Pines, Florida, 33024, on this 21 day of December, 1992.

W. C. McLAIN