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

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. This court affirmed Jackson's conviction and sentence on direct appeal. 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, which resulted in a death sentence. On appeal, this Court reversed this sentence and again directed a that a new penalty phase trial before a new jury be conducted. Jackson v. State, 648 So.2d 85 (Fla. 1994). The third penalty phase trial began on November 13, 1995. (Tr 126) On November 17, 1995, the jury recommended a death sentence. (R 207)(Tr 1747) Circuit Judge Donald R. Moran, Jr., followed the jury's recommendation and on January 18, 1996, sentenced Andrea Jackson to death. (R 229-239)(Tr 1792-1797) In aggravation, the court found two aggravating circumstances: (1) the homicide was committed in a cold, calculated and premeditated manner, sec. 921.141 (5)(i) Fla. Stat.; and (2) three law enforcement related aggravating circumstances -- avoiding arrest, disrupting governmental function and the victim a police officer -- merged into one forming the second

circumstance, secs. 921.141(5)(e)(g) & (j) Fla. Stat. Regarding mitigation, the court rejected the two statutory mental mitigating circumstances concerning extreme mental or emotional disturbance and substantially impaired capacity at the time of the crime, secs. 921.141(6)(b) & (f) Fla. Stat. (R 236-237) The court acknowledged that Andrea had suffered sexual abuse as a child and was addicted to drugs and alcohol. (R 237) However, the court concluded that these nonstatutory factors did not rise to the level of mitigation. (R 237)

Jackson filed her notice of appeal to this Court on February 1, 1996.(R 242)

Facts -- Prosecution's Case

On May 16, 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. and again at 10:00 p.m., neighbors heard Andrea unsuccessfully attempting to start the car.(Tr 610-611, 653) They next observed her breaking the windows out of the car with a crowbar, removing articles from the car, and cursing the automobile and talking to the automobile as if it were a person.(Tr 563-566, 578-580, 611-612, 634, 655-659) She removed tools, tires, the battery, and other items from the car.(Tr 566, 657-658) Andrea was obviously angry because her car would not crank. During this process which lasted over two hours, she carried some items upstairs to her husband's apartment. (Tr 658) Adam Gray, an automobile salesman at Rockett Motors, said that Andrea had brought the car to him on May 15 and May 16 with continued trouble.(Tr 725-729) When he saw her on May 16 in the

afternoon, he did not think she was intoxicated since her speech was not slurred. (Tr 730) She was upset with the car and told him she was going to drive "the mother-fucker off the main street bridge." (Tr 730)

Officer Burton Griffin arrived at the scene pursuant to a disturbance called at approximately 11:00 p.m..(Tr 545, 711) Officer Gary Bevel arrived first, and he volunteered to assist Griffin.(Tr 712) Andrea approached and told the police officers that she owned the car. (Tr 714) At the officer's request, Andrea returned to the apartment and retrieved a bill of sale for car. (Tr 718) She volunteered that she knew who damaged her car. (Tr 719) She would not give the officers a name and Griffin thought she wanted to deal with the problem herself. (Tr 719) Griffin said he detected a faint smell of alcohol on Andrea's breath, but he did not believe she was intoxicated because she walked without stumbling and did not slur her speech.(Tr 715-717) 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 724) The officer said it might be difficult to tell the behavioral effects if a person had taken alcohol, marijuana, cocaine and T's and Blue's on the same day. (Tr 722-723) He also stated that if he had seen someone smashing his car with a crowbar and cursing the car as if it were a person that such irrational behavior would lead him to believe that the person could be under the influence of some substance. (Tr 723-724) Griffin left the scene when Bevel began writing the report and said that he did not need further help.(Tr 719-720)

Four neighbors observed a confrontation between Andrea and Officer Bevel. (Tr 561, 574, 633, 651) Gina Roulhac observed Andrea destroying her car and the arrival of the police officers. (Tr 563-566) Gina and her sister watched from their front porch. (Tr 563) Gina said that she did not see Andrea stumble or fall as she walked as if intoxicated. (Tr 567) However, she was not close enough to overhear anything Andrea said or to tell if she smelled of alcohol. (Tr 572) After talking to Andrea, Officer Bevel approached the Roulhac's doorway. (Tr 566) Bevel was a friend of the family's and had dated one of Gina' sisters. (Tr 566, 573) He asked if they had seen what had happened and they told him that Andrea had damaged her own car. (Tr 568) At that time, Gina went inside her house to use the restroom and she heard shots. (Tr 518) She ran back to the window, but she could only see the patrol car; she could not see Bevel or Andrea. (Tr 569) A tree was blocking a portion of the patrol car from view. (Tr 573-574)

Anna Nelson, Gina's sister, also saw Andrea destroying her car and the confrontation between Andrea and Bevel. (Tr 574-633) Nelson said that Andrea's problems with the car started around 6:30 p.m. and continued for a lengthy period. (Tr 578-579) After unsuccessful attempts to crank the car, Andrea began removing items from the car and smashing the car with a crowbar. (Tr 579) Andrea was angry, and she cursed and talked to the car. (Tr 579-580, 611-612) Officer Bevel arrived at between 10:30 and 11:00. (Tr 581-583) Andrea came downstairs from the apartment and talked to Bevel. (Tr 581-582) Nelson did not see Andrea fall down or slip as she walked. (Tr 584-585) She heard Andrea tell

Bevel she wanted her car towed. (Tr 583) Nelson said that Andrea speech was not slurred. (Tr 584) Nelson said she was about 60 feet away and she was not concerned about determining if Andrea was under the influence of drugs or alcohol. (Tr 599) She was not close enough to tell if Andrea smelled of alcohol. (Tr 613) Andrea went back upstairs to obtain the registration for her car. (Tr 585) After giving the document to Bevel, Andrea returned upstairs. (Tr 585-587) Nelson did not perceive any confrontation between Andrea and Bevel at that time. (Tr 587) Bevel walked to Nelson's house and she told him that Andrea had damaged her car herself. (Tr 588-589)

While Bevel and Nelson were talking, Andrea again came downstairs and went to Bevel's patrol car. (Tr 590) She appeared to be going through things in the front seat of the officer's car. (Tr 590-591, 601) Andrea had put her hand through the open window and appeared to be getting ready to enter the car on the driver's side. (Tr 601-603) Bevel called out to Andrea and asked her why she was in his car. (Tr 591) She came away from the car. (Tr 591) Bevel confronted Andrea and told her he was arresting her for filing a false police report. (Tr 591) Andrea came toward Bevel and began hitting him in the chest. (Tr 592) Bevel grabbed both of Andrea's wrists and restrained her. (Tr 593, 605) They struggled. (Tr 593, 605) Bevel tried to get Andrea into the back of the patrol car. (Tr 605-606) At first, Bevel asked to her to get in the car, but Andrea refused and continued to struggle. (Tr 606) Andrea asked Bevel why he was manhandling her. (Tr 593) Bevel bent down and grabbed Andrea's knees. (Tr 606-607) At this time, Nelson heard keys drop and heard Andrea tell Bevel that he

had made her drop her keys. (Tr 594-595, 606-607) When Bevel grabbed the back of Andrea's knees, this caused Andrea to fall onto the backseat of the patrol car. (Tr 606-607) Nelson heard a gunshot. (Tr 596) After a slight pause, Nelson heard four or five more shots in rapid succession. (Tr 597) Bevel fell into the car onto Andrea; she pushed him off of her and fled. (Tr 598)

Leanderaus Fagg also saw the confrontation with the police officer. (Tr 634-636) He observed Andrea and Bevel talking. (Tr 638-639) Andrea acted angry and hostile and wanted to know where her car had been taken. (Tr 638-639) Bevel informed her that he was arresting her for giving false information, grabbed her and began to place her into the backseat of the patrol car. (Tr 639) Andrea resisted and tried to get away. (Tr 640, 644-645) Andrea was immensely angry and hostile. (Tr 645) The officer bent down to place Andrea into the backseat, and while she was sitting with her legs outside of the car, Fagg heard Andrea tell the officer that he had made her drop her keys. (Tr 641) Bevel paused and stepped back as if to look for keys, and at that time, Fagg heard the gunshots. (Tr 641-642, 645-646) He thought he heard four shots. (Tr 642) The shots were fired in rapid succession almost like an automatic weapon. (Tr 647-648) Bevel fell into the car onto Andrea. (Tr 642) Andrea pushed him from on top of her and then fled from the car. (Tr 642)

Mable Coleman lived in the apartment next door to Shelton Jackson, Andrea's estranged husband. (Tr 651, 654, 681) She knew Andrea and had heard the fights between Andrea and Shelton in the past. (Tr 686) Policemen responded to some of these fights and on one occasion Andrea's used Coleman's telephone to call the

police. (Tr 686) On the night officer Bevel was shot, Coleman saw and heard Andrea trying to start her car. (Tr 653) She heard Andrea's angry outburst and her cursing the car. (Tr 655-657) Coleman had a good view of Andrea demolishing the car, stripping it of certain items and cursing it as if it were a person. (Tr 655-658, 687) When the police officers arrived, Coleman saw Andrea meet with the officers and return upstairs to Shelton's apartment for the car's registration. (Tr 660) She returned to the officers with the papers. (Tr 661-662) Coleman saw Andrea sit in the passenger side of the patrol car while Bevel wrote something. (Tr 662) Andrea left and returned upstairs to Shelton's apartment. (Tr 662) After she left, her car was towed away. (Tr 665) Coleman saw Bevel walked to a neighbors house and talked to someone there. (Tr 662) A short time later, Coleman saw Andrea come out her apartment and start down the stairs. (Tr 663) She saw Andrea stop on the top step and placed a pistol in the waist area of her pants. (Tr 663-664) Andrea then walked to the police car. (Tr 664) Bevel came from the neighbor's house and met Andrea. (Tr 665) Andrea asked, "Where is my damn car?" (Tr 665) Bevel said, "They towed it away." (Tr 665) Bevel then told Andrea to "Get in the car I have to take you downtown." (Tr 665) Coleman did not know Bevel intended to arrest Andrea until he spoke to her at this time. (Tr 681) Andrea responded that she was not going anywhere. (Tr 665-666) By this time, Andrea was struggling with the police officer. (Tr 667) Bevel took Andrea to the back seat of the patrol car. (Tr 667) Coleman remembers seeing Andrea sitting down with her feet still outside of the car. (Tr 667) She heard Andrea say, "Oh, you made me drop my damn keys." (Tr 675)

Bevel and Andrea both leaned forward. (Tr 675) Coleman then heard five, rapidly-fired, gunshots. (Tr 675-676, 704-705) Officer Bevel fell into the car onto Andrea. (Tr 676-677, 705) Andrea pushed Bevel aside and fled. (Tr 677)

A paramedic, Thomas McCone, arrived at the scene shortly after receiving the call at 12:30 a.m. (Tr 734) He found Bevel lying in the backseat of the patrol car suffering from head wounds. (Tr 735-736) Bevel had a pulse and labored breathing. (Tr 735) The upper one-third of Bevel's body was inside the car on the backseat and he was reclining against the back of the front seat. (Tr 735) The remaining two-thirds of Bevel's body was outside of the car. (Tr 735, 738) McCrone did not know if Bevel had been moved and did not ask any of the police officers present if he had been moved. (Tr 738)[1] Soon after moving Bevel to the stretcher, Bevel's heartbeat stopped. (Tr 737)

At the scene, John Bradley, then a detective, recovered several items of evidence. (Tr 498-532) He found Bevel's uniform, baseball type cap with a bullet hole in the brim. (Tr 512) Bevel's bulletproof vest was also collected as evidence. (Tr 513) Bradley noted blood in the floorboard and on the rear seat of the car. (Tr 517-518) Officer Bevel's daily log and an offense report were recovered. (Tr 521-532) The last entry on the investigation report states that the subject possibly made a false report on

[1] Officer John Dean, the first officer at the scene, later testified in the defense case. (Tr 1125) He found Officer Bevel lying in the backseat of the car with his head facing the rear of the backseat. (Tr 1127, 1129) Only Bevel's feet and a portion of his legs were outside of the car. (Tr 1127) Dean pulled Bevel up from his position in order to check for vital signs. (Tr 1129)

the criminal mischief complaint. (Tr 531-532) The detective collected six bullets, five from the medical examiner and one from inside the frame around the door of the car. (Tr 515-516)

Bonifacio Floro, a forenic pathologist, performed the autopsy on Gary Bevel. (Tr 748) Just before he testified, defense counsel renewed his objection to the court's pretrial ruling deny him the right to hire a pathologist to assist in preparing to cross-examine Dr. Floro. (Tr 741-744) Floro found four gunshot wounds to the head and two to the shoulder and back area. (Tr 746-757) Three wounds entered the top of the head and showed stippling which indicated the gun was close when fired. (Tr 755-757) A fourth shot to the head entered above the right eyebrow and showed no stippling. (Tr 757-758) Floro stated this was consistent with the shot which first passed through the brim of the cap which would have filtered the gunshot residue and prevented stippling on the skin. (Tr 758) Additionally, Floro opined that this was the first shot since it would have knocked the cap free of the head before the other shots were fired which caused stippling. (Tr 758) The fifth and sixth wounds were located in the in the shoulder area, one on the top of the shoulder and the other just above the shoulder blade. (Tr 757-758) In response to the prosecutor's hypothetical questions, Floro stated the wounds were consistent with the shooter being in a seated position with Bevel being lower and looking down and away. (Tr 759-760) Floro said the wounds were inconsistent with the shooter lying down with Bevel lying on top of the shooter. (Tr 761) Floro stated that he could not determine the exact positions of the shooter and victim and his opinion was merely dealing with

the consistency of the wounds and the hypothetical positions. (Tr 762-765)

Shirley Freeman testified that Andrea came to the house where she live with Joi Shelton around 1:30 or 2:00 a.m. on the morning of May 17, 1983. (Tr 769-770) Andrea was hysterical and covered in blood. (Tr 770) She also had a gun with her. (Tr 773) Freeman could tell Andrea had been drinking, but she did not think Andrea high or intoxicated. (Tr 442-774) Andrea said she had shot a policeman and she did not want to go back to jail. (Tr 772) Andrea also told Freeman that she did not like men to put their hands on her because she had had bad experiences as a child and someone had tried to rape her. (Tr 777-778) Freeman washed Andrea's clothes to get the blood out and she also called the hospital to check on the officer. (Tr 771, 775) When Andrea learned the officer was dead, she cried and talked about how sorrow she was. (Tr 777) Freeman called a taxicab for Andrea, and she left. (Tr 773) Freeman admitted she had lied in a sworn statement to the police when she said she had picked Andrea up on 20th Street because she was trying to cover for Joi Shelton who had actually done so. (Tr 781-783)

The taxi driver, Carl Lee, picked-up Andrea at 4:15 a.m.(Tr 787) When he first saw Andrea at the door of the cab, she did not appear normal. (Tr 791) Lee had the impression she was high, drunk or sleepy. (Tr 791) After she entered the cab and talked to him, he concluded that she was not drunk or high. (Tr 789) He also noticed that Andrea had a gun. (Tr 789)

Andrea returned to her husband's apartment. (Tr 678- 679) His neighbor, Mable Coleman saw Andrea and called the police. (Tr

679) Officers responded and arrested Andrea. (Tr 793-802) Officer David Diperna, who had been Officer Bevel's supervisor, and Officer George Barge arrested Andrea. (Tr 794-802) Diperna said he saw Andrea as she ran upstairs to her husband's apartment. (Tr 798) They ultimately found Andrea on a porch. (Tr 802) She was lying down, curled up behind a trash can. (Tr 802) Barge jumped on top of her, pinning her with his knees and both officers struggled with her. (Tr 802-804, 808) Diperna said that Andrea kicked, jerked, butted and tried to bite during the struggle. (Tr 802-804, 808) She was handcuffed and searched for weapons, but the officers found Andrea did not have a weapon. (Tr 803) Later, in the apartment, the officers found a pistol lying on top of a laundry hamper. (Tr 803, 508-509) Diperna testified that he did not smell alcohol on Andrea, and in his opinion, she was not high or intoxicated. (Tr 804, 808)[2]

State's Victim Impact Evidence

Four witnesses testified to victim impact information. (Tr 493, 824, 827, 831) The State's very first witness in this case was Nathaniel Glover, the first African-American sheriff of Duval County who had just recently been elected. (Tr 493)(R 215-216) Glover testified in full uniform. (R 209, 214) Glover said he knew Bevel personally and professionally. (Tr 494) In fact, Glover had urged Bevel to change from corrections to law

[2]Officer Barge later testified in the defense case. (Tr 1111) He said he found Andrea lying in a fetal position and jumped on her with his knees and his six foot three inches and 225 pounds to stun her. (Tr 1118-1119) He hit Andrea in the face during struggle to subdue her. (Tr 1119-1120) Barge detected a slight odor of alcohol, but he did not think Andrea was intoxicated or high. (Tr 1121, 1124)

enforcement and had actively recruited Bevel. (Tr 494) Glover characterized Bevel as friendly, never angry, a good friend and committed public servant. (Tr 494) The State closed its case with the remaining three victim impact witnesses, Bevel's mother and two more police officers. (Tr 824-836) Eda Bevel testified that her son was a warm, loving son who was friendly toward others. (Tr 824-827) Police Officer Jerry Thomas first met Gary Bevel when they worked in corrections at the jail. (Tr 828) He characterized Bevel as energetic and compassionate. (Tr 828) The two of them enjoyed a friendship which included participation in public service activities for underprivileged youth and senior citizens. (Tr 828-829) Detective T.C. O'Steen also met Bevel when they worked together at the jail. (Tr 831-832) The two men socialized, played sports and attended church together. (Tr 832-833) O'Steen became a police officer and Bevel remained working at the jail. (Tr 832) Bevel had told O'Steen that he did not want to be a policeman. (Tr 833) However, Bevel was later recruited and attended the police academy. (Tr 833) O'Steen said Bevel was an asset to the sheriff's office and would have surely advanced in the department. (Tr 834) O'Steen said that Bevel left a son and he had talked to the boy about his father. (Tr 834)

During closing argument, the prosecutor told the jury that the jury could use the victim impact evidence in its sentencing decision:

> By the way, the final thing was victim impact and I'm going to spend a little time in few minutes about that but you obviously heard from the Sheriff, you heard from the victim's mother in this case, Miss Bevel, you heard from other people who knew him very well, T.C. O'Steen and Jerry Thomas, they just talked to you about how he was unique as a human being. And

what the loss would be to the community by his death. And that's the only reason it's admitted, it's not admitted in terms of aggravation or mitigation but it can be considered by you in making your decisions.

* * * *

This victim impact isn't introduced in an attempt to get your sympathy, or to show aggravations or rebut the mitigation. But it can be used in terms of the death penalty in your decision.

Officer Bevel in that photograph has been shown a lifeless corpse body and the reason that victim impact was to show you that he was a human being, that he meant something, that he did have an impact on this community in terms of what he was doing. Being involved with helping others, that he did make a difference, not just as a law enforcement officer but as an individual human being.

(Tr 1644-1645, 1664).

The court instructed the jury, over defense objections, that the jury could consider the victim impact evidence in making its sentencing decision:

> Your are now instructed the victim impact evidence offered by Nathanial Glover, Eddie 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 1738)

Facts -- Defense Case

The defense presented testimony providing further details surrounding the homicides, Andrea's actions on the day of the crimes, Andrea's background of childhood sexual abuse, spouse abuse, and the concomitant mental and emotional problems including extensive drug and alcohol abuse. These witnesses included police officers, citizens who happened to witness certain events, friends and relatives of Andrea's and mental health experts.

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

testified that she and Andrea used drugs and alcohol together frequently. (Tr 1456-1464) They used heroin, T's and Blues, marijuana, and lots of alcohol. (Tr 1456) T's and Blues were pink and blue pills that you crush, mixed together and shoot interveinously. (Tr 1456-1457) According Croft, this drug made you really high and sometimes irritated and angry. (Tr 1457) Croft said she and Andrea would get mean when using T's and Blues. (Tr 1468) Andrea and Croft would start using drugs early in the morning. (Tr 1459-1472) 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 1472) During April and May before the homicide, Andrea and Croft had increased their drug usage. (Tr 1458-1459) On the day of the homicide, she and Andrea did a great deal of drugs and alcohol. (Tr 1459-1463) As was their pattern, they started early in the morning about 7:00 to 8:00. (Tr 1461) The two of them used 30 or more T's and Blues, drank 2 or 3 fifths of liquor and smoked marijuana. (Tr 1462) They parted company in the late afternoon or early evening. (Tr 1463-1464) Richard Washington, another friend of Andrea's, drank alcohol with Andrea around 10:00 or 10:30 a.m. on day of the homicide. (Tr 1446-1447) She had two drinks with him. (Tr 1447) He said she had been drinking before she came into the bar. (Tr 1447) She left him about 1:30 p.m. (Tr 1448, 1449)

After the shooting, Andrea ran. A passing motorist, David Lee, and his passenger gave Andrea a ride. (Tr 1369-1373) Lee was a fire fighter. (Tr 1369) When he saw Andrea on the side of the road, her shirt was open exposing her bra, her hair was frizzy and out of place, and she seemed excited. (Tr 1371) Lee stopped

thinking she may have molested. (Tr 1371) As Andrea walked to Lee's truck, she did not fall, but she did "kind of fumble" when she attempted to get into the truck. (Tr 1376-1378) Once Andrea was inside the truck, Lee confirmed that Andrea was hysterical, nervous and frightened. (Tr 1372-1373) She smelled of alcohol, but she was able to converse without slurring her speech. (Tr 1372, 1377) Lee's friend commented on her appearance that she must have had to "take somebody out." (Tr 1373) Andrea replied, "Did something I didn't want to do." (Tr 1373) Shortly after obtaining the ride, Andrea told Lee to stop because she saw her ride. (Tr 1377) Andrea left and went to another vehicle and got inside. (Tr 1373-1374)

On the night of the homicide, Andrea telephoned her friend, Joi Shelton, and asked her to pick her up. (Tr 1486) Andrea told her that her car was broken down. (Tr 1487) Joi said that Andrea sounded nervous or excited on the telephone. (Tr 1486) Joi asked Andrea if she had been drinking. (Tr 1486) While driving to get Andrea, Joi heard Andrea call her name and she saw Andrea getting out of a truck. (Tr 1487-1488) She picked-up Andrea and they drove to Joi's house. (Tr 1488) During the drive, Andrea asked Joi several times to look at her. (Tr 1489) Finally, Joi noticed the blood on Andrea. (Tr 1489) When they were almost to Joi's house, Andrea told her that she had shot a policeman. (Tr 1490) Andrea was upset and crying. (Tr 1490) Andrea said the policeman was trying to arrest her and was putting her in the backseat of the car. (Tr 1490) The officer got on top of Andrea, and she shot him. (Tr 1490, 1512-1516)

When Joi and Andrea arrived at Joi's house, Joi awoke Shirley Freeman who was staying with her. (Tr 1491-1492) Shirley washed Andrea's clothes and drank vodka with Andrea. (Tr 1492, 1494-1495) Shirley also called the hospital to check on the condition of the officer and she learned that he was dead. (Tr 1495-1496) Hearing that news, Andrea "went crazy." (Tr 1496) She was upset and screaming. (Tr 1496) Joi would calm her down for a moment and then Andrea would erupt again. (Tr 1496) Andrea told Joi that she thought the officer was trying to rape her and she did not want to go to jail. (Tr 1496-1497) Joi gave Andrea money and she called a taxicab. (Tr 1497)

Later, Edith Croft was present at Shelton Jackson's apartment when Andrea returned and was arrested. (Tr 1464-1466) She saw Andrea hiding on the porch before the policeman came. (Tr 1465-1466) Andrea was "messed up" and still "glowing". (Tr 1466)

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 1157-1158, 1162-1163) During the interview, Andrea appeared uncooperative and hostile and also sleepy. (Tr 1159) Andrea had also reported having blackouts and headaches when she drinks and a previous attempted suicide. (Tr 1160, 1166) Andrea reported that when she drinks she cannot control her actions. (Tr 1165) At the time of the medical screening, Andrea's pupils were dilated and reacted very little to light. (Tr 1160) The medical records indicated that Andrea had scars and needle marks on her left arm. (Tr 1164) Andrea denied being an alcoholic. (Tr 1166-1167) On one question regarding allergies, Andrea responded

"policemen." (Tr 1166) She also indicated an allergy to aspirin. (Tr 1166) Andrea reported the date of her last drug use as the day of the homicide, May 16, 1983. (Tr 1163)[3]

At the scene of Andrea's arrest, Detective Bradley recovered a plastic vial and a syringe. (Tr 550) Lab testing on the liquid taken from the vial revealed pentazocine. (Tr 1444) This is an analgesic compound known as Talwin. (Tr 1444) The drug is also one of the ingredients in the street drug "T's and Blues." (Tr 1444)

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 1174-1198, 1223) He was asked to aid in obtaining information from Andrea's memory of what happened. (Tr 1198, 1224) The interview and hypnotic session was video-taped. (Tr 1223-1231) Defense counsel asked that the videotape be introduced into evidence along with a transcript of the tape, but the trial court denied the request. (R 171-176)(Tr 89-98, 1267) The videotape and a transcript of the tape are included as exhibits in this case and a copy of the transcript is

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[3]On rebuttal, the State called the nurse, Pamela Ferreira, who saw Andrea at the hospital where she was taken after her arrest. (Tr 1577) This nurse called the State during the course of the trial, twelve years after the fact, with her information. (Tr 1581) Ferreira said she saw Andrea at the emergency room and she appeared oriented, controlled and appropriate. (Tr 1579) She did not think Andrea was intoxicated. (Tr 1579-1580) She said Andrea sat staring off with a set expression on her face. (Tr 1579) When confronted with the examining physician's notes that Andrea was very belligerent when brought to the hospital and her pupils were dilated with little response to light, Ferreira admitted that she might suspect influence of drugs on such an observation. (Tr 1583) She never examined Andrea's pupils. (Tr 1584-1585)

included in the appendix to this brief. Mutter quoted from the session extensively during his testimony. (Tr 1246-1282)

Initially, Mutter went through Andrea's background and personal history and her memory of the events surrounding the shooting. (Tr 1238) 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 1238) She had a history of migraine headaches and an extensive drug and alcohol abuse history including marijuana, LSD, mescaline, window pane, quaaludes and cocaine. (Tr 1238-1239) He found that Andrea is generally a person who likes to avoid problems and conflicts. (Tr 1239, 1292) However, when angry she screams and yells. (Tr 1239) She used drugs to escape. (Tr 1239-1240) Mutter found that Andrea did not have bizarre thinking or a major mental disorder which produces hallucinations or delusions. (Tr 1240-1241)

Mutter explored with Andrea what she remembered about the events on the day of the shooting. (Tr 1243-1245) Her memory of the events were sketchy. (Tr 1243-1244) She said she was under the influence of alcohol, marijuana and other drugs that day. (Tr 1243-1244) She remembered problems with her car, she remembered smashing the car, she also remembered talking to the police officer, her car being towed and reading a report. (Tr 1243-1244) She remembered the confrontation with the police officer and his telling her he had to arrest her. (Tr 1244) She knew that she had shot someone but she did not know why. (Tr 1245) She had no conscious memory of the actual shooting. (Tr 1245)

In order to aid Andrea in remembering the circumstances around the shooting, Mutter hypnotized her. (Tr 1246-1247) Once

under the hypnosis, Mutter took Andrea back to the time of the shooting and asked her to describe the events. (Tr 1247) She described being unhappy and wanting to do drugs to get high. (Tr 1248) She wanted to kill herself. (Tr 1248) Additionally, she felt tired and had been packing her clothes that day. (Tr 1248) Andrea wanted to find a friend to do drugs. (Tr 1248) Andrea consumed alcohol and various drugs including quaaludes and cocaine. (Tr 1248) She describes her car not starting and becoming angry and smashing the windows. (Tr 1248) She remembered a policeman arriving and the car being towed.(Tr 1248) She talked about going upstairs to the apartment and returning. (Tr 1248) She went upstairs to tell Shelton to give her her wallet and gun. (Tr 1250) She said she was going to Joi's house. (Tr 1250) Shelton told her the car had been towed. (Tr 1250) Once downstairs, she saw the car was gone. (Tr 1250) The policeman asked her what she was doing in his car. (Tr 1249-1250) She indicated that she was reading the police report. (Tr 1251) The police officer said he was going to arrest her for lying about what happened to the car. (Tr 1251) She got out of the police car and began to walk away, and the police officer grabbed her and tried to drag her around the car. (Tr 1251) She kept saying, "Get your hands off of me." (Tr 1251) She remembered telling him to let her go. (Tr 1252) She felt him hitting her on the shoulder and pushing her head down. (Tr 1252-1253) She felt him grab her around the neck. (Tr 1253) Her keys fall, and she remembered telling the officer that he made her drop her keys. (Tr 1253) She could see him leaning over her. (Tr 1254) She said he fell and she felt something warm all over her; Andrea said, "He's on

top of me." (Tr 1254) She remembered sliding from under him and running to call Joi. (Tr 1254)

Mutter pressed her for more information about the gunshot. (Tr 1257) He took her back to the point in time where the officer was struggling with her and she dropped her keys. (Tr 1258) She remembered hearing her keys drop. (Tr 1258, 1262) She remembers being on her back with him on top of her, and sliding out from under him. (Tr 1259-1260) She remembered his hands on her, around her neck; he was twisting her hand. (Tr 1260-1262) She remembered him falling on her and feeling something warm. (Tr 1259-1263) She remembers running with the gun in her hand.(Tr 1263) He was trying to hold her down and she did not know why. (Tr 1270) She wanted him off of her. (Tr 1270) He was holding her wrist and twisting her hand. (Tr 1275) She perceived that he was trying to rape her. (Tr 1277) She felt a pistol, she pulled it out and started to shoot. (Tr 1277-1278)) Mutter asked if she remembers being raped before. (Tr 1279) Andrea started crying and said her stepdaddy raped her when she was ten. (Tr 1279) She thought the officer was trying to rape her because his hands were on her and he was tearing at her clothes. (Tr 1276-1279) She remembers yelling at him to get off of her but he would not. (Tr 1280) Mutter ended the hypnotic session at that point. (Tr 1281-1282) Mutter testified quoting this portion of the hypnotic regression session as follows:

> Andrea: "I don't know. I just see him on me trying to hold me."
>
> Doctor: "Okay."
>
> Andrea: "No. I see him over me trying to hold me."

Doctor: "Okay. So now you get the gun."

Andrea: "He popped the button off my shirt. Get your hands off of me."

Doctor: "What does Andrea think he's trying to do? What's he trying to do?"

Andrea: "He is hurting me, he's tearing my clothes. I want him off of me."

Doctor: "Why is he trying to put Andrea's hands together?"

Andrea: "I don't know."

Andrea: "He's got my hands."

Doctor: "He's got your hands?"

Andrea: "And he's got them down between my legs and I can feel my, I feel my pistol. I keep telling him to let me go and he won't let me go."

Doctor: "Does he say why he won't let you go? Is there any talk?"

Andrea: "No."

Doctor: "Is he just wrestling with you?"

Andrea: "Trying to hold me down."

Doctor: "Trying to hold you down? Do you know why he's trying to hold you down?"

Andrea: "No."

Doctor: "What are you thinking? This means what does this mean to you? What's the purpose, first thoughts?"

Andrea: "He's trying to rape me. I can feel my pistol."

Doctor: "....You got your hand on the pistol, see yourself right there and you've got it. Is your finger on the finger (sic), do you have control of the pistol?"

Andrea: "He's back and I bring out my pistol."

Andrea: "And I start to shoot."

Doctor: "Okay. How many times?"

Andrea: "I just grab it and I hold it."

Doctor: "Get that picture even clearer in your mind. You start to shoot. What happens when you start to shoot? You're right there."

Andrea: "Now let me go."

Andrea: "I want to get out."

Doctor: "You want to get out. Any other thoughts? If there aren't any that's okay."

Andrea: "He won't move."

Doctor: "He won't move. How are you feeling?"

Andrea: "I'm scared."

Doctor: "You're scared..."

Andrea: "He's on me, the gun is between us, I can't get up, he won't get off of me. My leg."

Doctor: "Freeze the scene . . You said before he's trying to rape me, has Andrea ever raped you before in your whole life?"

Answer is yes, that's when she starts crying.

Doctor: "Who?

Andrea: Crying. "My stepdaddy."

Doctor: "How old were you?"

Andrea: "Ten."

Doctor: "All right, now go back to the scene with the police officer. What made you think he was trying to do that?"

Andrea: "He's got his hands on me."

Doctor: "Where did he get his hands on you?"

Andrea: "He had his hands here, where my pistol was, he was tearing my clothes."

Doctor: "When he was tearing your clothes exactly what was he doing? Go back to the tearing of clothes. What made you think he was trying to rape you? First thoughts."

Andrea: "He got his hands all over me. He got --"

Andrea: "He got them on my neck and inside my waist."

Doctor: "Anywhere else?"

Andrea: "He got me down and he's over me."

Doctor: "What does over you mean?"

Andrea: "He's over me like over on top of me, I keep yelling get off me and he won't get off."

(Tr 1276-1280)

Mutter concluded that Andrea suffers from post-traumatic-stress disorder (PTSD) due to her sexual abuse history. (Tr 1284-1285) He stated that virtually every woman who has been raped develops this disorder. (Tr 1284-1285) In his practice, Mutter had seen many women who had been raped and everyone suffered from PTSD. (Tr 1284-1285) The symptoms of the disorder include feelings of helplessness, vulnerability, anxiety, depression, shame, guilt, physical and emotional feelings of reliving the assault, flashbacks, and drug and alcohol abuse as an escape from the emotional pain. (Tr 1285-1290) Those who have experienced childhood sexual abuse frequently describe the impact as not merely a bodily assault but an assault on the soul. (Tr 1285, 1289)

At the time of the shooting, Mutter concluded that Andrea suffered a flashback and misperceived Officer Bevel's actions as an attempted rape. (Tr 1287) She reacted in fear and out of self-preservation. (Tr 1287) He felt that Andrea was not capable of the state of mind necessary to characterize this homicide as a cold, calculated and premeditated murder because she was in terror and acted in an irrational panic. (Tr 1291-1293) Mutter concluded that Andrea was under the influence of drugs and

alcohol to the degree that her capacity to appreciate the criminality of her conduct and to conform her conduct was substantially impaired. (Tr 1294-1297) He also concluded that Andrea was under the influence of an extreme mental or emotional disturbance at the time of the crime. (Tr 1297)

Dr. Ernest Miller, a psychiatrist on the faculty of the University of Florida, examined Andrea in 1990. (Tr 1378-1382) He was originally appointed at the State's request to serve as a State's expert. (Tr 1382) Miller reviewed depositions and various reports including the hypnotic regression performed by Dr. Mutter. (Tr 1383) After his examination, Miller concluded that Andrea, at the time of the shooting was "a very disturbed lady." (Tr 1384) Miller said that Andrea suffered from a personality disorder, to which her history of childhood sexual abuse contributed. (Tr 1386-1387) Additionally, he diagnosed her with a substance abuse disorder involving both alcohol and drugs. (Tr 1387) Andrea had a history of excessive use of various street drugs and alcohol. (Tr 1387-1389) Miller explained that the toxic effects of such drug use poisons the processing of ideas and behavior. (Tr 1389-1390) He stated that one of the most consistent results of chronic drug use is the development of paranoid thinking. (Tr 1390-1391) This will cause the individual to misperceive circumstances. (Tr 1391-1392) Miller said the use of the street drug "T's and Blues" would likely produce paranoid ideation and a tendency to misinterpret situations as threatening. (Tr 1394-1395)

Andrea told Miller that she had no conscious memory of the shooting of Officer Bevel. (Tr 1397) He concluded that she could

have suffered chemogenic amnesia due to the drug and alcohol use. (Tr 1398-1399) He also stated that Andrea could have dissociated at the time of the shooting and could not remember. (Tr 1399) Miller explained that dissociation is common where individuals are faced with a horrifying situation and remembering or confronting it is too painful. (Tr 1399) There is psychological block of the memory, at least temporarily, to protect the individual psychologically. (Tr 1399)

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 1402-1405) He responded that that was unlikely due to the emotional level she was operating on at the time of the crime. (Tr 1402-1405) Furthermore, he felt that her toxic condition rendered her unable to function at the intellectual level of thought necessary to coldly calculate a premeditated murder. (Tr 1402-1405, 1420-1431) Miller was also of the opinion that the mitigating factor of substantially impaired capacity at the time of the crime was applicable. (Tr 1406, 1420-1421)

Dr. Lenora Walker, a clinical forensic psychologist specializing in domestic and family violence and battered women, examined Andrea and testified. (Tr 843-896) Walker is the director of the Domestic Violence Institute and holds a faculty position at the University of Denver School of Psychology. (Tr 846) Her research lead to the development of the "Battered Woman Syndrome." (Tr 877-888) 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 847, 915-916) She testified extensively about the symptoms and effects of post-traumatic stress disorder, which is quite common for victims of childhood sexual abuse. (Tr 847-907) Walker examined Andrea again on April 19 and September 30, 1991. (Tr 939) She also viewed the videotape of the hypnotic regression and examined various police reports, depositions, and reports of other experts. (Tr 939-942) She interviewed some family members, including Andrea's estranged husband, Shelton Jackson. (Tr 942) Walker's final diagnosis was that Andrea suffered from post-traumatic-stress disorder and battered woman syndrome.

Dr. Walker described Andrea's childhood history. (Tr 942) Andrea was the oldest of four children. (Tr 942) She never knew or lived with her natural father. (Tr 942) Her mother began living with Eddie Brown and had three other children. (Tr 942) When Andrea was about 8 or 9 years-old, Brown began sexually abusing her. (Tr 943) He began fondling her, and at about age 10, he raped her. (Tr 943) He continued to rape her two or three times a week until she was 15 or 16 years-old. (Tr 948) 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 944) 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 945) 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 945-946) The first incident

was extremely traumatic for her as she described the event to Walker, the pain was still present. (Tr 943-944) As Andrea retrieved those memories, she also retrieved the traumatic feelings which Walker noted as she related the story. (Tr 943-944) Andrea said that Brown took her into his bedroom, had her undress and lay down. (Tr 943) He had placed a towel on the bed, and he put her on the towel. (Tr 943) Brown put a pillow over Andrea's face, got on top of her and inserted his penis into her vagina. (Tr 943) 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 943-944) She remembers the extreme pain, and when Brown let her up, she noted "white stuff" all over her legs. (Tr 943-944) As she reported this story to Walker, she also said there was Vaseline on her. (Tr 944) 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 946) She said she was unable to sleep facing that wall, even when Brown was not in the bedroom. (Tr 947) She remembered the pain of being forced into intercourse when she saw the wall. (Tr 947) She also had to share a bed with her brother and he would become angry when she would turn away from the wall toward him. (Tr 947-948) 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 Shelton Jackson, whom she later married. (Tr 955) Shelton confirmed Andrea's childhood sexual abuse and said she would have flashbacks when he and Andrea had sex. (Tr 961)

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 949) She would dissociate -- separate her mind from what was happening to her body. (Tr 867, 949) Walker explained that dissociation is a common response when individuals have been raped as children. (Tr 867) Andrea began drinking alcohol at the age of 10 years as a way to numb her feelings. (Tr 949-955) 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 958) Andrea's drug and alcohol use escalated. (Tr 949-957) As Andrea got older, she began to exhibit angry and belligerent behavior. (Tr 956) Because of her heightened sense of vulnerability, she was quick to interpret situations as possibly dangerous. (Tr 957) This was almost a paranoid-type reaction. (Tr 956-957)[4]

Andrea's and Shelton's marriage was a tumultuous one. (Tr 958-968) They both used alcohol excessively and various drugs. (Tr 960) Shelton was abusive, violent and battered her. (Tr 960) On at least one occasion, Shelton beat Andrea to unconsciousness and she required hospital treatment and over 15 stitches to close the wounds. (Tr 960) The violence escalated to life-threatening encounters. (Tr 962) Shelton beat Andrea when she was pregnant with her second child. (Tr 963) The first time Shelton choked

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[4]Andrea's brother, Kevin Hicks, confirmed this behavioral change when he noted that as Andrea got older she got meaner. (Tr 1533)

Andrea was when she was pregnant. (Tr 965) He also chased her with a loaded gun. (Tr 965-966) Andrea tried to get her brother to get her a gun, but he would not give her one. (Tr 966) The police were called to Shelton's and Andrea's fights several times. (Tr 966) Andrea tried to avoid confrontations with Shelton. (Tr 963) She went to her mother, but her mother sent her back to Shelton. (Tr 964) Her mother believed that Andrea simply had to stay in the marriage and make it work. (Tr 964) Finally, shortly before the shooting of Officer Bevel, Andrea separated from Shelton. (Tr 962) However, she was not free of him. (Tr 980-981) He continued to pressure her to return and to have sex with him. (Tr 981-982) This persisted right up through the day of the shooting of Bevel. (Tr 989-991) Andrea began carrying a gun for protection. (Tr 967) A few days before the shooting the officer, Andrea was suicidal to the point of putting the gun to her head, but she could not pull the trigger. (Tr 982) Walker concluded that a number of factors increased Andrea's stress and frustration which impacted on Andrea's mental state at the time Officer Bevel was shot. (Tr 989-995) Andrea's depression, a common symptom of PTSD, was becoming worse. (Tr 994-995) She had attempted suicide a few days earlier. (Tr 982) Andrea drank alcohol and abused drugs extensively that day. (Tr 989-990) She went to Shelton's apartment to pick-up her children, but Shelton would not allow her to do so because she was too intoxicated. (Tr 991) When she lies down in Shelton's apartment to take a nap because she is tired and intoxicated, Shelton again pressures her to have sex with him. (Tr 991-992) She left, but her car would not start. (Tr 991) Andrea began to smash her car in anger and

frustration. (Tr 992-998) This ultimately lead to the confrontation with and shooting of Officer Bevel. (Tr 995-1002)

Walker testified about her conclusions about Andrea's mental state the time she shot Officer Bevel. (Tr 987-1023) First, she said that Andrea suffered from PTSD, rape trauma syndrome, and impairment from the use of drugs and alcohol. (Tr 1002-1020) During her struggle with Officer Bevel, Andrea had a flashback, misperceived Bevel's actions as an attempted rape. (Tr 1019-1021) At that time, Walker was of the opinion that Andrea was not capable of coldly calculating a premeditated murder. (Tr 1021) Additionally, Walker stated that Andrea's mental state qualified her for the mitigating circumstance of suffering from an extreme mental or emotional disturbance at the time of the crime. (Tr 1021-1022) Finally, Andrea was under the influence of drugs and alcohol to the extent that her ability to appreciated the criminality of her conduct or to conform her conduct was substantially impaired. (Tr 1022-1023)

Several of Andrea's relatives testified about her background. Lister Griffin was Andrea's mother's cousin and she lived nearby when Andrea was growing up. (Tr 1517-1520) When Andrea was ten to twelve years old, she would frequently come to Griffin's house. (Tr 1519) Andrea would not want to go home. (Tr 1519) Griffin encouraged Andrea and asked her why she did not want to stay at her home. (Tr 1519) Andrea replied, "You just don't know what I have to go through there." (Tr 1519-1520) Griffin's daughter, Beverly Turner, now an elementary school teacher, remembered Andrea as a child of nine or ten. (Tr 1539-1540) She said Andrea was an unhappy child. (Tr 1542-1543) Andrea

was a restless, nervous child. (Tr 1542) She chewed and sucked her tongue and bit her lip. (Tr 1542) She also pulled at her clothes. (Tr 1542) Turner also remembered the times when Andrea did not want to return home. (Tr 1542-1543) Turner also learned of Andrea's being abused by her husband and her drug and alcohol use. (Tr 1544-1550)

Marvin Hicks and Kelvin Hicks are Andrea's brothers. (Tr 1522-1523, 1561) Marvin died before this trial, but his affidavit was admitted in evidence. (Tr 1561) He confirmed that Eddie Brown was a heavy drinker and violent. (Tr 1562) Andrea became involved with drugs at a young age, and when she was eleven-years-old, her mood changed. (Tr 1563) Marvin knew Shelton Jackson and his sisters to be junkies when Andrea began associating with them. (Tr 1563) Andrea used heroin with Shelton for at least a year. (Tr 1563) Shelton was violent toward Andrea. (Tr 1564) Marvin stayed with Andrea when she was pregnant in case she needed help. (Tr 1564) Kelvin Hicks remembered Andrea as smart and athletic as a child. (Tr 1523-1524) He confirmed there was a time when Andrea did not want to go home and wanted to stay at Lister Griffin's house. (Tr 1525) When Andrea started junior high, her school performance and behavior changed.[5] (Tr 1526-1527) She got meaner. (Tr 1526) Hicks said he suspected drug use. (Tr 1526) He found little envelopes, a syringe with a spoon and a rubber band. (Tr 1526-1529) Andrea moved in with Shelton Jackson when she was in

[5]Andrea's school records confirmed a significant drop in school performance and increased absences in junior high years. (Tr 1131-1139)

the 9th or 10th grade. (Tr 1529) He was also aware of the abuse she suffered in that relationship. (Tr 1529-1530)

An affidavit Andrea's mother prepared in 1989, was read the jury. (Tr 1564) Barbara Hicks said she could never name Andrea's father because he was married and a prominent figure in the church. (Tr 1565) She left college to raise Andrea. (Tr 1565) Later, she lived with Eddie Brown off and on until his death. (Tr 1567) He had another family and they could never marry. (Tr 1567) Brown drank a great deal. (Tr 1567) Ms. Hicks said that Andrea developed health problems when she was around eight years-old -- terrible headaches and a series of bladder infections. (Tr 1567) Andrea started off well in school, but later her grades slipped. (Tr 1568) Ms. Hicks knew Andrea's marriage to Shelton was a problem, but she told Andrea she had to go back to Shelton, even though she knew Shelton was beating her, and make the marriage work. (Tr 1569) She expressed regrets for giving Andrea that advice. (Tr 1569-1570)

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. Neither the judge nor the jury should have considered this factor in the sentencing decision.

2. The mental health experts who examined Andrea 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 or to conform her conduct was substantially impaired. Sections 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 -- the three law enforcement related factors merged into a single circumstance. This Court has frequently held that one aggravating circumstance will not support a death sentence where mitigating circumstances are present. Significant mitigation exists in this case. The single aggravating circumstance is of insufficient weight to overcome the mitigation, and Andrea Jackson's death sentence is improperly imposed.

4. The prosecutor made improper closing arguments to this jury which invited the jurors to rest their recommendation on invalid considerations. First, the prosecutor properly told the jury that the three law enforcement related aggravating circumstances legally merged into a single aggravating circumstance. However, the prosecutor then improperly told that jury that, because the one circumstance under the facts of this case was actually based on three statutory aggravating circumstances, the one factor was entitled to enhanced weight. Second, the prosecutor told the jury that killing of police officers could lead to lawless chaos in the community and this single factor was enough to justify a recommendation of death. These arguments mislead and inflamed the jury in violation of Jackson's right to due process and fair sentencing trial.

5. Section 921.141(7), Florida Statute which allows the State to present victim impact evidence for the sentencer's consideration is unconstitutional for a variety of reasons under the United States and Florida Constitutions. The trial court should not have overruled defense objections to the introduction and use of such evidence. Since the evidence was not relevant to any issues to be decided in the sentencing process and since the jury was given inadequate guidance on the proper manner for consideration of this evidence, Andrea Jackson's death sentence has been unreliably imposed.

6. The trial court improperly excluded the videotape of the hypnotic regression session Dr. Mutter performed with Jackson. This video tape was admissible on several grounds. First, it is the evidence which formed a considerable part of the foundation for Mutter's expert opinion. Second, the tape was admissible to rebut attacks on the reliability of the hypnotic session and to provide the jury and the court the best source of information upon which to judge the reliability of the procedure. Third, the videotape was admissible as mitigation evidence. In ruling the videotape inadmissible, the court deprived both parts of the sentencing authority -- the jury and the judge -- of critical information relevant to the sentencing decision. This ruling denied Andrea Jackson her constitutional right to reliability in the sentencing process. Art. I, Secs. 9, 16, 17, Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const.

7. The trial court abused its discretion in denying the defense request for the appointment of a forensic pathologist to assist the defense in preparing to impeach the medical examiner's

testimony about the position of the victim at the time of the shooting. The position of the victim became a contested issue relevant to the CCP aggravating circumstance. Defense counsel made a specific request for an expert for the purpose of assisting the defense on a narrow specific issue. The court first denied the motion for costs concerns. Counsel complied with the court's request to search for a local expert to keep costs to the down, but an expert from Tampa was the closest available. Upon a renewal of the request, the court again denied the motion without reasons. At trial, counsel again renewed the request. At this time, the court stated the request for an expert was without merit because the medical examiner's testimony had no relevance to aggravating or mitigating circumstances.

8. The trial court improperly instructed the jury on the cold, calculated and premeditated aggravating circumstance. Although the court used the instruction this Court suggested in the previous appeal of this case, Jackson v. State, 648 So.2d 85, 95 n8 (Fla. 1994), the instruction is unconstitutional. This instruction fails to advise the jury of the legal limitations of the CCP circumstance, specifically concerning the element of heightened premeditation.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND IN FINDING AS AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

Two theories about why Andrea shot Officer Bevel is presented in this case. *First*, the defense evidence demonstrated that Andrea suffered post-traumatic-stress disorder as the result of childhood sexual abuse from her stepfather and two rapes which occurred 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. All three mental health experts who examined her concluded that Andrea's emotional state at the time of the shooting was inconsistent with the state of mind required to prove the CCP circumstance. *Second*, the prosecution's theory. The State contends that Andrea shot the officer to avoid arrest. The contention is that Andrea realized that Officer Bevel was going to arrest her and she planned an opportunity, during her struggle with the officer, to shoot him to prevent his arresting her for making a false report of a crime. The State's theory why CCP applies is not supported in either law or fact. Andrea Jackson's death sentence has been unconstitutionally imposed in violation of the United States and Florida Constitutions. Amends. V, VI, VIII, XIV U.S. Const.; Art. I, Secs. 9, 16, 17 Fla. Const.

LEGAL STANDARDS

Although this Court's first opinion in this case approved the CCP circumstance, Jackson v. State, 498 So.2d 406, 412 (Fla. 1986), the facts developed in the subsequent resentencings are different. Additionally, the sentence imposed pursuant to the new sentencing proceeding is the only sentence under review; the prior sentencings are irrelevant to these new sentencing proceedings. Lucas v. State, 417 So.2d 250, 251 (Fla. 1982). Furthermore, 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 held that Rogers is not to be given retroactive effect, Eutsy v. State, 541 So.2d 1143, 1146-1147 (Fla. 1989), Rogers and its progeny must be applied now to review the new sentence before this Court.

In the second appeal of this case, Jackson v. State, 648 So.2d 85 (Fla. 1994), and in Walls v. State, 641 So.2d 381 (Fla. 1994), this Court discussed the four elements which the State must prove beyond a reasonable doubt before the CCP circumstance is proved:

> Under Jackson, there are four elements that must exist to establish cold calculated premeditation. 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." Jackson [648 So.2d at 89] ...
>
> * * * *
>
> Second, Jackson requires that the murder be the product of "a careful plan or prearranged design to commit murder before the fatal incident." Jackson, ...

* * * *

> 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 ...

Walls, at 387-388. The State must prove each element beyond a reasonable doubt, State v. Dixon, 283 So.2d 1 (Fla. 1973), and when circumstantial evidence is used, the defense is entitled to any reasonable inference from the evidence which negates the CCP aggravating circumstance. E.g., Geralds v. State, 601 So.2d 1157 (Fla. 1992), after remand 674 So.2d 96 (Fla. 1996).

STATE'S EVIDENCE FAILS TO PROVE ELEMENTS OF CCP

In finding the CCP factor, the trial judge relied on the State's view of the case and wrote the following:

> **4. 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.** Florida Statutes 921.141 (5)(i). The totality of the facts in this case, which are uncontroverted, support this factor. The murder was carried out with the same measure of coolness 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 too, 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 bulletproof vest. Her dropping of the keys gave her the opportunity to shoot the officer in the head.

(R 236) Contrary to the judge's finding, the evidence was insufficient to support this aggravating circumstance.

(1) *Homicide Not the Product of Calm, Cool Reflection*

Andrea Jackson's state of mind prior to and at the time of the shooting was not one of calm, cool reflection. The opposite was true. Testimony of the witnesses to the homicide incident established that Andrea engaged Bevel in a heated confrontation and a struggle ensued when Bevel placed Andrea under arrest. (Tr 561, 574, 633, 651) This continued through the shooting of the officer as he physically placed Andrea into the patrol car. (Tr 591-607, 638-642, 665-677) The judge in his sentencing order found that a verbal and a physical confrontation occurred between Jackson and the officer. (R 234) Bevel told Andrea she was under arrest, Andrea hit Bevel, he, in turn, grabbed Andrea, restrained her and physically placed her in the patrol car. (R 234) Anna Nelson testified that when Bevel told Andrea she was being arrested, Andrea "got angry", "lunged" at Bevel and began hitting him. (Tr 591-592) Leandra Fagg testified that Andrea came up to Bevel in a hostile manner. She asked, "Where do you take my goddamn car?" (Tr 639) Fagg said from that point the whole confrontation between

Andrea and Bevel was hostile. (Tr 639) Fagg described Andrea as intensely "hot" and angry. (Tr 645)

Andrea was enraged. Being in a rage is completely inconsistent with a state of mind capable of calm, cool reflection. See, Jackson, 648 So.2d at 89; Walls, 641 So.2d at 387-388; 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. 1990).

In his sentencing order, trial judge said, "The murder was carried out with the same measure of coolness as was the stripping of the car of its valuables while she vandalized it." (R 236) This comparison, while apt, is one which negates rather than supports a cool, calm state of mind. Andrea's state of mind while vandalizing her car was anything but cool and calm. Anna Nelson and Mable Coleman testified about Andrea's intense expression of anger toward the car. (Tr 579-580, 611-612, 655-687) Nelson said that as Andrea smashed the car with crowbar, she talked to it and cursed it. (Tr 579-580, 611-612) Coleman said Andrea was angry at the car and cursed it as if it were a person. (Tr 655-687) Andrea was angry and acted in a rage. As this Court stated rage is the antithesis of the cool, calm reflection element which requires: "the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage." Jackson, 648 So.2d at 89.

(2) *Homicide Not Carefully Planned or Prearranged Before Incident*

The State's theory of a preplanned homicide in this case was dependant upon establishing certain facts. However, the State failed to prove those facts and was left with speculation and inferences which did not exclude inferences favoring the defense position that no preplanning of the homicide occurred. The premises essential to the State's position which were not proven were the following: (1) Andrea knew officer Bevel would arrest her before she went to Shelton's apartment the last time before the shooting; (2) Andrea obtained her pistol anticipating a confrontation with the officer; (3) when Andrea and the officer struggled, she would have felt his bullet proof vest; (4) Andrea intentionally dropped her keys to distract Bevel to give her the opportunity to shoot Bevel in the head. These assertions were not proven. This homicide was not calculated and does not qualify for the CCP circumstance.

First, Andrea did not know she was going to be arrested until Bevel advised her and the physical restraint and confrontation began. The comment Andrea made after the homicide about not wanting to return to jail lends no support to the assertion that she knew Bevel was going to arrest her before he actually commenced the arrest process. Bevel probably did not make the decision to arrest until Andrea returned from the apartment. Bevel was still talking to the neighbor who confirmed his suspicion that Andrea destroyed the car at the time Andrea returned. The fact that Bevel noted his suspicion on the police report does not indicate that Andrea was aware of

that when she went to the apartment that last time. Furthermore, the fact that Andrea appeared to be looking at Bevel's papers did not establish that she read this comment on the report. In fact, Andrea's main concern was the whereabouts of her car. The first question she asked Bevel was about her missing car. She had no concern about being arrested.

Second, Andrea had been carrying a pistol on her person for protection if her estranged husband, who battered her, again became physically abusive. Although Coleman testified she saw Andrea place the gun in her pants as she descended the steps of the apartment, this fact does not establish that Andrea had the gun to confront or kill Officer Bevel.

Third, there was no proof Andrea would have felt the bulletproof vest and understood what it was when she hit Bevel. The State's only evidence was the improper opinion testimony of Officer Bradley who said a person would have felt it upon striking Bevel in the chest. (Tr 513-514) Even if she did feel the vest and recognized what it was, that does not lead to the inference that Andrea devised a plan to kill which avoided the vest.

Fourth, Andrea's keys dropped. However, the State is left with mere speculation that she intentionally dropped the keys. A reasonable inference is that Andrea accidentally dropped her keys. In fact, the evidence lends stronger support for the inference of an accidental dropping of the keys. The keys dropped during a physical struggle between Andrea and the officer. Bevel had restrained Andrea and was in the process of placing her in the patrol car. An inference that under these

circumstances, Andrea, while restrained, devised a method to deliberately drop her keys to distract Bevel is simply not reasonable. Moreover, it is not reasonable to conclude that Bevel, while in a physical struggle to effect an arrest, would stop to look for dropped keys before securing the arrestee in the car.

(3) *A Pretense of Moral or Legal Justification Existed*

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 a three-week period, the 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 first person Andrea talked to about the shooting was her friend, Joi Shelton. Joi testified that Andrea told her that the officer was over her and she thought the officer was trying to rape her. (Tr 1496-1497) A pretense of moral or legal justification can be established solely through the statement of the defendant. Banda; Cannady. Consequently, even if all of the defense expert testimony on this issue from Drs. Mutter and Walker was disregarded, the pretense of a moral or legal justification was still established and the CCP factor is not applicable.

COMPARABLE CASES WHERE CCP DISAPPROVED

The State's 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. In Rivera v. State, 545 So.2d 864 (Fla. 1989), the defendant and his brother traveled 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. The shooting of Officer Bevel was no more a murder of heightened premeditation than the murder in Rivera. 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 homicide of the officer in Hill.

In Pietre v. State, 644 So.2d 1347 (Fla. 1994), Pietre had escaped from a work release center and spent four days committing burglaries and using cocaine. Pietre stole a truck and two firearms. Officer Chappell was on his motorcycle patrolling for speeders. He saw Pietre speed by him. Chappell stopped Pietre and walked toward the truck. A witness stated the Chappell's gun was in his holster as he approached the truck. When Chappell was two to four feet from the truck, Pietre shot Chappell from a distance of three to eight feet. Again, this Court disapproved the trial court's finding of the CCP factor for the murder of the police officer:

> While the record supports a finding that the murder was premeditated, it does not show the careful design and heightened premeditation necessary for a murder to be committed in a cold, calculated and premeditated manner. The fact that this murder occurred after a short chase does not show more premeditation than what is required for first-degree murder.

644 So.2d at 1353. Here, the shooting did not occur until Andrea was in a physical struggle with the officer. If anything,

Pietre's actions tended to demonstrate a calculated shooting more so that Andrea's actions the night of homicide of Officer Bevel. Pietre shot Officer Chappell well before a physical or emotional confrontation for no other purpose than avoiding a possible arrest.

Two police officers were murdered in Street v. State, 636 So.2d 1297 (Fla. 1994), but this Court concluded that the shooting deaths of the two officers during a struggle over a disorderly conduct arrest did not qualify for the cold, calculated and premeditated aggravating circumstance. Street had just been released from Glades Correctional Institution ten days before the confrontation with Officers Boles and Strzalkowski. The officers responded to a disturbance call and found Street to be the source of the disturbance. A struggle between Street and the officers ensued during which Street obtained Boles' gun. Street shot Strzalkowski three times killing him. Street then shot Boles three times before running out of ammunition. Street got Strzalkowski's gun and pursued Boles, who was already shot in the face and chest, and shot Boles again in the chest. Street fled in the police car, stating 'now I have got my lift." In rebuttal, the State presented testimony from another police officer about an earlier incident involving Street. Officer DeCarlo testified that he and another officer arrested Street for disorderly conduct and during a struggle, Street attempted to take DeCarlo's gun from his holster. This Court held that the trial judge improperly found the homicides to be cold, calculated and premeditated:

> ...In the finding of cold, calculated and premeditated, the judge relied on the fact that Boles' killing was more of an execution type murder in that Street shot Boles three times and upon emptying his firearm obtained another gun and shot him again.
>
> As reprehensible as the murder of Officer Boles may be, we cannot say that the circumstances of his killing meet the definition of either heinous, atrocious, or cruel, or cold, calculated, and premeditated. See, Rivera v. State, 545 So.2d 864 (Fla. 1989)(defenseless police officer shot three times within sixteen seconds held not to be heinous, atrocious or cruel or cold, calculated, and premeditated); Brown v. State, 526 So.2d 903 (Fla. 1988)(defenseless police officer shot in the arm who pleads for mercy and is then killed by two shots in the head not heinous, atrocious, or cruel), cert. denied, 488 U.S. 944, 109 S.Ct. 371, 102 L.Ed.2d 361 (1988); Rogers v. State, 511 So.2d 526 (Fla. 1987) (victim killed by three shots during grocery store robbery not cold, calculated, and premeditated), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988).

636 So.2d at 1303. Again, the facts of this case now before the Court show even less of a time for reflection before the shooting than did the facts of Street. Andrea shot Officer Bevel in a matter of seconds. Street obtained a gun, shot the two officers (emptying the weapon), secured a second gun and pursued an already wounded officer to shoot him again.

, An escape plan resulting in the shooting death of a correctional officer did not qualify for the CCP factor in Valdes v. State, 626 So.2d 1316 (Fla. 1993). Valdes and Van Poyck planned and executed the escape of a state prisoner being transported for medical care. Correctional Officers Turner and Griffis were responsible for transporting the prisoner. In the parking lot of the doctor's office, Van Poyck came to the prison van, aimed a

pistol at Turner's head and ordered him out of the van. Valdes went to the driver's side of the van where Griffis was getting out of the van. Van Poyck took Turner's gun and told him to get under the van. Griffis was forced back into the van where he was shot three times. Turner could not tell who fired the shots. Turner was forced from under the van to look for the vehicle's keys. They could not be found, and Valdes fired shots at the padlock in an attempt to free the prisoner. One shot ricocheted and hit Turner. Van Poyck pointed his gun at Turner's head and said, 'you're a dead man" and pulled the trigger. The gun misfired. Turner ran. Valdes and Van Poyck were tried separately before different judges. The trial judge in Van Poyck's case did not find the CCP aggravating circumstance. Van Poyck v. State, 564 So.2d 1066, 1068 (Fla. 1990). In Valdes' case, the judge found CCP, but this Court disapproved the finding:

> Here, while it is evident the escape was well planned, there is no evidence that Valdes had a plan to actually kill anyone. The evidence is entirely consistent with an escape attempt that got out of hand. While a plan to kill could be inferred from Officer Gaglione's testimony that Valdes admitted the murder was planned beforehand, Gaglione specifically testified that Valdes stated, "they" had planned the murder, referring to someone other than himself. On the facts of this case there was insufficient evidence to prove that this murder was cold, calculated, and premeditated beyond a reasonable doubt.

626 So.2d at 1323. Considerably less planned action surrounded the homicide of Officer Bevel in this case than in Valdes and Van Poyck.

In Washington v. State, 432 So.2d 44 (Fla. 1983), Washington, his brother and two friends stopped at a tire company trying to sell stolen guns. Everyone there declined to buy. However, one person present was Deputy Edwards. He thought the offer to sell guns to strangers was suspicious and decided to investigate. Edwards approached the car, identified himself as a deputy and asked the driver, Hunter, for his license. Hunter could not produce a license and Deputy Edwards had him get out of the car. Washington had been sitting in the rear seat of the car showing guns to a security guard from a nearby theater. Washington walked passed the security guard to the rear of the car, pulled a pistol and ordered Deputy Edwards to freeze. Edwards turned around to face Washington. The security guard reached for Washington's shoulder. Washington shrugged off the guard and then shot Edwards four times causing his death. Washington and his companions fled without the stolen car and guns. This Court disapproved the trial court's finding of the cold, caculated and premeditated aggravating circumstance on these facts:

> Although there was sufficient proof of premeditation, we find there is a lack of any additional proof that the murder was committed in a cold or calculated manner, such as a prior plan to kill.

432 So.2d at 48. Washington's actions showed more calm reflection during the shooting of Deputy Edwards than Andrea's did during the homicide of Bevel. In this case, just as in Washington , the CCP factor was not proven beyond a reasonable doubt.

The State's evidence in the case now before the Court failed, as it did Rivera, Hill, Pietre, Street, Valdes, Van Poyck

and Washington, to prove the cold, calculated and premeditated aggravating circumstance.

Andrea Jackson did not kill Officer Bevel in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The jury should not have been instructed on this aggravating circumstance since the evidence did not support it. The judge erred in finding, considering and weighing the aggravating circumstance in his sentencing decision. Jackson's death sentence has been unconstitutionally imposed. Art. I, Secs. 9, 16, 17, Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const. She urges this Court to reverse her death 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 statutory mental mitigating circumstances. 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. Although the opinions of these experts went unrebutted, the trial court refused to find the two statutory mental mitigating circumstances. (R 236-237) Furthermore, the judge rejected Andrea's mental condition as nonstatutory mitigation. Regarding the mental mitigation presented, the trial judge wrote,

> The Defendant argued that the two statutory circumstances and one general non-statutory circumstance, all listed below, applied. The Court, however, for the reasons, also listed below, rejects these arguments.
>
> **1. The crime for which the Defendant is to be sentenced was committed while the Defendant was under the influence of extreme mental or emotional disturbance.** Florida Statutes 921.141 (6)(b). The defense suggested the defendant suffered a flashback of a childhood rape. The Court believes this testimony to be noncredible.
>
> 2. **The capacity of the Defendant to appreciate the criminality of her conduct or to conform her conduct to the requirement of the law was substantially impaired.** Florida Statutes 921.141 (6) (f). The defense argues this was due to self induced drugs and alcohol. The Court

likewise believes this testimony to be of no significance.

3. **Any other aspect of the Defendant's character or record and any other circumstance of the offense.** 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 ox all of the suggested mitigating circumstances existed that the Court's sentence would be no different than that announced below.*

(R 236-237)(emphasis the court's).

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. Santos v. State, 591 So.261 160 (Fla. 1991); Nibert v. State, 574 So.2d 1059 (Fla. 1990); Rogers v. State, 511 So.2d 526 (Fla. 1987); see,also, Parker v. Dugger, 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991). Failure to weigh these 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, 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) In Campbell, this Court also added the requirement that the trial court's sentencing order expressly address the mitigating circumstances. Accord, Larkin v. State, 655 So.2d 95 (Fla. 1995); Ferrell v. State, 653 So.2d 367 (Fla. 1995). A short time later, in Nibert v. State, 574 So.2d 1059 (Fla. 1990), this Court reiterated the point that a trial court must find mitigating circumstances supported by unrefuted evidence:

> 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." 591 So.2d at 164. 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, the 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, 609 So.2d 513, 515-516 (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 court found the crime was committed to avoid arrest, sec. 921.141 (5) (e) Fla. Stat.; to disrupt governmental function, ibid. at (5)(g); and that the victim was a police officer, ibid. at (5) (i). (R 235-236) However, these three aggravating circumstances merged into a single factor. (R 236) The victim's status as a policeman, standing alone, cannot justify a death sentence. See, Songer v. State, 544 So.2d 1010 (Fla. 1989); see, also, Roberts v. Louisiana, 432 U.S. 282, 97 S.Ct. 2290, 52 L.Ed.2d 637 (1977) (mandatory death sentence for murder of a police officer unconstitutional). Moreover, the fact that the single aggravating circumstance was the result of the merger of three circumstances based on the same aspect of the case does not enhance the weight to be given the circumstance. Straight v. State, 397 So.2d 903, 910 (Fla. 1981). This Court has frequently held that one aggravating circumstance will not support a death sentence where mitigating circumstances are present. E.g., Clark v. State, 609 So.2d 513 (Fla. 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). The exceptions to this rule have been cases where the single

aggravating circumstance is a particularly weighty one -- a prior murder conviction -- and the mitigation has been insignificant. Ferrell v. **State,** Case No. 81,668 (Fla. April 11, 1996); Ducan v. State, 619 So.2d 279 (Fla. 1993). Compelling mitigating evidence was presented in this case. (See Issue II, supra.) Furthermore, the single aggravation circumstance, based largley on the police officer status of the victim, does not carry sufficient weight to outweigh the mitigation. The trial court improperly sentence Andrea Jackson's to death. Art. I, Secs. 9, 17, Fla. Const.; Amends. v, VIII, XIV, U.S. Const. She now urges this Court to reverse her death sentence and remand her case for imposition of a life sentence.

ISSUE IV

THE TRIAL COURT ERRED IN PERMITING THE PROSECUTOR TO MAKE IMPROPER ARGUMENTS TO THE JURY WHICH ENCOURAGED THE JURY TO MAKE ITS SENTENCING DECISIONS UPON EMOTION AND IRRELEVANT SENTENCING FACTORS WHICH INCLUDED IMPROPER AGGRAVATION AND THE EFFECT ON LAW AND ORDER IN THE COMMUNITY.

During the prosecutor's closing argument, he discussed the three law enforcement aggravating circumstances which merged into one under the facts of this case, and then told the jury the following:

> ...So what you have is you have these three aggravators and they're all police officer oriented. And the Court's going to instruct you about that, he's going [] instruct you about the fact they should be merged and I agree with that, that's the law, there's no issue about that. They all will be merged. So you can only really count them as one aggravator, but how much weight are you going to give

this aggravator? Realizing that there are three that have to be merged in this case because they are all police officer oriented. But just think of it, the legislature has seen fit to put three aggravators in terms of how much importance they place on a police officer being killed in the line of duty and line of enforcing the laws and how much weight they put on the fact that a person is trying to get away, escape from custody, that person is attempting to escape from being held responsible, accountable for their actions. If not we would have chaos. The police officer wouldn't be able to arrest somebody and actually detain him and take him and have him be held accountable, then we would have whoever was the victim of that crime say "I've got to take the law into my own hands. I'll handle it, you can't -- police officers can't handle it. I'll take it into my own hands. I'll take care of it."

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.

MR. WEINBAUM: Object, that's improper closing argument, Your Honor.

THE COURT: It's overruled.

This aggravator alone will outweigh that because there is no mitigation here, and if there is, well, we'll talk about the mitigation in a minute.

(Tr 1634-1636). This argument invited the jury to reach its sentencing decision on improper factors and considerations in violation of Andrea Jackson's rights to due process and a fair sentencing trial. Art. I, Secs. 9, 16, 17, Fla. Const.; Amends. v, VI, VIII, XIV, U.S. Const.

The first problem with the above argument is that it completely negated the fact that the three law enforcement circumstances merged into a single aggravating circumstance. Before the State's closing, the trial court had correctly ruled that the three police officer related aggravtaing circumstances {avoiding arrest, disrupting governmental function, and the victim's status as a police officer, Secs. 921.141(5)(e)(g) & (j) Fla.Stat.}, merged into a single aggravating circumstance. (Tr 1592, 1602, 1733-1734) See,e.g., Jackson v. State, 648 So.2d 85 (Fla. 1994); Valle v. State, 581 So.2d 40 (Fla. 1991). The purpose behind merging aggravating circumstances which are based on the same aspect of the crime is to prevent the sentencer from giving enhanced weight to the single aggravating fact. See, Castro v. State, 597 So.2d 259, 261 (Fla. 1992); Straight v. State, 397 So. 2d 903, 910 (Fla. 1981); Provence v. State, 337 So.2d 783 (Fla. 1976). However, the court eviserated this purpose when it allowed the prosecutor to tell the jury that the single merged aggravator was entitled to enhanced weight because it was formed from three statutory aggravating circumstances.

The second problem with prosecutor's argument is that it advised the jury to base its sentencing decision on the need to send a law and order message to the community. Such a message is an improper consideration for the jury and the prosecutor's argument does nothing more than play to the juror's own fears about crime in the community. This Court has consistently condemned such arguments. See,e.g., Campbell v. State, 21 Fla. Law Weekly S287 (Fla. No, 83,792, June 27, 1996) ; Bertolotti v.

State, 476 So.2d 130 (Fla. 1985). In Campbell, this Court recently wrote:

> We conclude that the above errors combined to deny Campbell a fair penalty hearing. The "cop-killer" rhetoric **and** "message to the community" statements played to the jurors' most elemental fears, dragging into the trial the specter of police murders and a lawless community that could imperil the jurors and their families. These arguments, which were emphasized at closing, were fresh in the jurors' minds when they retired to consider Campbell's sentence, and the State has failed "to prove beyond a reasonable doubt that the error[s] did not contribute to the [recommended sentence]." State v. DiGuilio, 491 So.2d 1129, 1138 (Fla.1986). On this record, it is entirely possible that several jurors voted for death not out of a reasoned sense of justice but out of a panicked sense of self-preservation.

Campbell, 21 Fla. Law Weekly at S288. In view of the prosecutor's argument in this case, the jury here, like the one in Campbell, may very well have "voted for death not out of a reasoned sense of justice but out of a panicked sense of self preservation." Campbell, 21 Fla. Law Weekly at S288 .

The improper remarks the prosecutor made to the jury in this case has tainted the reliability of the jury's sentencing recommendation and the resulting death sentence. Art. I, Secs. 9, 16, 17, Fla. Const.; Amends. V, VI, VIII, XIV, U.S. Const. Andrea Jackson urges this Court to reverse her death sentence and remand her case to the trial court for a new sentencing trial.

ISSUE v

SECTION 921.141(7), FLORIDA STATUTES, WHICH PERMITS INTRODUCTION OF VICTIM IMPACT EVIDENCE IN A CAPITAL SENTENCING PROCEEDING, IS UNCONSTITUTIONAL.

INTRODUCTION

Over defense counsel's objections, the trial court admitted testimony of four victim impact witnesses, three law enforcement officers and the victim's mother. (Tr 103-120, 420-447, 493, 824, 827, 831) During closing argument, the prosecutor told the jury that the evidence, although not relevant to aggravating or mitigating circumstances, could be used by the jury in reaching its sentencing decision. (Tr 1644-1645, 1664) The trial court reaffirmed the prosecutor's argument when it gave the State's requested jury instruction which stated that the evidence could be considered when the jury made its life or death decision. (Tr 1738) Other that advising the jury that the evidence could be considered when making its sentencing decision, no other guidance was offered, (Tr 1738) The admission of this irrelevant and emotionally inflammatory evidence, particularly without adequate guidance on its use, violated appellant's right to a fair penalty proceeding under the state and federal constitutions. Appellant acknowledges this Court's previous decisions which have permitted victim impact evidence-see, Bonifay v. State, 21 Fla. Law Weekly S301 (Fla. Case no. 84,918, July 11, 1996); Windom v. State, 656 So.2d 432 (Fla. 1995). However, Jackson asks that this ruling be reconsidered in light of the constitutional arguments presented below:

A. **Section 921.141(7) is Unconstitutional as it Leaves Judge and Jury with Unguided Discretion Allowing for Imposition of the Death Penalty in an Arbitrary and Capricious Manner.**

Effective July 1, 1992, the Florida Legislature enacted section 921.141(7), part of the Florida capital sentencing statute. This statute was enacted in response to the United States Supreme Court's opinion in Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). However, by enacting this statute, the Florida Legislature responded to Payne without giving full consideration to the statute's constitutional impact on the Florida capital sentencing procedure set forth in Chapter 921.141, Florida Statutes.

The sentencing scheme provided in Florida law is unlike the law reviewed by the Court in Payne in that Florida is a "weighing" state. In other words, the law requies a jury and the judge to weigh specifically enumerated and defined aggravating circumstances that have been proven beyond a easonable doubt against mitigating circumstances in determining the appropriate sentence. s.921.141, Fla. Stat. The law reviewed by the Court in Payne set no such limits. Unlike Florida, Tennessee's capital sentencing law is very broad:

> In the sentencing proceeding, evidence may be presented as to any matter that the Court deems relevant to the punishment and may include but not be limited to. the nature and circumstances of the character, the crime; the defendant's background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated . . .

T.C.A. 39-13-204(c)(1982)(emphasis added).[6]

Section 921.141(5), Florida Statutes, specifically limits the prosecution to the aggravating circumstances listed in the statute: "Aggravating circumstances shall be limited to the following . . ." (emphasis added). Accord Elledge v. State, 346 so. 2d 998, 1002-10 (Fla. 1977). The consideration of matters not relevant to aggravating factors renders a death sentence under Florida law violative of the Eighth Amendment. Socher v. Florida, 112 S.Ct. 2114, 117 L.Ed.2d 326 (1992); Stringer v. Black, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992).

It might be argued that victim impact evidence is not weighed, it is merely considered. This begs the question of how to apply this statute in a constitutional manner:

> "[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be sutiably directed and limited so as to iminimize the risk of wholly and capricious action."

Godfrey v. Georgia, 446 **U.S.** 420, 100 S.Ct. 1759, 1764 (1980).

The concern with randomness and arbitrary sentencing procedures has been the underlying theme of the Supreme Court's death penalty decisions. In Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the Supreme Court held that the death penalty could not be imposed under the sentencing procedures in effect because of the substantial risk that it would be inflicted in an arbitrary and capricious manner as a result of

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[6]It is also noteworthy that Tennessee requires a unanimous verdict of the jury to recommend death; Florida requires only a bare majority.

unbridled discretion, Several years later, in reviewing the Florida statute, the Supreme Court upheld the constitutionality of the death penalty finding that the statutory scheme "seeks to assure that the death penalty will not be imposed in an arbitrary or capricious manner." Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 2967, 49 L.Ed.2d 913 (1976).

The very problem inherent in this new statute is that one does not know where victim impact evidence **factors** into the sentencing determination. Although it might be argued that victim impact evidence is not to be weighed but merely considered, it is the very consideration of factors not inherent in the weighing process that has caused reversal of several death sentences. In Burns v. State, 609 So. 2d 600 (Fla. 1992), this Court reversed the death sentence where evidence was introduced concerning the deceased's background and character **as a** law enforcement officer. The Court held that it was harmless error as it related to the guilt phase but found it to be reversible error as it related to the penalty phase. Specifically, this Court held it was not relevant to any material fact in **issue.** It is particularly noteworthy that Burns was decided after Payne v. Tennessee. Similarly, in Taylor v. State, 583 So. 2d 323 (Fla. 1991), this Court reversed for a new penalty phase due to a prosecutor making an argument designed to invoke sympathy for the **deceased.** 583 so. 2d at 329-30. This Court relied on its prior opinion in Jackson v. State, 522 So. 2d 802 (Fla. 1988), in which it held such argument to be improper "because it urged consideration of factors outside the scope of the jury's deliberation." 522 So.

2d 809. The use of victim impact evidence allowed for imposition of the death penalty in an arbitrary and capricious manner.

B. Section 921.141(7), Florida Statutes, is Vague and Overbroad and Therefore Violative of the Due Process Guarantees of the Florida and United States Constitutions.

The victim impact statute provides that "such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the communities members by the victim's death." This language contains no definition or limitations.

A statute, especially a penal statute, must be definite to be valid. Locklin v. Pridgeon, 30 So. 2d 102 (Fla. 1947). An attack on a statute's constitutionality must "necessarily succeed" if its language is indefinite. D'Alemberte v. Anderson, 349 So. 2d 164 (Fla. 1977). The statute at issue here clearly fails under any standard of definiteness required by the Unites States and Florida Constitutions.

The phrase "loss to the community" contains no definition of community or limits on it membership. This could lead anyone testifying or even to death sentencing by petition or public opinion poll.[7] The phrase "uniqueness as a human being" places absolutely no limit on this evidence. Who defines uniqueness?

The Supreme Court has frequently addressed the issue of vagueness of legislatively defined aggravating circumstances.

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[7]The Florida Constitution provides "Victims of crime or their lawful representative including next-of-kin of homicide victims, are entitled . . . to be heard when relevant . . . . to the extent that these rights do not interfere with the constitutional rights of the accused." Art. I, section 16. The victim impact statute broadens these rights to the community at large.

'Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically asserted that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)." Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 1957-59 (1988). Similarly, in Espinosa v. Florida, 505 U.S. ___, 112, S.Ct. 2926, 120 L.Ed.2d 854 (1992), the Court held "our cases further establish that an aggravating circumstance is invalid in this sense if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor."

Perhaps of greatest concern, victim impact evidence as defined in this statute permits and may foster the special danger of racial or class prejudice infecting a capital sentencing decision. Both the United States Supreme Court and this Court have recognized the special danger of racial prejudice infecting a capital sentencing decision in a case involving a black defendant and a white victim. Turner v. Murray, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986); Robinson v. State, 520 So. 2d 1 (Fla. 1988). The introduction of victim impact evidence can be expected to result in even further discrimination toward defendants and imposition of the death penalty being rendered in an even more arbitrary manner.

Moreover, victim impact evidence leads to discrimination against victims, contrary to the guarantee contained in our

constitution of equal protection of the laws. Article I, Section 2, Florida Constitution. This Court has recognized that the victim's lack of social acceptability is not a proper basis for a jury recommendation of life. See Bolender v. State, 422 So. 2d 833 (Fla. 1982); Coleman v. State, 610 So.2 d 1283 (Fla. 1992). Nonetheless, victim impact evidence lends itself to comparing one individual's life against the value of another. Will one victim, depending upon race, social standing, religion, or sexual orientation, be more deserving of a death sentence for his or her killer? Is a murder which does not impact the "community" less heinous than one that does?[8]

Many reported decisions already reveal examples of attempts to exploit a victim's piety. See e.g. South Carolina v. Gathers, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989)(prosecutor recited prayer and argued victim's religiousness); Daniels v. State, 561 N.E.2d 487 (Ind. 1991) (prosecutor mounted life-size

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[8] 'Recall that the Nazis preyed on people they considered unworthy of life: Jews, Gypsies, homosexuals. The perceived subhuman status of the targets ostensibly justified any manner of outrage against them. Transported and later tattooed like cattle, victims were rated against one another in the fashion of animals. Camp commanders directed the younger and healthier captives rightward, to work; the old and weak, leftward, to die. While there is clearly no moral equivalence between genocide and capital punishment as practiced in the United States, the former by its very extremity highlights the need to resist all officially encouraged invidious distinctions founded on a person's class or caste. To countenance a capital sentence procedure that allows "`those to discriminate who are of a mind to discriminate, '" as does Payne with respect to victims, is to permit "grading" of humans, which Nazism (if nothing else) should brand as utterly beyond the pale. For the victim's status assumes no greater legitimacy as a basis for the lawful act of sparing or condemning a murderer than for the lawless murder itself." Vivian Berger, Payne and Suffering: A Personal Reflection and a Victim-Centered Critique, 20 Fla.St.L.Rev. 51 (1992).

photo of victim in full military uniform and stressed that he had been an army chaplain); State v. Huertas, 553 N.E.2d 1058 (Ohio 1990) (victim's mother mentioned son's church going habits); Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983) (witness testified that deceased was choir member at his church). Certainly the prosecution will not argue explicitly that a murder deserves death because the deceased had money or status or was white or religious. Yet characteristics like the articulateness of survivors frequently correlate closely with wealth and social position, thereby serving as surrogates for parameters nobody deems appropriate. So, too, victim attributes will import a certain community status.

In the event the state is permitted to use victim impact evidence, will it become a defense obligation to exploit or devalue victims in order to minimize such evidence or, in fact, to provide mitigation? In any event, devalued victims will be ignored at a minimum or, worst of all, their defects will be aired in sentencing proceedings. Certainly, if there is a principle of relevance to victim impact evidence that makes a victim's personal, familial, and social worth pertinent evidence in aggravation, worthlessness is these respects become pertinent evidence in mitigations.

Victim impact evidence asks a jury to compare the value of a victim's life to the value of other victims' lives and to the value of a defendant's life. The inherent risk that prejudice on racial, religious, social or economic grounds, will infect this decision are unaccepted under the Florida and United States

Constitutions. As such, the vagueness of the victim impact evidence renders this statute unconstitutional.

c. **The Florida Constitution Prohibits Use Of Victim Impact Evidence.**

The Florida Constitutional requires that victim sympathy evidence and argument be excluded from consideration whether death is an appropriate sentence, and provides broader protection than the United States Constitutions for the rights of a capital defendant. This Court recently found significant the disjunctive wording of Article I, Section 17 of the Florida Constitution, which prohibits "cruel or unusual punishment." Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991).[9] The Court in Tillman explicitly held that a punishment is unconstitutional under the Florida Constitution if it is "unusual" due to the procedures involved. The allowance of victim sympathy evidence and argument would violate Article I, Section 17. The existence of this evidence is totally random, depending upon the extent of the deceased's family and friends, and their willingness to testify.

The admission of victim impact evidence and argument would also violate the Due Process Clause of Article I, Section 9 of the Florida Constitution. In Tillman, supra, the Court states that Article I, Section 9 holds "that death is a uniquely irrevocable penalty requiring a more intensive level of judicial scrutiny or process than lesser penalties." Id. at 169. This Court's opinion in Tillman is clear indication that victim impact

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[9] This wording is in contrast to the ban on "cruel and unusual punishment" in the Eighth Amendment of the United States Constitution.

evidence violates Article I, Sections 9 and 17 in a capital case, even it it is permitted in other cases.

The admission of victim impact evidence and argument violates Article I, Section 9 and 17 of the Florida Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution for related reasons. First, such evidence introduced into the penalty decisions considerations that have no rational bearing on any legitimate aim of capital sentencing. Second, this proof is highly emotional and inflammatory, subverting a reasoned and objective inquiry which the courts have required to guide and regularize the choice between death and lesser punishments. Third, victim impact evidence cannot conceivably be received without opening the door to proof of a similar nature in rebuttal or in mitigation, further upsetting the delicate balance the courts have painstakingly achieved in this area. Fourth, the evidence invites the jury to impose the death sentence on the basis of race, class and other clearly impermissible grounds.

Victim impact evidence, whether considered a non-statutory aggravating circumstance or merely a factor to "consider" in the sentencing proceeding, encourages inconsistent, unprincipled and arbitrary application of the death penalty and therefore is violative of the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Article I, Sections 9, 17 and 21 of the Florida Constitution.

D. Section 921.141(7), Florida Statutes, infringea upon the exclusive right of the Florida Supreme Court to regulate practice and procedure pursuant to Article V, Section 2, Florida Constitution.

Article V, Section 2 of the Florida Constitution provides that the Supreme Court shall adopt rules for the practice and procedure in all courts.

> Practice and procedure "encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion 'practice and procedure' may be described as the machinery of the judicial process as opposed to the product thereof." In Re: Florida Rules of Criminal Procedure, 272 So. 2d 65, 66 (Fla. 1972) (ADKINS, J concurring). It is the method of conducting litigation involving rights and corresponding defenses. Skinner v. City of Eustis, 147 Fla. 22, 2 So. 2d 116 (1941).

Haven Federal Savings and Loan Association v. Kirian, 579 So. 2d 730 (1991).

This Court has relied on these principles to invalidate a wide variety of statutes, involving such topics as juvenile speedy trial (RJA v. Foster, 603 So. 2d 1167 (Fla. 1992)); severance of trials involving counterclaims against foreclosure mortgagee (Haven, supra); waiver of jury trial in capital cases (State v. Garcia, 229 So. 2d 236 (Fla. 1969)); and the regulation of vior dire examination (In Re: Clarification of Florida Rules of Practice and Procedure, 281 So. 2d 204, 205 (Fla. 1973)). The statute at issue here is an attempt to regulate "practice and procedure."

The statute unconstitutionally invades the province of this Court by providing an evidentiary presumption that victim impact

evidence will be admissible at the penalty phase of a capital case, regardless of its relevance toward proving an aggravating or mitigating circumstance. The statute also permits the prosecutor to argue in closing argument evidence that has previously been determined to be irrelevant in capital sentencing proceedings. See Jackson v. State, 522 So. 2d 802 (Fla. 1988) (prohibiting argument that the victims could no longer read books, visit their families, or see the sun rise in the morning).

Through enactment of the victim impact statute, the legislature has tried to amend portions of the Evidence Code without first obtaining approval of this Court as required by Article V.

The victim impact statute, if it is not an aggravating circumstance, is not substantive law. Rather, if the argument that it is merely evidence to be "considered" is accepted, then it must be legislatively determined relevant evidence. It is for the courts to determine relevancy, not the legislature.

E. Application of section 921.141(7), Florida Statutes, violates the Ex Post Facto clauses of Article I, Section 10 and Article X, Section 9 of the Florida Constitution and Article I, Section 9 and 10 of the United States Constitution.

The statutes in question took effect in 1992. The offense in this cause occurred in 1983. Article I, Sections 9 and 10, of the United States Constitution prohibits Congress from enacting laws that retrospectively apply new punitive measures to conduct already consummate, to the detriment or material disadvantage of the wrongdoer. Through this prohibition, the framers "sought to assure that legislative acts give fair warning to their effect and permit individuals to rely on their meaning until explicitly

Changed." Weaver v. Graham, 450 U.S. 24, 28-29, 109 S.Ct. 960 (1981).

Florida has also adopted an ex post facto prohibition under Article I, Section 10 of the Florida Constitution. This provision states that "[n]o bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed." An ex post facto law, such as the instant one, applies to events occurred before it existed, which results in a disadvantage to the defendant. Blankenship v. Dugger, 521 So. 2d 1097 (Fla. 1988).

In Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987), the Court held a law is ex post facto if "two critical elements [are] 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."' (quoting Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960 (1981)). Both elements are present here. The law took effect since the alleged crime, and adds a powerful reason for imposing death as a punishment which is not permitted to be considered at the time of the offense. The previously well-recognized exclusion of such evidence in a number of cases because of its inflammatory, non-statutorily aggravating nature is stark recognition of the new law's substantial disadvantage. Grossman v. State, 525 So. 2d 833 (Fla. 1988) (holding similar victims' rights statute unlawful to apply to capital sentencing); Booth v. Maryland, 107 S.Ct. 2529 (1987) (declaring such evidence violative of the Eighth Amendment), overruled Payne v. Tennessee, 111 S.Ct. 2597 (1991).

At the time of the defendant's crime, Florida law prohibited the consideration of victim impact evidence as a sentencing consideration. This is clearly a substantial substantive right which is protected by the ex post facto clause of the United States Constitution and the Florida Constitution. In the event the statute is deemed to be purely procedural and therefore not violative of the ex post facto clause, it must be considered a violation of the separation of powers and the Supreme Court's exclusive jurisdiction to adopt rules for the practice and procedure of all courts.

ISSUE VI

THE TRIAD COURT ERRED IN REFUSING TO ADMIT INTO EVIDENCE AND TO CONSIDER IN SENTENCING 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.

Judge Moran ruled that Dr. 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. (R 171-176) (Tr 89-90, 1276) However, the court ruled the the videotape itself was irrelevant and inadmissible for any purpose. (Tr 89-90, 1276) During the trial, Mutter testified, referred to the hypnotic regression and read portions of the transcript of the session to the jury. (Tr 1246-1282) 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 1311-1343) Finally, the court instructed the jury that it was its role to assess the reliability of expert testimony presented. (Tr 1731) In his sentencing order, the trial judge made a credibility finding regarding Mutter's testimony and opinion when he rejected as a statutory mitigating circumstance that Andrea suffered from an extreme mental or emotional disturbance at the time of the crime. (R 237) The judge made this credibiltiy evaluation without any indication that he had viewed the videotape of the hypnotic regression. (R 237)

In ruling that the videotape of the hypnotic regression was inadmissible for the jury's consideration and in failing to view the tape himself, 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, 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). Jackson realizes that this Court ruled on

the admissibility of the videotape in the previous appeal, Jackson v. State, 648 So.2d 85, 90-91 (Fla. 1994). However, she now urges this Court to revisit that decision.

This Court addressed a similar issue in Moraan. 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); Dowel1 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 of 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. Section 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 and the sentencing judge.

ISSUE VII

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

Before trial, defense counsel filed a motion requesting the appointment of a forensic pathologist to assist in preparation of the defense. (R 96) Specifically, counsel noted that the State, as it had in the previous sentencing trial, intended to use the medical examiner to render opinions regarding the position of the victim at the time of the shooting. (R 96) The position of the victim was a critical issue since it became important to the issue of whether the homicide was cold, caculated and premeditated. (R 96) Counsel requested the appointment of Dr. John Feegel from Tampa as the defense expert to assist in preparing to rebut and cross-exam the medical examiner on this point. (R 96) The court originally denied this request due to the costs of bringing someone from out of town. (Tr 97) Later, Defense counsel renewed and amended the request advising he court that there was no local expert available. (R 149) (Tr 96-98) The court again denied the motion. (R 156)(Tr 96-98) During trial, before the medical examiner testified, defense counsel again renewed the request for appointment of a defense expert pathologist. (Tr 740-744) At this time, the court denied the motion and stated that defense counsel's position that he was entitled to an expert to assist in impeaching the medical examiner was "totally without merit" and had "...nothing to do with aggravating factors or mitigating factors . ..." (Tr 743-744)

In Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), the United States Supreme Court held that due process required, in a capital case, the appointment of the a defense psychiatrist when sanity was a sigificant factor in the defense. This principle has been extended to other experts in Florida via Section 914.06, Florida Statutes (1991), which requires payment for experts needed for an indigent defendant. The statute provides:

> Compensation of expert witnesses in criminal cases.--In a criminal case when the state or an indigent defendant requires the services of an expert witness whose opinion is relevant to the issues of the case, the court shall award reasonable compensation to the expert witness that shall be taxed and paid by the county as costs in the same manner as other costs.

Payment is mandated by the statute when the "...indigent defendant requires the services of an expert witness whose opinion is relevant to the issues of the care...." This Court has generally applied an abuse of discretion standard when reviewing a trial court's decision to deny the appointment of a defense expert. See, Burch v. State, 522 So.2d 810 (Fla. 1988); Martin v. State, 455 So.2d 370 (Fla. 1988). Recently, the Fifth District Court of Appeal undertook an examination of this statute and the standard to be employed on appeal when a lower court denies payment for a defense expert in a noncapital case. Cade v. State, 658 So.2d 550 (Fla. 5th DCA 1995). The Cade court concluded that an abuse of discretion standard was to be used even though the statutory language itself gave little room for the exercise of discretion. 658 So.2d at 553. The district court noted that this court has used an abuse of discretion standard concerning the appointment

of defense experts, but the district court also noted that there existed little guidance from this Court or from those of other jurisdictions on just how to apply this standard in this context. 658 So.2d at 553-555. In Cade, the court commented as follows:

> In attempting to answer the question in this case, we have reviewed the developing law in other jurisdictions. Although this has been of some help, we are bound to conclude that determining "abuse of discretion" in this context has typically boiled down to an ad hoc exercise of intuition by the appellate court that there was a substantial risk that the failure to supply the defendant with an expert deprived the defendant of a fair trial. The prevailing view appears to be that a defendant is entitled to the "basic tools" of an adequate defense, and abuse of discretion is the point at which the court concludes the defense has not been provided such a "basic tool." See generally David Harris, The Constitution and Truth Seeking: A New Theory on Expert Services for Indigent Defendants, 83 J.Crim.L. & Criminology 469, 484 (1992).

The court discussed the case law from the federal and some other state jurisdictions on this issue and then concluded that reversible error occured in Cade when the trial court refused to appoint a defense DNA expert. 658 So.2d at 553-554. Applying some factors gleened from the cases reviewed, the district court commented on them as follows:

> The cases cited above do suggest a number of factors that may be weighed in this case in determining whether the lower court has abused its discretion in refusing to appoint an expert for this indigent criminal defendant. In this case, the DNA evidence was central to the state's case and the remaining evidence against defendant was not overwhelming. Also, scientific evidence received from an expert is impressive to a jury, Ake v. Oklahoma, 470 U.S. 68, 81 n. 7, 105 S.Ct. 1087, 1095 n. 7, 84 L.Ed.2d 53 (1985),

> and we perceive that the use of DNA matching to prove identity is especially persuasive. It is also a highly technical methodology that the literature and case law suggest can be vulnerable to attack. See Thomas M. Fleming, Annotation, Admissibility of DNA Identification Evidence, 84 A.L.R.4th 313 (1991); Harris at 519-20. See also Vargas v. State, 640 So.2d 1139 (Fla. 1st DCA 1994), review granted, 659 So.2d 273 (Fla. 1995). In this case, the request was made timely. Also, there was specificity: The expert sought to be appointed was identified, the tasks to be performed were outlined, the hourly rate was given and an estimate of fees was made which fell into the $3,000 range. (FN3)

658 So.2d at 554.

Similar factors are present in this case. First, the position of the victim at the time of the shooting was a critical issue to the State's case for the CCP aggravating circumstance. Second, the State relied on an expert to aid in establishing that fact. Third, the expert's opinion testimony was based on his evaluation of the body and the scene which is beyond the ability of a layman to perform. Fourth, expert testimony can be particularly impressive to a jury. Fifth, defense counsel made a specific request for a pariticular expert to deal with a specific issue. Sixth, defense counsel's motion demonstrated the anticipated testimony from the medical examiner and how that impacted the case. Seventh defense counsel made efforts to secure an expert locally in an effort to keep costs down. Finally, and quite crucially, this case is a capital sentencing trial where this Court has recognized the need for greater attention to due process standards and the need for reliability.

At trial, the medical examiner did render an opinion as to the position of Officer Bevel at the time of the shooting. (Tr 759-765) Bevel's position was a contested issue at trial. Bevel's position was an important element relevant to the cold, calculated and premeditated aggravating circumstance. Denying Andrea Jackson's defense the benifit of an expert pathologist to aid in developing adequate impeachment of the medical examiner denied her the right to due process and a fair sentencing trial. Art. I, Secs. 9, 16, 17, Fla.Const.; Amends. V, VI, VIII, XIV, U.S. Const. The reliability of the sentence imposed is tainted and the death sentence must be reversed for a resentencing trial with a new jury.

ISSUE VIII

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

The trial court improperly instructed the jury on the cold, calculated and premeditated aggravating circumstance. Section 921.141(5)(i) Fla. Stat. (Tr 713-714) Although the instruction used was the one suggested in this Court's previoius decision in this case, Jackson **v. State,** 648 So.2d 85, 95 n8 (Fla. 1994), it is unconstitutionally vague and misleading. Art. I, Secs. 2, 9, 16, 17, Fla. Const.; Amends. V, VI, VIII, XIV, U.S. Const. The instruction to the jury was as follows:

> ...Two, 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 your must find the murder was cold, calculated, and premeditated and that there was no pretense of moral or legal justification.
>
> Cold means that 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 that he 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 the homicide nevertheless rebuts the otherwise cold and calculating nature of the homicide.

(Tr 1732-1733).

This instruction fails to adequately aprise the jury of the legal limitations of the CCP circumstance, specifically

concerning the element of heightened premeditation. The entire instruction was unconstitutionally vague, particularly the portion defining the heightened premeditation element. The judge instructed:

> Premeditated means the defendant exhibited a higher degree of premeditation than that which is normally required in a premeditated murder.

(Tr 1732) This definition is meaningless and gives the jury no guidance. What does 'a higher degree of premeditation" mean? This Court has held that a defendant must have intended the murder before the crime ever began. E.g. Porter v. State, 564 so. 2d 1060, 1064 (Fla. 1990), cert. denied, 498 U.S. 1110, 111 S. Ct. 1024, 112 L. Ed. 2d 106 (1991). Jackson and the standard instruction defined "calculated" to be a careful plan or prearranged design to commit the murder. The "premeditated" element cannot mean the same thing as the "calculated" element because each part of the statute has to have independent meaning and significance. The revised instruction approved by this Court in Standard Jury Instructions in Criminal Cases, 20 Fla. Law Weekly S589 (Fla. Dec. 7, 1995), recognizes that problem and attempts to cure it.[10] But, the attempted cure was not in place in this

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[10] Standard Jury Instructions in Criminal Cases, 20 FLW S589 (Fla. Dec. 7, 1995), defined heightened premeditation as:

> [As I have previously defined for you] a killing is "premeditated" if it occurs after the defendant consciously decides to kill. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The

trial, and the resulting instruction was inadequate both as a matter of statutory construction and constitutional requirements of due process and cruel or unusual punishment. Art. I Secs. 2, 9, 16, 17, Fla. Const.; Amends. V, VI, VIII, XIV, U.S. Const. Jackson is entitled to a new penalty phase trial with a new, properly instructed jury.

> premeditated into to kill must be formed before the killing.
>
> However, in order for this aggravating circumstance to apply, a heightened level of premeditation, demonstrated by a substantial period of reflection, is required.

Id. (underscoring omitted).

CONCLUSION

Andrea Jackson asks this Court to reverse her death sentence and remand her case to the trial court with directions to impose a sentence of life in prison. Alternatively, she asks that her sentence be reverse and her case remanded for a new penalty phase sentencing trial before a new jury.

Respectfully submitted,

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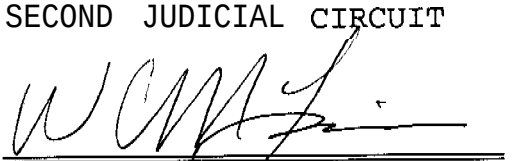

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by U.S. Mail to Richard B. Martell, Assistant Attorney **General**, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301; and a copy has been mailed to appellant, Andrea Hicks Jackson, on this 6th day of November, 1996.

W.C. McLAIN