IN THE SUPREME COURT OF FLORIDA

ANDREA HICKS JACKSON,

Appellant,

v. CASE NO. 87,345

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee accepts Jackson's statement of the case and facts with the following additions.

Detective John Bradley **was** called to the scene on May 17, 1983, to investigate the death of Officer Gary Bevel. During the course of his investigation, he had occasion to observe Andrea Hicks Jackson and testified that on May 17, 1983, he observed that Jackson was neither drunk nor high. (TR 533-34, 548, 558). Although he smelled alcohol on her, she was not intoxicated to the point where she could not understand what was happening. (TR 534, **549,** 558).

Anna Allen testified that at approximately 6:30 p.m., she heard glass breaking and saw Jackson smashing the car windows with a crowbar. (TR 579). She saw Jackson pulling wires out from under the hood of the car; remove items from the car, and remove the auto tag. (TR 579). She observed Jackson's behavior and testified that she did not appear to be intoxicated. (TR 584). When Officer Bevel came over to their house to ask whether she had seen anything that evening, she saw Jackson go to the side of the patrol car. Jackson was walking normally. She alerted Officer Bevel who turned to Jackson and yelled, "Hey lady, what are you doing in my car?" (TR 590). As Bevel approached the car he informed Jackson that she

was being arrested for making a false report. (TR 591). Jackson then got violent with the officer. Jackson lunged at Bevel and started hitting him. (TR 592). After Jackson hit the officer, he grabbed Jackson's hands and tried to move her to the back door of the car. (TR 593). Officer Bevel asked her to get into the car. Jackson said "she was not going to." A struggle ensued and Ms. Allen heard Jackson say, "You made me drop my damn keys." (TR 593) . Bevel backed away to help pick up the keys. She then heard the first shot. There was a pause and then four more shots were heard. (TR 597). She observed Officer Bevel fall into the car and then saw Jackson push him over and get out of the car and run behind the apartments nearby. (TR 598). On cross-examination, Ms. Allen testified that she heard Jackson say, "Why are you manhandling me?", but further observed that Officer Bevel never frisked or handcuffed Jackson. (TR 620). Officer Bevel was never on top or lying down on Jackson until after the shooting. (TR 627).

Leanderaus Fagg's testimony was read to the jury. Mr. Fagg testified that on May 16, 1983, he heard unusual noises, specifically glass shattering from a car parked directly outside the bedroom window. Fagg later heard and saw the shooting of Officer Bevel. (TR 635). Fagg overheard the conversation between

Officer Bevel and Jackson regarding the towing of **Jackson's car.** Jackson said to the officer, "I told you don't take my god damn car nowhere." (TR 639). Fagg heard Officer Bevel tell Jackson that he **was** arresting her for false information. He attempted to place her into the police car. (TR 639). Jackson responded, "You ain't taking me anywhere", and Fagg heard her yell, "You made me drop my keys." (TR 640-641). Jackson was in a sitting position with her feet handing out in the back seat of the patrol car. Officer Bevel stepped back and the first shot **was** fired. Four shots later Officer Bevel fell forward into the car. (TR 641). Jackson then slid out from underneath the body and ran to the house **across the** street from his location. (TR 642). The struggle occurred between the officer and Jackson after **Jackson was** told that she was under arrest and after the officer tried to place her into the police car. (TR 649-650).

Mabel Coleman also observed the shooting on May 17, 1983. She testified that she saw Jackson beating up on the car; taking the license tag off; opening the trunk and taking stuff out of the car. (TR 657-658). Ms. Coleman observed that Jackson did not appear to be drunk. (TR 658). On the third time Jackson returned from the house, Coleman **saw** that Jackson placed in Jackson's pants' pocket or waistband. (TR 663-664). Jackson, in response to the officer

telling her that she had to go downtown, said she was not going anywhere. (TR 665). Ms. Coleman heard Jackson say something about keys, saw the officer reach down and, then, heard five shots. (TR 675-676). Coleman testified that Bevel was never on top of Jackson prior to the shooting. The officer fell forward after he was shot. (TR 682).

The State also called Adam Gray, who worked at Rocket Motors. (TR 726). Jackson purchased her Buick from him and on May 16, 1983, came to Rocket Motors to complain about car trouble. When told she was going to have to pay for repairs, Jackson told Gray that she would rather 'drive the car over the Main Street Bridge" than pay any more money to have it fixed. (TR 729). Mr. Gray observed that Jackson was not intoxicated nor high on drugs. (TR 732).

Shirley Freeman testified that she saw Jackson on May 17, 1983, when she arrived at her house at approximately 1:30 a.m., covered with blood. (TR 770). Jackson indicated that she needed her clothes washed to get the blood out and stated that she had 'just shot a cop." (TR 772). Jackson told Freeman that she was 'not going back to jail" and that was the reason why she did it. (TR 772). Freeman observed that Jackson was sober and was not high. (TR 772). She further observed that Jackson had a gun and

took the gun with her when she left the apartment. (TR 773). On cross-examination, Ms. Freeman again affirmed that Jackson was sober, although she had been drinking. (TR 773). Jackson became hysterical when she talked about shooting the cop and said that she was sorry it happened. (TR 775). Jackson asked Ms. Freeman to call the hospital to find out whether the officer had died and cried when she found out he had. (TR 777). Ms. Freeman testified Jackson had told her that she, Jackson, was abused as a child and someone had tried to rape her. (TR 778).

Carl Lee, a cab driver, picked up a fare on May 17, 1983, around 4:15 or 4:20 a.m. He identified Jackson as the person he picked up and testified that she seemed okay and was not high or drunk. (TR 787-789). When Jackson was arrested by Officer Dipernia, she told him "she did not shoot no policeman," and she did not appear to be high or intoxicated. (TR **804**).

The defense called the following witnesses:

Dr. Lenora Walker, a clinical and forensic psychologist specializing in the study of women and family violence, examined Jackson on March 29, 1989, for the first time. (TR 847). Dr. Walker's testimony discusses the battered woman syndrome and family violence and her belief that battered woman syndrome is a sub-category of post-traumatic stress syndrome. (TR 873, 917).

After examining Jackson, it was her opinion that at the time of the offense, Jackson suffered from battered woman syndrome. (TR 865). Jackson told Dr. Walker that she was sexually abused by her step-father starting at age eight or nine and at ten or eleven she was raped by him. (TR 943). Dr. Walker observed that Jackson was a good athlete and used sports to cope with the sexual abuse at home. Jackson became more aggressive. Jackson also started using alcohol and drugs to dull the pain of the sexual abuse. (TR 949). Her medical history reflects that Jackson developed migraine headaches and had vaginal infections likely the result of the sexual abuse. (TR 957-958).

Dr. Walker detailed how in late 1982, Jackson left Shelton and started living sometimes with her mother, sometimes with Joi and sometimes in hotel rooms. (TR 978). Based on a combination of drugs and the post-trauma syndrome, Dr. Walker believed Jackson could not recall everything that happened the day of the murder. (TR 982). Although Jackson was able to recall details leading up to the shooting, even to the point of returning to the apartment and getting the car registration, Dr. Walker concluded that when Jackson came back out of the apartment and saw her car gone, she "did not recognize the police car as a police car." (TR 996-997). Jackson did not even recognize the police officer as a police

officer. (TR 997). The "blackout" began and Jackson "experienced a rape." Dr. Walker stated Jackson told the officer to stop and not to touch her. Jackson heard her blouse rip, heard the buttons pop and felt her breasts being touched. The officer had his hands between her legs and, she heard her keys drop. (TR 998-999). When the officer fell on top of her, Dr. Walker surmised that Jackson thought he had ejaculated because she felt a warm liquid on her. (TR 1000). Dr. Walker observed that Jackson had no actual memory of the shooting and only after she tried to wiggle out from under the officer did she begin to realize what had happened. Jackson's next memory was going to the telephone booth and calling Joi. (TR 1001). When Jackson finally saw Joi, she realized she "shot a police officer." (TR 1002).

In Dr. Walker's opinion, Jackson's emotional reasoning interfered with her thinking and she suffered from battered woman syndrome. (TR 1010-1011). Dr. Walker believed that at the time of the shooting, Jackson had a flashback and thought she was going to be sexually abused. Dr. Walker also concluded that Jackson had no serious mental illness except the post-traumatic stress syndrome. (TR 1007). Jackson could not conform her conduct to the requirements of law nor appreciate the criminality of her conduct. She suffers from childhood abuse and domestic violence. Jackson

was alcohol dependent and an abusive drug user, (TR 1022). Dr. Walker stated Jackson was not sane at the time of the murder, did not know the difference between right and wrong and could not conform her conduct to the requirements of law based on the drug usage, her alcohol usage and the post-traumatic stress syndrome suffered at the time of the crime. (TR 1045-1046). Dr. Walker admitted that this assessment was contrary to Dr. Mutter's and Dr. Miller's conclusions. (TR 1045).

Dr. Charles Mutter, a forensic psychiatrist, examined Jackson on January 29, 1988. (TR 1223). He performed a hypnotic regression on Ms. Jackson to determine why she committed the homicide. (TR 1248-1282). He found Ms. Jackson competent and sane. (TR 1193, 1198).

Dr. Mutter's assignment was to determine "what Jackson was thinking at the time of the crime." (TR 1176). He admitted that hypnosis is only as good as the hypnotist doing it and that it is subject to suggestive influences. (TR 1206).

In reviewing Jackson's background prior to the hypnosis session, Dr. Mutter observed that there was no mental disturbance or psychosis present in her background (TR 1236-1237), and informed Jackson that he was there to determine the reasons for her inability to remember the crime. (TR 1237). He uncovered that

Jackson was born in Jacksonville, Florida, the eldest of four children. She had a tenth grade education and had married at age twenty. She had two sons, ages nine and eight, and during her lifetime had several head injuries. She had no history of prior psychiatric illness. (TR 128-1239). Jackson used drugs, including marijuana, LSD, Mescaline, Quaaludes and alcohol. (TR 1239). Jackson had a prior record for writing bad checks and a prior assault. (TR 1240). Jackson suffered no schizophrenia nor did she hallucinate; she could do abstract thinking and thought in an organized manner. (TR 1241-1242). In detailing the events leading to the murder of Officer Bevel, Jackson recalled that she was under the influence of alcohol and drugs, having drunk malt beer and taken pills that day and did recall an altercation. She remembered lying to the police and the police telling her she was under arrest for making a false report. She remembered nothing after that (TR 1244). After the murder, she told Dr. Mutter she recalled being in a frenzy, running to a friend's house and getting out of her clothes. (TR 1244). She knew she had shot someone but did not know why. (TR 1244). Dr. Mutter testified Jackson told him that she had no conscious recollection of pulling the trigger but recalled returning to the crime scene and being placed under

arrest. (TR 1246). Jackson was then hypnotized and the questions and answers which followed were videotaped. (TR 1248-1282).

Dr. Mutter opined that Jackson knew what she was doing, she knew it **was** wrong, she felt guilty but did not want to remember because of her traumatic childhood. Jackson perceived that she **was** being assaulted and that perception **was** a result of **a** flashback of being raped at age ten. He speculated that she **was** responding out of fear and was under extreme emotional distress. Although she knew what she was doing was wrong, it **was** a painful circumstance for her. She was suffering from post-traumatic stress syndrome. (TR 1286-1290). Dr. Mutter also reaffirmed that Jackson was not insane or incompetent (TR 1287), and believed she fled because she knew she did something wrong. (TR 1292). Dr. Mutter **would not comment** as **to whether the murder was cold, calculated or premeditated.** (TR 1291). He believed that Jackson's ability to appreciate the criminality of her conduct was impaired and that she was under extreme emotional disturbance at the time of the crime. (TR 1297). He observed that Jackson suffered **a** grave misconception of the officer's actions, which explained her actions based on her earlier experiences. (TR 1291).

On cross-examination, Dr. Mutter admitted that hypnotic regression was still controversial (TR 1304), and that, under

hypnosis, a person could lie and distort information. (TR 1311-1312). He noted that on the fourth time questioning Jackson about the murder, she mentioned she thought she might be raped. (TR 1319). Defense counsel passed Dr. Mutter a note - to ask her more questions about this. Dr. Mutter admitted that defense counsel had spoken previously to his client about this. (TR 1321-1322).

Contrary to the testimony of Dr. Walker, Dr. Mutter stated Jackson recognized Officer Bevel as a police officer (TR 1327); told Dr. Mutter she shot the officer (TR 1330); and she did not want to go back to jail. (TR 1330). Jackson also exhibited some desire to get away (TR 1331), and knew at all times what was happening. (TR 1331-1332). Dr. Mutter also observed that Jackson was immature and exhibited violent tendencies. (TR 1344-1346).

When specifically addressing Jackson's 'flashback", Dr. Mutter stated the flashback was a "split second" (TR 1363) and that Jackson shot Officer Bevel the moment she became aware of a possible assault. (TR 1364). We testified the flashback lasted as long as it took to unload the gun. (TR 1366).

The defenses motion to introduce the hypnotic regression videotape was again denied at the close of Dr. Mutter's testimony. (TR 1368).

Dr. Ernest Miller, a psychiatrist, evaluated Jackson in May 1990. (TR 1382). In a one hour session, he evaluated Jackson to determine her competency. (TR 1383). He determined Jackson was competent to stand trial. (TR 1384). He found that at the time of the shooting, Jackson **was** in a highly agitated state and was not thinking clearly. (TR 1384). He believed she might be suffering from either chemical amnesia or recent blows to the head which caused memory problems. (TR 1397-1398). When Jackson shot the police officer, her thought process was at a basic emotional level. He did not believe she could have formulated the cold, calculated and premeditated intent to commit the murder. (TR 1400-1402). Based on her condition and her background it was his observation that Jackson suffered from a misconception of the arrest (TR 1138), that her mental capacity was impaired and that she was under extreme mental disturbance. (TR 1403-1404). Although he did not diagnosis flashbacks, he said it could have happened. (TR 1405).

On cross-examination he noted that she was found competent and further observed that if she purposefully dropped her keys, that would lend credibility to the likelihood that she committed the murder in a cold, calculated and premeditated manner. (TR 1407-1410). Dr. Miller testified that he did not agree with Dr. Walker's report nor Dr. Macaluso's report with regard to Jackson's

state. (TR 1413-1414). In observing and reviewing the hypnotic regression session by Dr. Mutter, it was Dr. Miller's observation that the questions used might be leading or suggestive. (TR 1418).

When Joi Shelton saw Jackson May 16, 1983, Jackson told her that she had "killed a cop" because he was "trying to arrest her." (TR 1504). Jackson told Ms. Shelton that when the officer tried to put her into the back seat, she shot him. (TR 1513). Ms. Shelton gave Jackson money for a cab and observed that Jackson took the gun with her when she left. (TR 1510). While the clothes were being washed, Jackson told Ms. Shelton that she was "going out of town." (TR 1509).

The jury recommended a sentence of death by a vote of 12-0. (TR 1747).

The trial court, in the January 18, 1996, sentencing order, found two statutory aggravating factors: 1) the murder was, as merged, committed for the purpose to avoid arrest or to effectuate an escape; committed to disrupt law enforcement and was committed against a law enforcement officer engaged in the performance of his duty, and 2) the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (TR 235-236) .

Regarding mitigation, the court found that the two statutory mitigators argued were not supported by credible evidence. Specifically, the court rejected that Jackson was under extreme emotional or mental disturbance; and that she could conform her conduct to the requirements of law. (TR 237). As to non-statutory mitigation, based on the requirement that Jackson's character or record and any other circumstance be considered, the court held:

> The Defendant had a difficult childhood that included sexual abuse and as an adult she suffered domestic violence and abused drugs and alcohol.
>
> Thus, this Court finds no statutory mitigating circumstances, furthermore no aspect of the Defendant's character is sufficient to be of a mitigating nature and no circumstance of the offense appears mitigating. Notwithstanding this, however, the Court concludes, in light of the aggravating circumstances found above, that even if one or all of the suggested mitigating circumstances existed that this Court's sentence would be no different than that announced below.

(TR 237).

SUMMARY OF ARGUMENT

Jackson is entitled to no relief as to any of the issues raised.

The CCP aggravating factor was proven beyond a reasonable doubt based on the facts of this execution-type murder of Officer Bevel.

In ascertaining whether any mitigation occurred the trial court properly considered but rejected the two statutory mental mitigating factors and concluded the tendered mitigation as to non-statutory mitigation was wanting. No relief is mandated based on Walls v. State, 641 So.2d 381 (Fla. 1994), and Foster v. State, 679 So.2d 747 (Fla. 1996).

The death sentence is proportional based on the trial court's determination that two statutory aggravating factors were proven beyond a reasonable doubt and no mitigation was present.

The prosecutor's remarks pertaining to merger of the three law enforcement-oriented aggravators proven herein to one aggravator or substance is not error. The prosecutor's remarks did not urge a send a message to the community message, and there was no specific objection by defense counsel regarding some.

Victim impact evidence that satisfies Payne v. Tennessee, 501 U.S. 808 (1991), is admissible and constitutional under Windom v. State, 656 So.2d 432 (Fla. 1995).

Whether the videotaped hypnotic regression session should have been admitted was decided adversely to Jackson in Jackson v. State, 648 So.2d 85 (Fla. 1994).

Jackson's Ake v. Oklahoma, 470 U.S. 68 (1985), argument is groundless and distinguishable from authorities cited in her brief.

Lastly, the CCP instruction rewritten in Jackson v. State, 648 So.2d at 95, n.8, is valid and no authority has been cited to suggest to the contrary herein.

Death is the appropriate sentence for the 1983 murder of Officer Bevel.

ARGUMENT

Issue I

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON, AND IN FINDING AS, AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

In Jackson v. State, 648 So.2d 85, 89 (Fla. 1994), this Court, in reversing for an new sentencing proceeding, held:

> Thus, in order to find the CCP aggravating factor under our caselaw, the jury must determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), Richardson, 604 So.2d at 1109; and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), Rogers, 511 So.2d at 533; and that the defendant exhibited heightened premeditation (premeditated), id.; and that the defendant had no pretense of moral or legal justification. Banda v. State, 536 So.2d 221, 224-225 (Fla. 1988), cert. denied, 489 U.S. 1084, 109 S.Ct. 1548, 103 L.Ed.2d 853 (1989). . . .

648 So.2d at 89.

In Walls v. State, 641 So.2d 381, 387-388 (Fla. 1994), the court reaffirmed Jackson, finding four specific elements which the State must prove beyond a reasonable doubt before affirming a CCP aggravating factor:

> . . . The first is that 'the killing was the product of cool and calm reflection and not an

> act prompted by emotional frenzy, panic or a fit of rage.' . . ,
>
> Second, Jackson requires that the murder be the product of 'a careful plan or prearranged design to commit murder before the fatal incident.' . . .
>
> Third, Jackson requires 'heightened premeditation,' which is to say, premeditation over and above what is required for unaggravated first degree murder. . . .
>
> Finally, Jackson states that the murder must have 'no pretense of moral or legal justification.' . . . Our cases on this point generally establish that a pretense of moral or legal justification is any colorable claim based at least in part on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense as to the homicide . . . .

641 So.2d at 387-388.

The trial court, in its written order (TR 236), concluded:

> The totality of the facts in this case, which are uncontroverted, support this factor. The murder was carried out with the same measure of cruelness as was the stripping of the car of its valuables while she vandalized it. Just as Ms. Jackson told the car dealer she would destroy the car so to, did she shoot the police officer because she did not want to go back to jail. Ms. Jackson, while hitting the officer, had the opportunity to become aware of the bullet-proof vest. Her dropping of the keys gave her the opportunity to shoot the officer in the head.

(TR 236).

Jackson argues that the evidence fails to support all four prongs of the CCP aggravating factor. The State would disagree and would submit that this Court has always found the aggravating factor proven in this case. In Jackson, 498 So.2d 406, 412 (Fla. 1986), this Court, on direct appeal, and based on "identical evidence," held:

> . . . We agree with the conclusions of the trial court:
>
> > The evidence indicates this Defendant was armed throughout this entire event or armed herself when she went to her home to obtain the papers relating to the car. It further indicates that when she produced the pistol on the unexpecting officer, she made no attempt to disarm him or escape without the necessity of deadly force, but decided to shoot six (6) times at point blank range into his body. This decision was coldly and premeditatedly done as was her removal of the battery, spare tire and license plate from the just-damaged car. For this, there can be no moral or legal justification.
>
> Further, we point out that Appellant had the presence of mind while struggling with the victim to devise a method to catch him off guard, i.e., the statement that she had dropped her keys. This record does not show a woman panicking in a frightening situation, but rather a woman determined not to be imprisoned who fashioned her opportunity to

> escape and then acted accordingly. We see no error.

498 So.2d at 412.

Moreover, in Jackson v. State, 648 So.2d 85 (Fla. 1994), this Court did not determine after it opined what the CCP factor entailed that the facts of the instant case failed to satisfy those factors. Rather, the Court concluded:

> We cannot say beyond a reasonable doubt that the invalid CCP instruction did not affect the jury's consideration or that its recommendation would have been the same if the requested expanded instruction had been given. Thus, we vacate Jackson's death sentence and remand to the trial court with directions to empanel a new jury, to hold a new sentencing proceeding and to resentence Jackson. . . .

648 So.2d at 90.

Jackson divides the argument into three categories. She argues that 1) at the time of the shooting she was under the influence of drugs and alcohol, had a flashback and misperceived the struggle with Officer Bevel as an attempted rape thus, the homicide was not the product of calm, cool reflection; 2) that there was no plan to kill because (a) she did not know she would be arrested, (b) it was not proven she armed herself to confront or kill Officer Bevel, (c) she did not know Officer Bevel had a bullet-proof vest on and did not understand what she felt when she

hit Officer Bevel, (d) it was sheer speculation as to why Andrea dropped her keys; and 3) Jackson had **a** pretense of moral or legal justification **because** she perceived the circumstances surrounding Officer Bevel's actions as a possible sexual assault.

I. The Homicide Was The Product Of Calm And Cool Reflection

The State presented a detailed accounting of the facts and circumstances developed at the resentencing, regarding what transpired on May 16-17, 1983. Every state witness and some of the defense witnesses stated that Jackson was not drunk nor high, although there was some evidence that she had been drinking, at the time leading to and right after the murder. John Bradley, an investigator for the Sheriff's Office, testified that on May 17, **1983**, he did not believe Jackson was intoxicated when he **saw,** although he smelled alcohol on her breath. She did not appear to be high and he observed that she walked okay, did not stagger, and was able to converse in a normal voice without slurring her speech. (TR 533-534, 548-549, 558). Gina Rhoulac looked out her mother's window and saw Jackson vandalizing her car. (TR 565). She testified that Jackson did not appear high and was walking and talking with the officer unremarkably. (TR 567-568). Anna Nelson testified that Jackson had no problems speaking with Officer Bevel

and did not appear to have any problems walking. (TR 584). Prior to Jackson retrieving the car registration, she saw Jackson and Officer Bevel talking and there was no evidence of any violence. (TR 586-587). It was only after Officer Bevel told Jackson that he was going to arrest her that she got angry and lunged towards the office and started struggling. (TR 591-592). Mabel Coleman observed on May 16, 1983, Jackson banging on her car and taking stuff out of it. (TR 655-657). Ms. Coleman saw Jackson taking tires out of the trunk, removing the license plate on the car and yelling for assistance to remove the battery. (TR 657-658). Ms. Coleman stated Jackson was not stumbling nor did she appear drunk or high. (TR 658-659).

Officer Griffin, who also appeared at the crime scene to assist Officer Bevel, testified that he talked to Jackson and that she appeared fine. There was no slurred speech and she did not appear to be under the influence of any drugs or alcohol. (TR 714-717). Although she had a faint smell of alcohol on her (TR 724), he described Jackson as cooperative at the time, volunteering that she thought she knew who had vandalized her car. (TR 719). Officer Griffin testified that Bevel sat down with Jackson in the front seat of the patrol vehicle and did a report. (TR 719). Adam Gray, a salesman at Rocket Motors, revealed that on May 16, 1983,

he saw Jackson concerning repairs to her car. She was mad because the car broke down and said that if they did not fix the car she would run it off the Main Street Bridge. (TR 729). Although Jackson used profanity (TR 730), he observed that Jackson acted "pretty straight" and did not appear to be on drugs. (TR 731-732).

Shirley Freeman, who lives with Joi Shelton, recalled that after the murder, Jackson came to their abode where her bloodied clothes were washed. (TR 770-771). Jackson told her that she, Jackson, had killed a cop and that she was not going back to jail. Ms. Freeman specifically said that Jackson did not appear to be on drugs (TR 772), although she smelled of alcohol. (TR 773). Carl Lee, the cab driver who picked Jackson up as a fare at approximately 4:15 a.m., that day, testified that Jackson did not appear drunk or high. (TR 789, 791).

Officer Dipernia arrested Jackson at approximately 4:45 a.m., May 17, 1983. When he saw Jackson, she said "she didn't shoot no policeman" but more importantly she did not appear to be drunk or high at the time. (TR 804).

The defense called: Deputy George Barge who testified he assisted in the arrest of Jackson. Although he could detect a slight odor of alcohol on her. (TR 1121) . He testified that she was not high or intoxicated and did not seem impaired in any way.

(TR 1124, 1125). Roy Blighton, called by the defense, testified that as custodian for the University Medical Center, he reviewed the records of May 17, 1983, regarding Jackson. Jackson, on that day, complained of knee pain and had a laceration on her forehead. At approximately 6:30 a.m., that day, she was treated and ultimately released. The records reflect no indication of intoxication or drugs and that in fact no actual injury was found. (TR 1148).

When Jackson could not reach Joi Shelton immediately following the murder, she tried to flag down a car. (TR 1371). David Lee stopped and picked her up. He noted that her shirt was open and she seemed excited, her hair was all messed up and she seemed agitated. (TR 1371-1372). Jackson smelled of alcohol and said something to the effect that "she didn't want to do it." (TR 1373). Jackson seemed to walk okay and had no problem talking or providing directions or instructions as to where she wanted to go. (TR 1376-1378). Joi Shelton, called by the defense, also testified that although Jackson was excited when she arrived at her home, she stated that Jackson told her that "she had shot a cop." (TR 1490). While at Ms. Shelton's house, Jackson had some Vodka (TR 1495), and had to be calmed down once she found out that the officer had died. (TR 1496). Ms. Shelton testified that she only saw Jackson do

drugs once and Jackson did not do any drugs that night after the murder while she was at her house. (TR 1499-1500). Ms. Shelton observed that Jackson was able to tell her on the phone where Jackson was located after the murder and did not seem to have any memory loss or a blackout. (TR 1503). Jackson was clearly able to say that she killed a cop and to 'look at her," she was covered with blood. (TR 1503). Jackson said that Officer Bevel was trying to arrest her, (TR 1504). Ms. Shelton testified that Jackson knew she was in trouble and that she "could not believe she had done it." (TR 1505-1507). Jackson asked for money and said that she needed to get out of town because she was not going back to jail. (TR 1509-1510).

Contrary to Jackson's assertion in her brief that she was enraged and out of control, the record reflects that, with the exception of the doctors' testimony, witnesses who observed her before, during and after the murder, testified that she was acting in a calm fashion. The fact that she was perturbed that her car did not work and then was caught in a lie to Officer Bevel, evidences nothing more than what Dr. Mutter and Dr. Miller concluded was Jackson's immature behavior. Indeed, her conduct was the product of cool and calm reflection. The very things that Jackson now points to--the fact that she was enraged and vandalized

her car--all dissipated once she started talking to the police officers in a calm and rational fashion. As Officer Griffin noted, she appeared to be very cooperative. Finally, it is clear from the Jackson opinion itself, 648 So.2d at 89, that the court contemplated that the "act prompted by emotional frenzy, panic or a fit or rage" was something more than breaking windows in a car that would not start. See, clearly distinguishable, Richardson v. State, 604 So.2d 1107, 1109 (Fla. 1992) (Richardson's actions were spawned by an ongoing dispute with girlfriend. "Richardson appeared angry, crazy and mean when he shot Newton.").

II. The Homicide Was Carefully Planned and Prearranged Before The Incident

Jackson next points to four reasons why she believes that the homicide was not carefully planned. First, she points to the fact that she did not know she would be arrested when she went to Shelton's apartment for the last time before the shooting. Such a contention is not based on the record before the Court. The record reflects that she lied purposefully to the police officers regarding who vandalized her car and, upon her return back to Officer Bevel, Mabel Coleman testified that she saw Jackson put a pistol in her waist. (TR 663). Jackson had an opportunity to look at Bevel's police report and she knew that Officer Bevel was

talking to the neighbors. Instead of fleeing the scene, she purposefully returned to where her car had been located and where the officer's car was parked and engaged in a confrontational encounter with Officer Bevel.

Anna Nelson testified that, while Officer Bevel was talking to her, she turned to him and said, "Hey Gary, that lady is going into your car." (TR 590). Ms. Nelson saw Jackson looking through papers in the patrol car. (TR 590). Bevel asked Jackson what she was doing in his car, at which point she got out and came towards him. (TR 591). Bevel then told her he was going to arrest her for making a false report and she lunged towards him. (TR 592). As he tried to restrain her and put her in the back seat of his car, Jackson struggled and asked why he was "manhandling her." (TR 592). Ms. Nelson testified she heard Jackson say, "You see what you've made me do? You made me drop my keys." (TR 593). She saw Officer Bevel bend down as he was going to get the keys (TR 596), and she heard one shot and then five other shots. (TR 596-597). Ms. Nelson testified that Jackson pushed the officer off her and then she ran. (TR 598, 627).

Without a question, Jackson knew or should have known that she was about to be arrested.

Second, Jackson argues that no significance can be placed on the fact that Mabel Coleman saw Jackson place a gun in her waistband as she came downstairs following her discussion with the police. Jackson argues that there was evidence that she carried the gun around for her own protection and therefore, no significance can be made of the factor. To the contrary, Jackson had been over at her ex-husband's apartment and did not have the gun on her person, even though Shelton tried to "hit her up" for sex that very day. When she went over to Rocket Motors to complain about her car, there was no evidence that she **was** carrying her gun. When she first went out to talk to Officer Bevel and Officer Griffin, she **was** carrying no weapon. **The only conclusion that can be drawn from her arming herself was that she did so in anticipation of trouble with Officer Bevel.**

Third, the trial judge, in his sentencing order, found that Jackson knew Officer Bevel wore a bullet-proof vest. She argued that although there was evidence from Officer Bradley regarding the bullet-proof vest, that it was improper for the trial court to assign any weight or attribute any "planning" to this fact. **The State would agree that this fact alone would not have demonstrated prearranged plan, however, the fact that Officer Bevel was shot in the head and, that occurred only after Jackson put up a struggle**

about getting into the back seat of the car, is a valid fact to be considered in the CCP finding.

Fourth, Jackson argues that there is only "mere speculation that she (Jackson) intentionally dropped the keys." (Appellant's brief, page 43). Contrary to Jackson's contention that she dropped the keys during **a** struggle, the record reflects Jackson was already seated with her legs hanging out in the back seat of the patrol car. Jackson dropped her keys, the officer took a step backward, bent over and attempted to retrieve them. Then, and only after distracting the officer, Jackson pulled the gun from her waistband and emptied six bullets into Officer Bevel's body. **Clearly, this is an opportunistic moment created by Jackson.**

The aforenoted clearly satisfies the 'calculated" prong explained in Rogers v. State, 511 So.2d 526, 533 (Fla. 1987).

III. No Pretense Of Moral Or Legal Justification Existed

Lastly, Jackson argues that because of her perceived circumstances "that she **was** about to be raped", she had a pretense of moral or legal justification. The facts presented by the defense **as** to why she reacted as she did are all over the board. Dr. Walker stated that Jackson was insane and incompetent and that she did not know who the officer was or that she was being placed

in a police car. Dr. Mutter, through his "suggestive" hypnotic regression, finally got Jackson to state she thought she might be assaulted. Dr. Mutter, when questioned, **said** he disagreed with Dr. Walker's findings that Jackson was insane and incompetent. More importantly, he stated that the flashback theory occurred in a "split second," iust long enough for her to put six bullets in Officer Bevel's body. Dr. Mutter admitted that if the facts were as the State said rather than the facts as the defense stated, this murder could be cold, calculated and premeditated. Finally, Dr. Miller testified that Jackson was neither insane nor incompetent but **was** disturbed. When questioned, Dr. Miller very reluctantly agreed that Dr. Mutter's flashback theory was plausible. Based on the foregoing, there is clearly no uniform theory as to Jackson's mental state by defense witnesses.[1] However, reviewing all the State witnesses who were either at the scene or saw Jackson before or right after the murder, it is apparent that Jackson was not high nor was she intoxicated. She was angry at her car.

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[1] Further it should be recalled in Jackson, 547 So.2d 1197, 1200-1201 (Fla. 1989), that Jackson's mental health defense has traveled the gamut from PMS syndrome to Battered Woman Syndrome to the post-traumatic stress syndrome to chemical amnesia to finally flashbacks of childhood sexual abuse.

In Valle v. State, 581 So.2d 40, 48 (Fla. 1991), this Court found the CCP factor valid where Valle, stopped for a traffic violation, walked back to his vehicle when Officer Pena ran a license check, turned to the patrol car and fired a single shot at the officer, killing him. In deciding that the murder **was** cold, calculated and premeditated, this Court observed:

> Approximately eight minutes elapsed between the initial stop and the murder of Officer Pena. After the Defendant heard the information about the car come on the radio, he returned to his car and told Mr. Ruiz that he would have to waste the officer. He got the gun and concealed it along the side of his leg and slowly walked back to the car. He fired at Officer Pena from a distance of one and a half to three feet from the officer, hitting him in the neck. He purposefully said, 'officer' in order to get a better shot. He then stepped back and shot at Officer Spell. Although he aimed at his head, Officer Spell was able to quickly turn, causing the bullet to strike him in the back. Approximately two to five minutes elapsed from the time the Defendant left Officer Pena's car to get the gun and slowly walk back to shoot and kill Officer Pena.
>
> The Court finds that these actions establish not only a careful plan to kill Officer Pena to avoid arrest, but demonstrate the heightened premeditation needed to prove this aggravating circumstance. This was, without any doubt, an execution-type murder. It was committed without any pretense of moral or legal justification. Officer Pena did nothing to provoke or cause the Defendant's actions. This aggravating factor has been proven beyond

> and to the exclusion of every reasonable doubt. . . .

581 So.2d at 48. See also Swafford v. State, 533 So.2d 270 (Fla. 1988); Phillips v. State, 476 So.2d 194 (Fla. 1985), and Hall v. State, 614 So.2d 473 (Fla. 1993).

Jackson could have absconded at any time. She did not. She admitted to the doctors, and the eyewitnesses testified, that Jackson was the one that smashed her car; she was the one that made a false report and she lied to the police officers. Jackson knew she was in trouble; and she made statements about not wanting to go back to jail and told witnesses **after the murder** that that was the reason why she shot the officer. Jackson armed herself, and returned to the area where her smashed car had been parked. Officer Bevel told her that she **was** under arrest and Jackson indicated that she was not going anywhere with him. As he attempted to place her in the police car, she pulled out her .22 caliber weapon and shot six bullets into his body. See also Jones v. State, 612 So.2d 1370 (Fla. 1993); Fotopoulos v. State, 608 So.2d 784 (Fla. 1992); Henry v. State, 613 So.2d 429 (Fla. 1992), and Cruse v. State, 588 So.2d 983, 992 (Fla. 1991) (witnesses testified Cruse acted in calm and controlled manner).

Jackson's argument that there was no evidence of a plan to kill is equally without support. She emptied six bullets into the officer's body and this was done following her purposeful conduct of dropping her keys, to distract Officer Bevel as he tried to put her into the car. Clearly the plan to kill existed. See Valle v. State, supra; Lamb v. State, 532 So.2d 1051 (Fla. 1988); Eutzy v. State, 458 So.2d 755 (Fla. 1984), and Williamson v. State, 511 So.2d 289 (Fla. 1987).

Lastly, Jackson cites to Banda v. State, 536 So.2d 221 (Fla. 1988), arguing that she felt threatened by the police officer when he placed her under arrest, she had a pretense of legal or moral justification for the murder. Banda is distinguishable from the instant case in that Banda believed that the victim was going to get him. In Christian v. State, 550 So.2d 450 (Fla. 1989), also cited by Jackson, the defendant had a "misguided" belief that he was going to be killed by the victim. In Cannady v. State, 427 So.2d 723 (Fla. 1983), also cited by Jackson, the Court held CCP was erroneously found because Cannady believed the victim was "jumping at him".

Sub judice, this Court should distinguish Cannady just as was done in Williamson v. State, 511 So.2d 289, 293 (Fla. 1987):

> Williamson argues that he "murdered Drew because if he did not, Drew would have killed Omer Williamson and perhaps himself for not repaying a $15.00 drug debt Omer Williamson owed to Drew." . . . There is no evidence of any threatened acts by Drew prior to the murder; nor is there any evidence that Drew planned to attack either Omer or Williamson. Based on the record before us, we conclude this aggravating factor was proven a reasonable doubt.

See also Jones v. State, supra (Record shows that Jones coldly and dispassionately decided to kill the victim in order to steal the truck. There is no merit to Jones' argument that he had a pretense of moral or legal justification for killing because he perceived the victim as part of the world that was rejecting him.). See also Arbelaez v. State, 626 So.2d 169 (Fla. 1993), and Walls v. State, 641 So.2d 381 (Fla. 1994).

Likewise, no credible evidence exists that Jackson believed she had a moral or legal justification for the murder. Evidence derived by Dr. Mutter through the hypnotic regression session proved to be suggestive and both Dr. Mutter and Dr. Miller acknowledged that if the fact scenario were such as reflected by the State's witnesses, Jackson's conduct was logical and calculated although perhaps done by an "immature individual." The underlying facts upon which Dr. Walker premised her conclusions are faulty and not reflective of the facts and circumstances surrounding the

instant murder. Dr. Walker's findings were discredited by Dr. Miller and Dr. Mutter regarding her suggestion that Jackson was neither sane nor competent at the time of the murder.

The instant case is controlled by Cruse v. State, 588 So.2d 983, 992 (Fla. 1991), wherein the Court found that Cruse's "delusions" that people were talking about him or attempting to turn him in to a homosexual did not provide a colorable claim of any kind of moral or legal justification for lashing out at society.

Jackson cites a number of comparable cases where CCP has been disapproved. For example, in Rivera v. State, 545 So.2d 864 (Fla. 1989), the Court found CCP not to be appropriate where a defenseless police officer was shot three times within sixteen seconds after the officer chased the defendant into the mall and caught him as he tried to escape through doors which could not be opened. The court reasoned that the murder of Officer Miyaras was of a spontaneous design and did not rise to the level to prove the murder was cold, calculated and premeditated. The Rivera facts are far different from the instant case.

Moreover, in Hill v. State, 515 So.2d 176 (Fla. 1987), relied upon by Jackson, the facts of a robbery and escape gone awry, reflect the absence of any evidence that Hill carefully planned or

prearranged to kill a person or persons during the 'course of this robbery." Likewise, Pietri v. State, 644 So.2d 1347 (Fla. 1994), is distinguishable since the murder was the culmination of a short chase where the officer walked up to Pietri's truck, at which point Pietri shot Officer Chappell from a distance of 3 to 8 feet. Moreover, Street v. State, 636 So.2d 1297 (Fla. 1994), is equally distinguishable because, following the officers' response to a disturbance call, a struggle ensued between Street and the officers, at which point Street, otherwise unarmed, obtained Officer Boles' gun and shot Officer Strzalkowski three times, killing him, and then shot at Boles three times, before running out of ammunition.

In all of the examples cited by Jackson, it is clear that no plan to kill was formulated where the defendants were either engaged in a robbery or burglary and were surprised by the encounter with police officers. This Court was correct in Jackson v. State, 498 So.2d at 412, when the Court found:

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

The trial court was correct in finding that the murder of Officer Bevel was committed in a **cold, calculated** and premeditated manner without **any** pretense of moral or legal justification. See especially Wuornos v. State, 644 So.2d 1000, 1008-1009 (Fla. 1994).

ISSUE II

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

Jackson next takes issue with the fact that the trial court rejected Jackson's mental condition as either statutory or nonstatutory mitigation. Citing to the opinions of Dr. Mutter, Dr. Miller and Dr. Walker, she argues that their opinions were consistent with one another and that the 'State could not rebut them." (Appellant's Brief, page 54).

The trial court, in rejecting these two statutory mitigating factors, specifically that the defendant was under the influence of extreme mental or emotional disturbance, Sec. 921.141(6)(b), Fla.Stat., and Jackson's capacity to appreciate the criminality of her conduct **was** not impaired, Sec. 921.141(6) (f), Fla.Stat., found that Jackson's suggestion that she suffered **a** flashback of a childhood rape non-credible and that any drugs or alcohol she took

that day were due to self-induced usage and of no significance. The trial court further found that as to any other aspect of Jackson's character or any other circumstance of the offense:

> The Defendant had a difficult childhood that included sexual battery and as an adult she suffered domestic violence and abused drugs and alcohol. . . . This Court finds no statutory mitigating circumstances, furthermore no aspect of the Defendant's character is sufficient to be of a mitigating nature and no circumstance of the offense appears mitigating, Notwithstanding this, however, the Court concludes, in light of 'the aggravating circumstances found above, that even if one or all of the suggested mitigating circumstances existed that the Court's sentence would be no different than that announced below.

(TR 236-237).

Jackson asserts: '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." (Appellant's Brief, page 55). The State would submit that significantly absent from the cases cited by Jackson is this Court's decision in Walls v. State, 641 So.2d 381 (Fla. 1994), and the decision last year Foster v. State, ,679 So.2d 747 (Fla. 1996). Jackson points to no specific facts in mitigation which the trial court rejected but rather, recites a litany of cases concerning the trial court's responsibility in either giving weight to a

mitigating factor or expressly addressing a mitigating factor that **was brought to the attention of the court at the penalty** phase. In fact, the issue before the Court is not whether the trial court weighed and considered Jackson's mental and emotional condition but rather, whether the trial court **erred in not finding this** mitigation. In Walls v. State, this Court was faced with a similar contention as to whether the trial court improperly rejected expert opinion testimony as to whether Walls suffered extreme emotional disturbance and whether his capacity to conform his conduct to the requirements of law were substantially impaired. The Court observed:

> . . . In Florida, as in many states, a distinction exists between factual evidence or testimony, and opinion testimony. As a general rule, uncontroverted factual evidence cannot simply be rejected unless it is contrary to law, improbable, untrustworthy, unreliable, or contradictory. E.g., Brannen v. State, 94 Fla. 656, 114 So. 429 (1927). This rule applies equally to the penalty phase of a capital trial. Hardwick, 521 So.2d at 1076.
>
> Opinion testimony, on the other hand, is not subject to the same rule. Brannen. Certain kinds of opinion testimony clearly are admissible -- as especially qualified expert opinion testimony -- but they are not necessarily binding even if uncontroverted. Opinion testimony gains its greatest force to the degree **it is supported by the** facts at **hand, and its weight diminishes to the degree**

> such support is lacking. A debatable link between fact and opinion relevant to a mitigating factor usually means, at most, that a question exists for judges and juries to resolve. See Hardwick, 521 So.2d at 1076. We cannot conclude that the evidence here was anything more than debatable. Accordingly, this Court may not revisit the judge and jury's determination on appeal.

641 So.2d at 390-391.

In reaffirming this notion, the Court, in Foster v. State, 679 So.2d 747, 755-756 (Fla. 1996), affirmed the trial court's rejection of the statutory mental mitigator of extreme mental or emotional disturbance and other nonstatutory mitigation:

> . . . During the penalty phase, Foster presented expert testimony that he was under the influence of extreme mental or emotional disturbance and that his capacity to conform his conduct to the requirements of law was substantially impaired. Foster claims that since this expert testimony was uncontroverted, the trial court should have found this statutory mitigator. Additionally, Foster claims that the trial court should have found the nonstatutory mitigators that he came from an abused background; was mentally retarded; had a deprived childhood and poor upbringing; has organic brain damage; and is an alcoholic and was under the influence of alcohol at the time of the homicide.
>
> The decision as to whether a mitigating circumstance has been established is within the trial court's discretion. (cite omitted). Moreover, expert testimony alone does not require a finding of extreme mental or emotional disturbance. (cite omitted). Even

> **uncontroverted opinion testimony can be rejected, especially when it is hard to reconcile with the other evidence presented in the case. (cite omitted). As long as the Court considered all of the evidence, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion.**

679 So.2d at 755 (emphasis added).

The Court then detailed the sentencing order regarding mitigation and found that although Foster's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, the court found no other statutory mitigating factors and specifically found that the murders were not committed while the defendant was under the influence of extreme mental or emotional disturbance as contended by the defense. The Florida Supreme Court held:

> We conclude that the trial court considered all of the evidence presented, and it **was** not a palpable abuse of discretion for the trial court to refuse to find the statutory mitigator of extreme emotional disturbance. This mitigating circumstance has been defined **as** 'less than insanity, but more emotion than the average man, however inflamed.' (cite omitted). **It is clear from the sentencing order that the trial court gave some weight to nonstatutory mitigation; however, the Court did not find it rose to the level of the statutory mitigator. Accordingly, we find that the trial court did not abuse its discretion in finding that this mitigator was not established.**

679 So.2d at 756 (emphasis added).

With regard to nonstatutory mitigating evidence in Foster, the court held:

> . . . The sentencing order shows that the trial court found and weighed the nonstatutory mitigating evidence that Foster contends should have been found. Deciding the weight given to a mitigating circumstance is within the discretion of the trial court, and a trial court's decision will not be reversed because an appellant reaches an opposite conclusion.

679 So.2d at 756.

In the instant case, as previously detailed, both State and defense witnesses testified that on May 16 and 17, 1983, Jackson was not impaired via drugs or alcohol. While her history demonstrated that she may have been abused as a child and may have suffered domestic violence at the hands of her husband, the record reflects that none of these events had anything to do with the facts and circumstances of Officer Bevel's murder. The three doctors that testified in Jackson's behalf contradicted one another as to what exactly was going on the day of the murder and, more importantly, contradicted one another as to the "reasons" why Jackson did the things she did. Dr. Walker found her incompetent, insane and suffering from battered woman syndrome. Dr. Mutter, through his hypnotic regression, was able to eek out, after four

tries, that Jackson thought she might be sexually assaulted and therefore she suffered a "split-second" flashback while she emptied her .22 caliber gun into Officer Bevel. Dr. Miller stated his disagreed with Dr. Walker and was not to confident that Dr. Mutter was correct with regard to this split-second flashback concept.

Lay witnesses such as Edith Croft, testified that Jackson had told her that Jackson's step-father had sexually abused her as a child (TR 1454), and that Shelton and Jackson has marital problems and would fight. (TR 1455). Edith Croft was heavy into drinking and drugs and related that Jackson would do drugs and alcohol and used T's and Blue's with her. (TR 1456-1457). Just prior to Jackson's arrest, she returned to her ex-husband's house where she met up with Edith Croft. Jackson told her that the police are "mad because I killed a police officer" minutes before the police arrived and arrested her. (TR 1466) . Ms. Croft testified that although Jackson might have been high she knew what she was doing and what was happening. She said Jackson would get mean when she started using drugs. (TR 1468). Joi Shelton, also a defense lay witness, testified that she and Jackson were close friends and that she saw Jackson every day. (TR 1498). It was Ms. Shelton's testimony that she only saw Jackson do drugs once and that Jackson did not do any drugs the night after the murder. (TR 1499-1500).

Lister Griffin, who knew Jackson as a child (TR 1517), testified that Jackson would stay with her while Jackson's mother was at work. It was her testimony that Jackson never mentioned any sexual assaults by her step-father. (TR 1520).

Kevin Hicks, Jackson's brother, testified that he was closest to Jackson when they were growing up. (TR 1524). He recalled that Jackson got into trouble at school fighting, but he had no knowledge of whether she was using drugs or alcohol. (TR 1526). Mr. Hicks testified that when Jackson went to junior high school, she started acting differently and got meaner, although Jackson made the basketball team, her mother made her quit because Jackson was a disciplinary problem. (TR 1527-1528). Mr. Hicks recalled that Jackson fought with her step-father Eddie Brown (TR 1531), and confirmed that the older Jackson got, the meaner she got. (TR 1533). Beverly Turner, a distant cousin of Jackson's, would babysit for her when Jackson was a child. (TR 1537-1539). Ms. Turner remembered that there were times when Jackson did not want to go home and in her early teens she started running away. (TR 1540-1541). It was her view that Jackson was an unhappy child but she lost touch with Jackson after Jackson got married. (TR 1543).

The defense also introduced documents reflecting that Jackson was born on February 26, 1958, and married October 14, 1977. (TR

1561). The affidavit of her deceased brother Marvin Hicks was read to the jury and revealed that Jackson did not deal with life normally and, that she was into drugs early on. He blamed the neighborhood they lived in for the exposure to drugs, the fact that it was full of low income people. (TR 1562). He detailed how Shelton's family was into drugs and that he had seen Jackson use heroin. He recalled how when Jackson was pregnant, he lived with her because the neighborhood was a bad area. (TR 1564).

The affidavit of Barbara Hicks was also read to the jury. Barbara Hicks, Jackson's mother, stated that she loved her daughter and that the shooting of the officer hurt her greatly. (TR 1564-1565). She stated that Jackson had the burden of carrying the fact that her mother could not name Jackson's father because he was a married man and a member of the church. (TR 1565). For the most part, Jackson was raised by her aunt who took care of her while her mother worked. Jackson's mother observed that Jackson was a smart child but started getting headaches at age eight and also had numerous bladder infections. (TR 1567). She detailed how Jackson's grades started slipping in the third and fourth grade and that she was called by the juvenile authorities because Jackson was a problem in school. (TR 1568). By the time Jackson was fifteen she was living with Shelton and she finally married him in 1977.

They had two sons, however Jackson's mother believes that the marriage was not good. (TR 1568-1569).

While not unmindful that many of the factors discussed herein could be considered mitigation in a given case, the facts and circumstances of the instant case and the nature of the mitigation herein do not rise to the level of mitigation. See Foster, supra, and Lucas v. State, 613 So.2d 408, 410 (Fla. 1992), wherein this Court recognized that whether a mitigator 'has been established is a question of fact, and a court's findings are presumed correct and will be upheld if supported by the record." See Sireci v. State, 587 So.2d 450 (Fla. 1991); Clark v. State, 613 So.2d 412 (Fla. 1992), and Hall v. State, 614 So.2d 473 (Fla. 1993):

> In considering allegedly mitigating evidence the Court must decided if 'the facts alleged in mitigation are supported by the evidence,' if those established facts are 'capable of mitigating the defendant's punishment, i.e., . . . may be considered as extenuating or reducing the degree of moral culpability for the crime committed', and if 'they are of sufficient weight to counterbalance the aggravating factors. (cites omitted). 'The decision as to whether a mitigating circumstance has been established is within the trial court's discretion.' Preston, 607 So.2d at 412. The judge carefully and conscientiously applied the Rogers standard and resolved the conflict in the evidence, as this was his responsibility. (cite omitted). The record supports his conclusion that the mitigators either had not been established or

were entitled to little weight. Preston; Ponticelli v. State, 593 So.2d 483 (Fla. 1991), vacated on other grounds, ___ U.S. ___, 113 S.Ct. 32, 121 L.Ed.2d 5 (1992).

614 So.2d at 478-479.

The trial court did not err in concluding that the two statutory mitigating factors argued by Jackson were not applicable and further did not err in determining that no non-statutory mitigating evidence concerning Jackson's character or nature of the crime rose to the level of mitigation based on the facts and the testimony presented at resentencing.[2] All relief should be denied as to this claim. See Wuornos v. State, 644 So.2d 1000, 1010 (Fla. 1994).

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[2] Even assuming that this Court determines there was some evidence in mitigation show, any failure on the part of the trial court to specifically note said evidence, other than to say if it were found it would not make a difference is harmless error. Wickham v. State, 593 So.2d 191, 194 (Fla. 1991); Rogers v. State, 511 So.2d 526, 535 (Fla. 1987), and Wuornos v. State, 644 So.2d 1012, 1019-1020 (Fla. 1994) ('The vast bulk of the case for mitigation was hearsay. While hearsay can be admissible in the penalty phase, we cannot conceive that there is any absolute duty for the trial court to accept it in mitigation where, as here, the State's rebuttal established strong indicia of unreliability.").

ISSUE III

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

Jackson next argues that the death sentence is disproportionate and must be reversed because there may be only one statutory aggravating factor, should this Court strike the CCP aggravating factor. The State would urge that the death penalty is proportional in this case because there are two strong statutory aggravating factors and no mitigation sub judice. Even assuming for the moment that only one statutory aggravating factor is left, to-wit: the combined aggravating factor that the murder was committed to avoid arrest, disrupt law enforcement and the person killed was a law enforcement officer, is sufficient to overcome the lack of any credible mitigation herein. See Duncan, 619 So.2d 279 (Fla. 1993), and Ferrell v. State, 680 So.2d 390, 391 (Fla. 1996), wherein the court held:

> Although we have reversed the death penalty in single aggravator cases where substantial mitigation was present, we have affirmed the penalty despite mitigation in other cases where the lone aggravator was especially weighty.

680 So.2d at 391. The facts in the Ferrell case are very similar to the instant case in the sense that the nature of the crime was

very similar and the lone aggravating circumstance was weighty. See also Armstrong v. State, 642 So.2d 730 (Fla. 1994); Hello v. State, 547 So.2d 914 (Fla. 1989); Windom v. State, 656 So.2d 432 (Fla. 1995) (as to murders of two of the victims, the only aggravating factor was prior violent felony conviction, based on contemporaneous crime; in mitigation, trial court found no significant criminal history, extreme mental disturbance, substantial domination of another person, help in community, was good father, saved sister from drowning, saved another person from being shot over twenty dollars); Cardona v. State, 641 So.2d 361 (Fla. 1994) (mitigation included extreme emotional disturbance, daily use of cocaine and substantial impairment therefrom, rape as a child, did not meet father until she was twelve), and Grossman v. State, 525 So.2d 833 (Fla. 1988).

Based on the foregoing, the trial court did not improperly sentence Jackson to death.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO MAKE REMARKS CONCERNING THE MERGER OF THREE STATUTORY AGGRAVATING FACTORS INTO ONE STATUTORY AGGRAVATING FACTOR.

During closing argument, the prosecutor, in discussing the merger of the three law enforcement aggravating circumstances into

one, informed the jury that great weight may be given these merged factors into one. Specifically, the objection arose when the State argued:

> . . . Can you imagine? We'd have chaos. We would cease to exist as a nation. So what I submit to you, even though all three of these aggravators have to be merged, that this aggravator has got so much weight that no matter how much mitigation you believe this aggravator alone will outweigh that.

(TR 1635-1636).

Following the objection which was overruled, the prosecutor argued: "This aggravator alone will outweigh that because there is no mitigation here, and if there is, well we'll talk about that mitigation in a minute." (TR 1635-1636).

Citing to two problems that exist with regard to these remarks, defense counsel argues that this instruction "negated the fact that the three law enforcement circumstances merge into a single aggravating circumstance" (Appellant's Brief, page 63), and that the jury is to base "its sentencing decision on the need to send a law and order message to the community." (Appellant's Brief, page 63).

First of all, the record reflects that at sentencing, the trial court read to the jury the following instructions:

The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:

1. The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody.

2. The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. In order for you to consider this aggravating factor, you must find the murder was cold, and calculated, and premeditated, and that there was no pretense of moral or legal justification. "cold" means the murder was the product of calm and cool reflection. "Calculated" means that the defendant had a careful plan or prearranged design to commit the murder. "Premeditated" means the defendant exhibited a higher degree of premeditation than that which is normally required in a premeditated murder. A "pretense of moral or legal justification" is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.

3. The victim of the crime for which the defendant is to be sentenced was a law enforcement officer engaged in the performance of his official duties.

4. The crime for which the defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

As you may have observed, three of the aggravating factors I have defined for you are law enforcement related. These are the

following: The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody; the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of law; the victim of the capital felony was a law enforcement officer engaged in the performance of his official duties.

If you find any or all of these three aggravating circumstances to exist, you should consider them to have merged into one factor. This is because be proving the elements of one, the State may have proven the elements of the others. In other words, while it may be said that the Defendant shot Officer Bevel in order to escape custody, to say that she shot him to hinder law enforcement required an examination of what law enforcement activity she sought to disrupt. In this case, the activity was to arrest her; therefore, the same aspect of the offense is being used to justify those factors.

Likewise, if you find that either of those two aggravating circumstances existed, it would follow, at least in this case, that the victim was a law enforcement officer in the performance of his duties.

Therefore, if you find any or all of these law enforcement-type aggravating circumstances to exist, you are to treat them as only one aggravating factor. This is the same way the law requires me to consider these three aggravating circumstances in deciding what sentence to impose.

(TR 202-203, 1732-1734).

Clearly the jury was properly instructed with regard to how they were to consider the merging of these three aggravating factors if found. Moreover, the instruction **was** provided long after the prosecutor's remarks and after defense counsel also explained to the jury what the merger of these three aggravating factors meant. (TR 1678-1680). Indeed, a review of defense counsel's closing argument reveals that he read the jury instruction the trial court ultimately gave to the jury.

Clearly, under Castro v. State, 597 So.2d 259 (Fla. 1992), a proper limiting or merging instruction was given. The prosecutor's remarks with regard to what weight to give that aggravating factor did not result in a violation of this Court's reasoning in Castro, supra, which provides: ". . . A limiting instruction properly advises the jury that should it find both aggravating factors present, it must consider the two factors as one, . . .". 597 So.2d at 261.

Defense counsel did not make a specific objection to the statement made by the prosecutor, rather he merely argued that the argument was improper. The State did not argue that in some fashion this aggravator should become a super-aggravator, rather

the State argued there was substance to this aggravator.[3] Such an argument is appropriate and does not violate the legal principal set out in Provence v. State, 337 So.2d 783 (Fla. 19761, or White v. State, 403 So.2d 331 (Fla. 1981).

As the second prong to Jackson's argument, she asserts that the prosecutor improperly argued that the jury, in its sentencing decision, "needs to send a law and order message to the community." First of all, the issue has not been preserved for review since nowhere did defense counsel make this specific objection. More importantly, however, nowhere did the prosecutor suggest such a result. To the extent that he was arguing that Jackson's conduct was disruptive to police authority, the State would submit that that, in fact, is the facts and circumstances of this crime. Jackson, in an attempt to avoid being arrested, shot and killed Officer Bevel. In Bonifay v. State, 680 So.2d 413 (Fla. 1996), the Court reaffirmed the caselaw with regard to closing argument. Therein, the Court stated:

> . . . With respect to an attorney's arguments to the jury, we have previously stated:

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[3] See Maxwell v. State, 603 So.2d 490, 493 (Fla. 1992), where court recognized some aggravating facors are more weighty than others.

> Wide latitude is permitted in arguing to the jury. Thomas v. State, 326 So.2d 413 (Fla. 1975); Spencer v. State, 133 So.2d 729 (Fla. 1961), cert. denied, 369 U.S. 880, 82 S.Ct. 1155, 8 L.Ed.2d 283 (1962), cert. denied, 372 U.S. 904, 83 S.Ct. 742, 9 L.Ed.2d 730 (1963). Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments. Spencer. The control of comments is within the trial court's discretion, and the appellate courts will not interfere unless an abuse of such discretion is shown. Thou; Paramore v. State, 229 So.2d 855 (Fla. 1969), modified, 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 751 (1972). A new trial should be granted when it is 'reasonably evident that the remarks might have influenced the jury to reach a more severe verdict of guilt than it would have otherwise done.' Darden v. State 329 So.2d 287, 289 (Fla. 1976), cert. denied, 430 U.S. 704, 97 S.Ct. 308, 50 L.Ed.2d 282 (1977). Each case must be considered on its own merits, however, and within the circumstances surrounding the complained-of remarks. Id. Compare Paramore with Wilson v. State, 294 So.2d 327 (Fla. 1974).

Breedlove v. St-ate, 413 So.2d 1, 8 (Fla.), cert. denied, 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982).

We have carefully reviewed the prosecutor's closing argument and do not find that the biblical references were fundamental error or even harmful error in the context of the entire argument. We also do not find, in the context of this case, the prosecutor's singular use of the word 'exterminate' to be harmful error.

Jackson's reliance on this Court's recent decision in Campbell v. State, ___ So.2d ___ (Fla. 1996), 21 Fla. L. Weekly S287, S288, is distinguishable. Clearly, the statements by the prosecutor in Campbell, specifically used the 'message to the community" terminology in closing argument. The Court concluded that the error **was** not harmless under State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), because 'on this record, it is entirely possible that several jurors voted for death, not out of reasoned sense of justice but out of a panicked sense of self-preservation." 21 Fla. L. Weekly at S288.

In the instant case, relief is not warranted because the comments made by the prosecutor were not the send a message to the community genre, and, more importantly, although a general objection to closing argument was made, there was no specific objection made pointing out to the trial court that this was an improper message to the community argument. Based on the foregoing, all relief should be denied as to this claim.

ISSUE V

WHETHER SEC, 921.141(7), FLA.STAT. (1993), IS UNCONSTITUTIONAL,

Albeit the constitutionality of Sec. 921.141(7), Fla.Stat. (1993), has been held valid, see Bonifay v. State, 680 So.2d 413

(Fla. 1996), and Windom v. State, 656 So.2d 432 (Fla. 1995), cert. denied, 116 S.Ct. 571 (1995), Jackson makes another attempt at challenging the value of victim impact statements.

Sec. 921.141(7), Fla.Stat. (1993), provides as follows:

> (7) **Victim Impact Evidence. --** Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

In Windom v. State, 656 So.2d at 438, this Court stated that victim impact testimony is admissible as long as it comes within the parameters of Payne v. Tennessee, 501 U.S. 808 (1991). Since Windom, this Court has acknowledged and upheld the State's right to present victim impact evidence, see Bonifay v. State, 680 So.2d 413 (Fla. 1996); Farina v. State, 680 So.2d 392 (Fla. 1996); Hitchcock v. State, 673 So.2d 859 (Fla. 1996), and Allen v. State, 662 So.2d 323 (Fla. 1995).

In Fonifay, this Court observed:

> Clearly, boundaries of relevance under the statute includes evidence concerning the

> impact to family members. Family members are unique to **each** other by reason of the relationship and the role each has in the family. A loss to the family is a loss to both the community of the family and to the larger community outside the family.

680 So.2d at 419-420.

In the instant case, the trial court provided the following jury instructions with regard to victim impact evidence:

> You are now instructed that the victim impact evidence offered by Nathanial Glover, Etta Bevel, Jerry Thomas and T. C. O'Steen, during the penalty phase of this trial shall not be considered as an aggravating circumstance but **may** be considered in making your decision.

(TR 205, 1738).

The victim impact evidence in the instant **case** came from four witnesses presented by the State. Nathanial Glover read a prepared statement reflecting that on a personal and professional level he knew the victim. Gary Bevel was a nice person, a good friend, a committed public servant who recruited a number of people to become law enforcement officers. Mr. Glover stated that it was important to have minorities in the police department and stated on a personal level he had competed together with Gary Bevel in sports and that Gary Bevel was always smiling and a helpful person. Nathanial Glover said he was fortunate to know Gary Bevel. (TR 493-495). On cross-examination, the defense brought out that

Nathanial Glover was Sheriff Nathanial Glover (TR 495), and that Sheriff Glover did not know anything about Jackson; knew nothing about her upbringing and knew nothing about the circumstances that caused the murder. (TR 495). Gratuitously, defense counsel opined that he and the Sheriff had also played sports together and further elicited from the Sheriff that he would miss defense counsel in the same way if he were gone. (TR 497). Defense counsel went on:

> Q: It's not so much that you played sports with him that causes you to be here testifying today about the loss, it's the fact you knew him personally and the fact he was a police officer.
>
> A: Well; I did know him personally, I also knew him as a police officer, but I also miss him as a friend, and as a fine individual that he was. I think mankind lost when Gary Bevel died.

(TR 497).

Later in the State's case, Eda Bevel, Officer Bevel's mother, testified that Officer Bevel was her son and he was one of six children that she reared. He born in Hartsfield, South Carolina and had been involved in sports. He loved his family and he always looked out for his siblings. He went to Massey College until he joined the Sheriff's Office. (TR 825). MS. Bevel testified that she was proud of her son and that he had matured into a fine young man. He had high morals, was respectful and friendly. She

observed that he never forgot birthdays or holidays and that she thinks about him daily. She observed that his death has been a tremendous impact on her. (TR 826-827).

Jerry Thomas testified that he knew Officer Bevel to be an energetic, friendly and compassionate person. Officer Bevel was an athlete and he was also willing to lend a helping hand and worked with underprivileged youth. He assisted in helping turn young men and their lives around and helped the elderly. Jerry Thomas said he was left without a good friend. (TR 828-829). On cross-examination, Mr. Thomas testified that Officer Bevel had at one time expressed reluctance about becoming a police officer. When asked, Mr. Thomas said he did not know anything about Jackson. (TR 830).

Lastly, T.C. O'Steen, a detective in the Jacksonville Sheriff's Department, testified that he worked as a Correctional Officer with Officer Bevel and they were close friends. (TR 831). He observed that Officer Bevel always had a smile on his face and had the utmost respect for everyone. Officer Bevel attended church with Mr. O'Steen and their friendship grew. (TR 832). Officer Bevel was a great athlete and an influence on everyone he came across. (TR 832). Detective O'Steen was the one that got Gary to become a police officer and he observed that Officer Bevel was a

hard worker and he enjoyed police work. (TR 833). They basketball, softball and football together (TR 833), and although Officer Bevel had had an uphill climb, Bevel was proud of his accomplishments. (TR 833). Detective O'Steen stated that he lost a true friend who was an asset to the police department. He observed that he had recently met Officer Bevel's son and felt sad when he realized that the boy would grow up without a father. (TR 834).

On cross-examination, defense counsel asked Detective O'Steen whether he knew that Jackson had children; whether he knew anything about her background and whether he knew about the terrible things that have happened to her. (TR 835).

As observed in Windom v. State, supra, victim impact evidence is limited to that which is relevant to demonstrate the victim's uniqueness and the loss to the community's members by the victim's death. In the instant case, the testimony of the four victim impact witnesses were totally geared towards the uniqueness of Officer-Bevel and the loss to the community's members by Officer Bevel's death. No relief should be forthcoming as to this claim. Sec. 921.141(7), Fla.Stat. (1993), is constitutional. Windom v. State, supra, and Payne v. Tennessee, supra.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN REFUSING TO ADMIT INTO EVIDENCE AND TO CONSIDER IN SENTENCING THE VIDEOTAPE OF THE HYPNOTIC REGRESSION BY DR. MUTTER.

Jackson takes issue with the fact that the trial court disallowed the introduction of the videotape of the hypnotic regression by Dr. Mutter of Jackson. The record reveals that although the videotape itself was not played during the course of this resentencing, Dr. Mutter freely read from the transcript of the videotape of the hypnotic regression as well as references were made by both Dr. Walker and Dr. Miller to the videotape. Jackson now argues:

> In ruling that the videotape of the hypnotic regression was inadmissible for the jury's consideration and failing to view the tape itself, the trial judge 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, Section 9, 16 and 17 of the Florida Constitution.

(Appellant's Brief, page 79). The argument presented herein is identical to that presented in Jackson v. State, 648 So.2d 85, 90-91 (Fla. 1994). In fact, in reviewing the authorities cited by Jackson, it should be noted that similar, if not identical,

arguments were made in 1993 when this issue was briefed by Jackson and the State. In Jackson, supra, this Court found:

> The trial court in this case allowed the expert opinion testimony but would not allow the videotape to be admitted into evidence because of the State's inability to cross-examine Jackson, Instead, the court allowed Dr. Mutter to explain the basis of his opinion by giving a detailed account of the procedure used and by reading extensively from the transcript of the regression session. Under these circumstances, the trial court did not abuse its discretion in refusing to admit the videotape as the basis for Dr. Mutter's opinion. Similarly, because Dr. Mutter was allowed to go into great detail concerning the procedure used and the questions asked during the session, we find no error in connection with the trial court's ruling that the videotape could not be admitted to rebut the State's charges that the hypnotic session was somehow flawed,
>
> Finally, we also find no error in the trial court's refusal to admit the videotape as mitigating evidence. If we were to rule otherwise, defendants in capital cases could present as mitigating evidence videotaped statements to mental health experts, and thereby preclude cross-examination by the State.

648 So.2d at 91.

Jackson has demonstrated no basis upon which to suggest a different outcome should occur in this resentencing with regard to the admission of the videotape of her hypnotic regression.

ISSUE VII

WHETHER THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE DEFENSE TO HIRE A PATHOLOGIST TO ASSIST IN REBUTTING TESTIMONY OF THE MEDICAL EXAMINER CONCERNING THE POSITIONING OF THE VICTIM AT THE TIME OF THE SHOOTING.

Jackson argues that the trial court erred in not granting his motion for request to appoint a forensic pathologist to assist in the preparation of their defense. She notes that in previous resentencings, the State sought the assistance of the medical examiner to provide insight regarding the position of the victim at the time of the shooting. In the instant case, Jackson has cited no authority to support her contention except to argue that in Ake v. Oklahoma, 470 U.S. 68 (1985), the United States Supreme Court held that due process required in capital cases the appointment of a defense psychiatrist when sanity was a significant factor in the defense.

Citing Sec. 914.06, Fla.Stat. (1991), Jackson reads this provision to apply to circumstances where the medical examiner testifies as to how the death occurred. The problem with Jackson's analysis and reliance on Sec. 914.06, Fla.Stat., is that how Officer Bevel died is not at issue. Six gunshot wounds to his body killed him. (TR 750). The only point of contention was whether Jackson was in a position that put her above Officer Bevel when the

shots were fired. The record reflects that virtually every other witness to the murder testified that Officer Bevel was bending down to pick up Jackson's keys after she made the statement, "Look what you've made me done, you've made me drop my keys." As he took a step backwards and bent down to retrieve the keys, Jackson took the .22 caliber gun from her waistband and fired six bullets into Officer Bevel. Dr. Floro, the medical examiner, testified that the trajectory was from above and consistent with Officer Bevel bending down. (TR 759). He further testified that based on the nature of the shots, Officer Bevel would have fallen forward and that the wounds were inconsistent with Jackson laying down or that Officer Bevel was on top of her. (TR 761) Defense counsel cross-examined Dr. Floro with regard to the bullet that went into the doorjam (TR 763), and whether Officer Bevel would have been in the car at the time he sustained the wound to his shoulder. (TR 764). On cross-examination, Dr. Floro testified that the gunshot wounds were from one to two inches away (TR 766), and he admitted that he could not reconstruct exactly how the shots entered the body or how Officer Bevel's body would have been positioned after the first shot. (TR 766-767). On re-direct, Dr. Floro testified that one would have to rely on the witnesses who testified as to what they saw at the time of the murder. (TR 768).

In the instant case, the nature of the discussion with regard to whether Jackson was laying down or Officer Bevel was on top of her is not supported by the testimony of all the witnesses at trial. The instant case does not even come close to the decision in Burch v. State, 522 So.2d 810 (Fla. 1988), where the Court found the trial court did not err in not appointing a specific expert on the use of PCP. Likewise, the decision cited by Jackson, specifically Cade v. State, 658 So.2d 550 (Fla. 5th DCA 1995), is distinguishable in that Cade was seeking the assistance of a DNA expert where DNA evidence was central to the State's case and the remaining evidence against Cade was not overwhelming.

Based on the foregoing, no error occurred when the trial court disallowed Jackson's motion, especially where defense counsel had every opportunity and in fact did seriously cross-examine the medical examiner as to his findings.

ISSUE VIII

WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COLD, CALCULATED AND PREMEDITATED USING AN UNCONSTITUTIONALLY VAGUE INSTRUCTION.

Recognizing that in Jackson v. State, 648 So.2d 85, 95 n.8 (Fla. 1994), this Court rewrote the jury instruction pertaining to

the CCP factor, Jackson now says that this instruction still inadequately apprises the jury of the legal limitations of the CCP circumstance. While acknowledging that the revised instruction approved by this Court in In re: Standard Jury Instruction in Crimin l Cases, 678 So.2d 1224 (Fla. 1996), Jackson contends that the revision remains faulty.

Jackson has cited no authority that would support her conclusion that this Court's evolutionary jury instruction for CCP developed in Jackson is at all wanting.

CONCLUSION

Based on the foregoing, Appellee respectfully requests this Honorable Court affirm the trial court's reimposition of the death sentence in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Bill McClain, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 10th day of February, 1997.

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