IN THE SUPREME COURT OF FLORIDA

ANDREA HICKS JACKSON,	:	
Appellant,	:	
v.	:	**CASE NO. 93,925**
STATE OF FLORIDA,	:	
Appellee.	:	

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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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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

This is an appeal from a resentencing without a new jury. The resentencing record consists of eight volumes. However, only volume I contains new materials not included in the previous record on appeal (case no. 87,345). One exception is the new notice of appeal contained in volume VIII. Beginning with page 109 of volume I through volume VIII is a copy of the penalty phase trial which is contained in the previous record (case no. 87,345). For clarity, references in this brief to the penalty phase trial will use the page numbers in the previous record on appeal. The only page references to the resentencing record will be to the new material produced on the resentencing and contained in volume I and to the notice of appeal in volume VIII. References to the resentencing record will use the prefix “RES”. References to the previous record on appeal and transcript of the penalty phase trial will use the prefixes “R” and “T”. References to the appendix to this brief will use the prefix “App.” followed by a reference letter to the exhibit.

Undersigned counsel certifies that this brief has been

prepared using 12 point Courier New, a font that is not proportionately spaced.

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.(R1: 1-2) Jackson proceeded to a jury trial where 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. (T6: 126) On November 17, 1995, the jury recommended a death sentence. (R2: 207)(T14: 1747) Circuit Judge Donald R. Moran, Jr., followed the jury’s recommendation and on January 18, 1996, sentenced Andrea Jackson to death. (R2: 229-239)(T14: 1792-1797)(App. B) 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. (R2: 236-237) The court acknowledged that Andrea had suffered sexual abuse as a child and was addicted to drugs and alcohol. (R2: 237) However, the court concluded that these nonstatutory factors did not rise to the level of mitigation. (R2: 237) On appeal, this Court held that the trial court failed to expressly evaluate each mitigating factor as required by Campbell v. State, 571 So.2d 415 (Fla. 1990). Jackson v. State, 704 So. 2d 500, 505-507 (Fla. 1997). This Court "vacate[d] Jackson's sentence and remand[ed] to the trial court to reweigh the aggravating and mitigating circumstances and resentence Jackson in compliance with Campbell and its progeny." Jackson, 704 So.2d at 508 (Fla. 1997).

Circuit Judge Donald R. Moran again resentenced Jackson on August 17, 1998. (RES1:82-107)(App. A) Before the resentencing, Andrea Jackson filed a *pro se* motion requesting transportation from Broward Correctional Institution to Jacksonville for the resentencing. (RES1:16) The court denied the motion stating the following:

> ... The Supreme Court of Florida reversed the defendant's death sentence and remanded the case back to this Court for the sole purpose of entering a new written sentencing order, setting forth this Court's evaluation of each of the sentencing mitigators pursuant to the court's decision in Campbell v. State, 571 So.2d 415 (Fla. 1990). No additional hearings will be held and this Court will not be entertaining any new evidence beyond that which is already in evidence. Accordingly, the defendant's presence is neither necessary nor required. Sinks v. State, 661 So.2d 303 (Fla. 1995).

(RES1:21)

The trial court received sentencing memorandums from the State and the Defense. (RES1:27-41, 50-81) Judge Moran then issued a sentencing order resentencing Jackson to death. (RES1:82-107)(App. A) In aggravation, the court found two circumstances: (1) the homicide was cold, calculated and premeditated, sec. 921.141 (5)(i) Fla. Stat.; and (2) three circumstances merged into one: the homicide was committed to avoiding arrest, disrupt a governmental function and the victim a police officer. secs. 921.141(5)(e)(g) & (j) Fla. Stat. In mitigation, the court: (1) rejected the statutory mitigating circumstance that the defendant suffered an extreme mental or emotional disturbance, sec. 921.141(6)(b) Fla. Stat.; (2) rejected the statutory mitigating circumstance that the defendant's capacity to conform her conduct was substantially impaired, sec. 921.141(6)(f) Fla. Stat.; (3) rejected the nonstatutory mitigating circumstance that the defendant suffered from childhood sexual abuse; (4) found the nonstatutory factor that the defendant has suffered from instances of physical and domestic violence, but assigned the factor little weight; (5) found the nonstatutory factor that the defendant was dependent on

alcohol, but assigned the factor little weight; (6) found the nonstatutory factor that the defendant was dependent on drugs, but assigned the factor little weight; (7) found the nonstatutory factor that the defendant was under the influence of drugs and alcohol at the time of the crime, and assigned the factor some weight; (8) rejected the nonstatutory factor that the defendant acted from a misperception that the police officer was attempting to rape her; and (9) found the nonstatutory factor that the defendant exhibited remorse, but assigned it little weight.

Jackson filed her notice of appeal to this Court on September 1, 1998. (RES8:1459)

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.(T8: 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.(T8: 563-566, 578-580, 611-612, 634, 655-659) She removed tools, tires, the battery, and other items from the car.(T8: 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. (T8: 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.(T9: 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. (T9: 730) She was upset with the car and told him she was going to drive “the mother-fucker off the main street bridge." (T9: 730)

Officer Burton Griffin arrived at the scene pursuant to a disturbance called at approximately 11:00 p.m. (T8: 545, 711) Officer Gary Bevel arrived first, and he volunteered to assist Griffin.(T9: 712) Andrea approached and told the police officers that she owned the car. (T9: 714) At the officer’s request, Andrea returned to the apartment and retrieved a bill of sale for car. (T9: 718) She volunteered that she knew who damaged her car. (T9: 719) She would not give the officers a name and Griffin thought she wanted to deal with the problem herself. (T9: 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.(T9: 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. (T9: 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. (T9: 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. (T9: 723-724) Griffin left the scene when Bevel began writing the report and said that he did not need further help.(T9: 719-720)

Four neighbors observed a confrontation between Andrea and Officer Bevel. (T8: 561, 574, 633, 651) Gina Roulhac observed Andrea destroying her car and the arrival of the police officers. (T8: 563-566) Gina and her sister watched from their front porch. (T8: 563) Gina said that she did not see Andrea stumble or fall as she walked as if intoxicated. (T8: 567) However, she was not close enough to overhear anything Andrea said or to tell if she smelled of alcohol. (T8: 572) After talking to Andrea, Officer Bevel approached the Roulhac's doorway. (T8: 566) Bevel was a friend of the family's and had dated one of Gina' sisters. (T8: 566, 573) He asked if they had seen what had happened and they told him that Andrea had damaged her own car. (T8: 568) At that time, Gina went inside her house to use the restroom and she heard shots. (T8: 518) She ran back to the window, but she could only see the patrol car; she could not see Bevel or Andrea. (T8: 569) A tree was blocking a portion of the patrol car from view. (T8: 573-574)

Anna Nelson, Gina's sister, also saw Andrea destroying her car and the confrontation between Andrea and Bevel. (T8: 574-633) Nelson said that Andrea's problems with the car started around 6:30 p.m. and continued for a lengthy period. (T8: 578-579) After unsuccessful attempts to crank the car, Andrea began removing items from the car and smashing the car with a crowbar. (T8: 579) Andrea was angry, and she cursed and talked to the car. (T8: 579-580, 611-612) Officer Bevel arrived at between 10:30 and 11:00. (T8: 581-583) Andrea came downstairs from the apartment and talked to Bevel. (T8: 581-582) Nelson did not see

Andrea fall down or slip as she walked. (T8: 584-585) She heard Andrea tell Bevel she wanted her car towed. (T8: 583) Nelson said that Andrea's speech was not slurred. (T8: 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. (T8: 599) She was not close enough to tell if Andrea smelled of alcohol. (T8: 613) Andrea went back upstairs to obtain the registration for her car. (T8: 585) After giving the document to Bevel, Andrea returned upstairs. (T8: 585-587) Nelson did not perceive any confrontation between Andrea and Bevel at that time. (T8: 587) Bevel walked to Nelson's house and she told him that Andrea had damaged her car herself. (T8: 588-589)

While Bevel and Nelson were talking, Andrea again came downstairs and went to Bevel's patrol car. (T8: 590) She appeared to be going through things in the front seat of the officer's car. (T8: 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. (T8: 601-603) Bevel called out to Andrea and asked her why she was in his car. (T8: 591) She came away from the car. (T8: 591) Bevel confronted Andrea and told her he was arresting her for filing a false police report. (T8: 591) Andrea came toward Bevel and began hitting him in the chest. (T8: 592) Bevel grabbed both of Andrea's wrists and restrained her. (T8: 593, 605) They struggled. (T8: 593, 605) Bevel tried to get Andrea into the back of the patrol car. (T8: 605-606) At first, Bevel asked her to get in the car, but Andrea refused and continued to struggle. (T8: 606) Andrea asked Bevel why he was

manhandling her. (T8: 593) Bevel bent down and grabbed Andrea's knees. (T8: 606-607) At this time, Nelson heard keys drop and heard Andrea tell Bevel that he had made her drop her keys. (T8: 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. (T8: 606-607) Nelson heard a gunshot. (T8: 596) After a slight pause, Nelson heard four or five more shots in rapid succession. (T8: 597) Bevel fell into the car onto Andrea; she pushed him off of her and fled. (T8: 598)

Leanderaus Fagg also saw the confrontation with the police officer. (T8: 634-636) He observed Andrea and Bevel talking. (T8: 638-639) Andrea acted angry and hostile and wanted to know where her car had been taken. (T8: 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. (T8: 639) Andrea resisted and tried to get away. (T8: 640, 644-645) Andrea was immensely angry and hostile. (T8: 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. (T8: 641) Bevel paused and stepped back as if to look for keys, and at that time, Fagg heard the gunshots. (T8: 641-642, 645-646) He thought he heard four shots. (T8: 642) The shots were fired in rapid succession almost like an automatic weapon. (T8: 647-648) Bevel fell into the car onto Andrea. (T8: 642) Andrea pushed him from on top of her and then fled from the car. (T8: 642)

Mable Coleman lived in the apartment next door to Shelton Jackson, Andrea's estranged husband. (T8: 651, 654; T9: 681) She knew Andrea and had heard the fights between Andrea and Shelton in the past. (T9: 686) Policemen responded to some of these fights, and on one occasion, Andrea's used Coleman's telephone to call the police. (T9: 686) On the night officer Bevel was shot, Coleman saw and heard Andrea trying to start her car. (T8: 653) She heard Andrea's angry outburst and her cursing the car. (T8: 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. (T8: 655-658; T9: 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. (T8: 660) She returned to the officers with the papers. (T8: 661-662) Coleman saw Andrea sit in the passenger side of the patrol car while Bevel wrote something. (T8: 662) Andrea left and returned upstairs to Shelton's apartment. (T8: 662) After she left, her car was towed away. (T8: 665) Bevel walked to a neighbor's house and talked to someone there. (T8: 662) A short time later, Coleman saw Andrea come out her apartment and start down the stairs. (T8: 663) She saw Andrea stop on the top step and place a pistol in the waist area of her pants. (T8: 663-664) Andrea then walked to the police car. (T8: 664) Bevel came from the neighbor's house and met Andrea. (T8: 665) Andrea asked, "Where is my damn car?" (T8: 665) Bevel said, "They towed it away." (T8: 665) Bevel then told Andrea to "Get in the car I have to take you downtown." (T8: 665) Coleman did not know Bevel intended to

arrest Andrea until he spoke to her at this time. (T9: 681) Andrea responded that she was not going anywhere. (T8: 665-666) By this time, Andrea was struggling with the police officer. (T8: 667) Bevel took Andrea to the back seat of the patrol car. (T8: 667) Coleman remembers seeing Andrea sitting down with her feet still outside of the car. (T8: 667) She heard Andrea say, "Oh, you made me drop my damn keys." (T9: 675) Bevel and Andrea both leaned forward. (T9: 675) Coleman then heard five, rapidly-fired, gunshots. (T9: 675-676, 704-705) Officer Bevel fell into the car onto Andrea. (T9: 676-677, 705) Andrea pushed Bevel aside and fled. (T9: 677)

A paramedic, Thomas McCone, arrived at the scene shortly after receiving the call at 12:30 a.m. (T9: 734) He found Bevel lying in the backseat of the patrol car suffering from head wounds. (T9: 735-736) Bevel had a pulse and labored breathing. (T9: 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. (T9: 735) The remaining two-thirds of Bevel's body was outside of the car. (T9: 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. (T9: 738)[1] Soon after moving Bevel to the stretcher, Bevel's heartbeat stopped. (T9: 737)

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[1] Officer John Dean, the first officer at the scene, later testified in the defense case. (T11: 1125) He found Officer Bevel lying in the backseat of the car with his head facing the rear of the backseat. (T11: 1127, 1129) Only Bevel's feet and a portion of his legs were outside of the car. (T11: 1127) Dean pulled Bevel up from his position in order to check for vital signs. (T11: 1129)

At the scene, John Bradley, then a detective, recovered several items of evidence. (T8: 498-532) He found Bevel's uniform, baseball-type cap with a bullet hole in the brim. (T8: 512) Bevel's bulletproof vest was also collected as evidence. (T8: 513) Bradley noted blood in the floorboard and on the rear seat of the car. (T8: 517-518) Officer Bevel's daily log and an offense report were recovered. (T8: 521-532) The last entry on the investigation report states that the subject possibly made a false report on the criminal mischief complaint. (T8: 531-532) The detective collected six bullets, five from the medical examiner and one from inside the frame around the door of the car. (T8: 515-516)

Bonifacio Floro, a forensic pathologist, performed the autopsy on Gary Bevel. (T9: 748) Just before he testified, defense counsel renewed his objection to the court's pretrial ruling denying him the right to hire a pathologist to assist in preparing to cross-examine Dr. Floro. (T9: 741-744) Floro found four gunshot wounds to the head and two to the shoulder and back area. (T9: 746-757) Three wounds entered the top of the head and showed stippling which indicated the gun was close when fired. (T9: 755-757) A fourth shot to the head entered above the right eyebrow and showed no stippling. (T9: 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. (T9: 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. (T9: 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. (T9: 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. (T9: 759-760) Floro said the wounds were inconsistent with the shooter lying down with Bevel lying on top of the shooter. (T9: 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. (T9: 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. (T9: 769-770) Andrea was hysterical and covered in blood. (T9: 770) She also had a gun with her. (T9: 773) Freeman could tell Andrea had been drinking, but she did not think Andrea was high or intoxicated. (T7: 442-T9: 774) Andrea said she had shot a policeman and she did not want to go back to jail. (T9: 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. (T9: 777-778) Freeman washed Andrea's clothes to get the blood out, and she also called the hospital to check on the officer. (T9: 771, 775) When Andrea learned the officer was dead, she cried and talked about how sorrow she was. (T9: 777) Freeman called a taxicab for Andrea, and she left. (T9: 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. (T9: 781-783)

The taxi driver, Carl Lee, picked-up Andrea at 4:15 a.m.(T9: 787) When he first saw Andrea at the door of the cab, she did not appear normal. (T9: 791) Lee had the impression she was high, drunk or sleepy. (T9: 791) After she entered the cab and talked to him, he concluded that she was not drunk or high. (T9: 789) He also noticed that Andrea had a gun. (T9: 789)

Andrea returned to her husband's apartment. (T9: 678- 679) His neighbor, Mable Coleman saw Andrea and called the police. (T9: 679) Officers responded and arrested Andrea. (T9: 793-802) Officer David Diperna, who had been Officer Bevel's supervisor, and Officer George Barge arrested Andrea. (T9: 794-802) Diperna saw Andrea as she ran upstairs to her husband's apartment. (T9: 798) They ultimately found Andrea on a porch. (T9: 802) She was lying down, curled up behind a trash can. (T9: 802) Barge jumped on top of her, pinning her with his knees and both officers struggled with her. (T9: 802-804, 808) Diperna said that Andrea kicked, jerked, butted and tried to bite during the struggle. (T9: 802-804, 808) She was handcuffed and searched for weapons, but the officers found Andrea did not have a weapon. (T9: 803) Later, in the apartment, the officers found a pistol lying on top of a laundry hamper. (T9: 803; T8: 508-509) Diperna testified

that he did not smell alcohol on Andrea, and in his opinion, she was not high or intoxicated. (T9: 804, 808)[2]

State's Victim Impact Evidence

Four witnesses testified to victim impact information. (T8: 493; T9: 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. (T8: 493)(R2: 215-216) Glover testified in full uniform. (R2: 209, 214) Glover said he knew Bevel personally and professionally. (T8: 494) In fact, Glover had urged Bevel to change from corrections to law enforcement and had actively recruited Bevel. (T8: 494) Glover characterized Bevel as friendly, never angry, a good friend and committed public servant. (T8: 494) The State closed its case with the remaining three victim impact witnesses, Bevel's mother and two more police officers. (T9: 824-836) Eda Bevel testified that her son was a warm, loving son who was friendly toward others. (T9: 824-827) Police Officer Jerry Thomas first met Gary Bevel when they worked in corrections at the jail. (T9: 828) He characterized Bevel as energetic and compassionate. (T9: 828) The two of them enjoyed a friendship which included participation in public service activities for underprivileged youth and senior citizens. (T9: 828-829) Detective T.C. O'Steen also met Bevel

[2]Officer Barge later testified in the defense case. (T11: 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. (T11: 1118-1119) He hit Andrea in the face during the struggle to subdue her. (T11: 1119-1120) Barge detected a slight odor of alcohol, but he did not think Andrea was intoxicated or high. (T11: 1121, 1124)

when they worked together at the jail. (T9: 831-832) The two men socialized, played sports and attended church together. (T9: 832-833) O'Steen became a police officer and Bevel remained working at the jail. (T9: 832) Bevel had told O'Steen that he did not want to be a policeman. (T9: 833) However, Bevel was later recruited and attended the police academy. (T9: 833) O'Steen said Bevel was an asset to the sheriff's office and would have surely advanced in the department. (T9: 834) O'Steen said that Bevel left a son, and he had talked to the boy about his father. (T9: 834)

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. (T13: 1456-1464) They used heroin, T's and Blues, marijuana, and lots of alcohol. (T13: 1456) T's and Blues were pink and blue pills that you crush, mixed together and shoot intravenously. (T13: 1456-1457) According Croft, this drug made you really high and sometimes irritated and angry. (T13: 1457) Croft said she and Andrea would get mean when using T's and

Blues. (T13: 1468) Andrea and Croft would start using drugs early in the morning. (T13: 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. (T13: 1472) During April and May before the homicide, Andrea and Croft had increased their drug usage. (T13: 1458-1459) On the day of the homicide, she and Andrea did a great deal of drugs and alcohol. (T13: 1459-1463) As was their pattern, they started early in the morning about 7:00 to 8:00. (T13: 1461) The two of them used 30 or more T's and Blues, drank 2 or 3 fifths of liquor and smoked marijuana. (T13: 1462) They parted company in the late afternoon or early evening. (T13: 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. (T13: 1446-1447) She had two drinks with him. (T13: 1447) He said she had been drinking before she came into the bar. (T13: 1447) She left him about 1:30 p.m. (T13: 1448, 1449)

After the shooting, Andrea ran. A passing motorist, David Lee, and his passenger gave Andrea a ride. (T12: 1369-1373) Lee was a fire fighter. (T12: 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. (T12: 1371) Lee stopped thinking she may have molested. (T12: 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. (T12: 1376-1378) Once Andrea was inside the truck, Lee confirmed that Andrea was hysterical, nervous and frightened. (T12: 1372-1373) She

smelled of alcohol, but she was able to converse without slurring her speech. (T12: 1372, 1377) Lee's friend commented on her appearance that she must have had to "take somebody out." (T12: 1373) Andrea replied, "Did something I didn't want to do." (T12: 1373) Shortly after obtaining the ride, Andrea told Lee to stop because she saw her ride. (T12: 1377) Andrea left and went to another vehicle and got inside. (T12: 1373-1374)

On the night of the homicide, Andrea telephoned her friend, Joi Shelton, and asked her to pick her up. (T13: 1486) Andrea told her that her car was broken down. (T13: 1487) Joi said that Andrea sounded nervous or excited on the telephone. (T13: 1486) Joi asked Andrea if she had been drinking. (T13: 1486) While driving to get Andrea, Joi heard Andrea call her name and she saw Andrea getting out of a truck. (T13: 1487-1488) She picked-up Andrea and they drove to Joi's house. (T13: 1488) During the drive, Andrea asked Joi several times to look at her. (T13: 1489) Finally, Joi noticed the blood on Andrea. (T13: 1489) When they were almost to Joi's house, Andrea told her that she had shot a policeman. (T13: 1490) Andrea was upset and crying. (T13: 1490) Andrea said the policeman was trying to arrest her and was putting her in the backseat of the car. (T13: 1490) The officer got on top of Andrea, and she shot him. (T13: 1490, 1512-1516)

When Joi and Andrea arrived at Joi's house, Joi awoke Shirley Freeman who was staying with her. (T13: 1491-1492) Shirley washed Andrea's clothes and drank vodka with Andrea. (T13: 1492, 1494-1495) Shirley also called the hospital to check on the condition of the officer and she learned that he was dead.

(T13: 1495-1496) Hearing that news, Andrea “went crazy.” (T13: 1496) She was upset and screaming. (T13: 1496) Joi would calm her down for a moment and then Andrea would erupt again. (T13: 1496) Andrea told Joi that she thought the officer was trying to rape her and she did not want to go to jail. (T13: 1496-1497) Joi gave Andrea money and she called a taxicab. (T13: 1497)

Later, Edith Croft was present at Shelton Jackson’s apartment when Andrea returned and was arrested. (T13: 1464-1466) She saw Andrea hiding on the porch before the policeman came. (T13: 1465-1466) Andrea was "messed up" and still "glowing". (T13: 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. (T11: 1157-1158, 1162-1163) During the interview, Andrea appeared uncooperative and hostile and also sleepy. (T11: 1159) Andrea had also reported having blackouts and headaches when she drinks and a previous attempted suicide. (T11: 1160, 1166) Andrea reported that when she drinks she cannot control her actions. (T11: 1165) At the time of the medical screening, Andrea's pupils were dilated and reacted very little to light. (T11: 1160) The medical records indicated that Andrea had scars and needle marks on her left arm. (T11: 1164) Andrea denied being an alcoholic. (T11: 1166-1167) On one question regarding allergies, Andrea responded “policemen.” (T11: 1166) She also indicated an allergy to aspirin. (T11: 1166) Andrea reported the

date of her last drug use as the day of the homicide, May 16, 1983. (T11: 1163)[3]

At the scene of Andrea's arrest, Detective Bradley recovered a plastic vial and a syringe. (T8: 550) Lab testing on the liquid taken from the vial revealed pentazocine. (T13: 1444) This is an analgesic compound known as Talwin. (T13: 1444) The drug is also one of the ingredients in the street drug "T's and Blues." (T13: 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. (T11: 1174-1198, 1223) He was asked to aid in obtaining information from Andrea's memory of what happened. (T11: 1198, 1224) The interview and hypnotic session was video-taped. (T11: 1223-T12: 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. (R1: 171-176)(T6: 89-98; T12: 1267) The videotape and a transcript of the tape are included as exhibits in this case and a copy of the transcript is included in the appendix to this

[3]On rebuttal, the State called the nurse, Pamela Ferreira, who saw Andrea at the hospital where she was taken after her arrest. (T13: 1577) This nurse called the State during the course of the trial, twelve years after the fact, with her information. (T13: 1581) Ferreira said she saw Andrea at the emergency room and she appeared oriented, controlled and appropriate. (T13: 1579) She did not think Andrea was intoxicated. (T13: 1579-1580) She said Andrea sat staring off with a set expression on her face. (T13: 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 the influence of drugs on such an observation. (T13: 1583) She never examined Andrea's pupils. (T13: 1584-1585)

brief.(App. C) Mutter quoted from the session extensively during his testimony. (T12: 1246-1282)

Initially, Mutter went through Andrea's background and personal history and her memory of the events surrounding the shooting. (T12: 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. (T12: 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. (T12: 1238-1239) He found that Andrea is generally a person who likes to avoid problems and conflicts. (T12: 1239, 1292) However, when angry she screams and yells. (T12: 1239) She used drugs to escape. (T12: 1239-1240) Mutter found that Andrea did not have bizarre thinking or a major mental disorder which produces hallucinations or delusions. (T12: 1240-1241)

Mutter explored with Andrea what she remembered about the events on the day of the shooting. (T12: 1243-1245) Her memory of the events were sketchy. (T12: 1243-1244) She said she was under the influence of alcohol, marijuana and other drugs that day. (T12: 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. (T12: 1243-1244) She remembered the confrontation with the police officer and his telling her he had to arrest her. (T12: 1244) She knew that she had shot someone but she did not know why. (T12:

1245) She had no conscious memory of the actual shooting. (T12: 1245)

In order to aid Andrea in remembering the circumstances around the shooting, Mutter hypnotized her. (T12: 1246-1247) Once under the hypnosis, Mutter took Andrea back to the time of the shooting and asked her to describe the events. (T12: 1247) She described being unhappy and wanting to do drugs to get high. (T12: 1248) She wanted to kill herself. (T12: 1248) Additionally, she felt tired and had been packing her clothes that day. (T12: 1248) Andrea wanted to find a friend to do drugs. (T12: 1248) Andrea consumed alcohol and various drugs including quaaludes and cocaine. (T12: 1248) She describes her car not starting and becoming angry and smashing the windows. (T12: 1248) She remembered a policeman arriving and the car being towed.(T12: 1248) She talked about going upstairs to the apartment and returning. (T12: 1248) She went upstairs to tell Shelton to give her her wallet and gun. (T12: 1250) She said she was going to Joi's house. (T12: 1250) Shelton told her the car had been towed. (T12: 1250) Once down-stairs, she saw the car was gone. (T12: 1250) The policeman asked her what she was doing in his car. (T12: 1249-1250) She indicated that she was reading the police report. (T12: 1251) The police officer said he was going to arrest her for lying about what happened to the car. (T12: 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. (T12: 1251) She kept saying, "Get your hands off of me." (T12: 1251) She remembered telling him to let her go. (T12: 1252) She felt

him hitting her on the shoulder and pushing her head down. (T12: 1252-1253) She felt him grab her around the neck. (T12: 1253) Her keys fall, and she remembered telling the officer that he made her drop her keys. (T12: 1253) She could see him leaning over her. (T12: 1254) She said he fell and she felt something warm all over her; Andrea said, "He's on top of me." (T12: 1254) She remembered sliding from under him and running to call Joi. (T12: 1254)

Mutter pressed her for more information about the gunshot. (T12: 1257) He took her back to the point in time where the officer was struggling with her and she dropped her keys. (T12: 1258) She remembered hearing her keys drop. (T12: 1258, 1262) She remembers being on her back with him on top of her, and sliding out from under him. (T12: 1259-1260) She remembered his hands on her, around her neck; he was twisting her hand. (T12: 1260-1262) She remembered him falling on her and feeling something warm. (T12: 1259-1263) She remembers running with the gun in her hand.(T12: 1263) He was trying to hold her down and she did not know why. (T12: 1270) She wanted him off of her. (T12: 1270) He was holding her wrist and twisting her hand. (T12: 1275) She perceived that he was trying to rape her. (T12: 1277) She felt a pistol, she pulled it out and started to shoot. (T12: 1277-1278)) Mutter asked if she remembers being raped before. (T12: 1279) Andrea started crying and said her step daddy raped her when she was ten. (T12: 1279) She thought the officer was trying to rape her because his hands were on her and he was tearing at her clothes. (T12: 1276-1279) She remembers yelling

at him to get off of her but he would not. (T12: 1280) Mutter ended the hypnotic session at that point. (T12: 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 step daddy.”

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.”

(T12: 1276-1280)

Mutter concluded that Andrea suffers from post-traumatic-stress disorder (PTSD) due to her sexual abuse history. (T12: 1284-1285) He stated that virtually every woman who has been raped develops this disorder. (T12: 1284-1285) In his practice, Mutter had seen many women who had been raped and everyone suffered from PTSD. (T12: 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. (T12: 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. (T12: 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. (T12: 1287) She reacted in fear and out of self-preservation. (T12: 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. (T12: 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. (T12: 1294-1297) He also concluded that Andrea was under the influence of an extreme mental or emotional disturbance at the time of the crime. (T12: 1297)

Dr. Ernest Miller, a psychiatrist on the faculty of the University of Florida, examined Andrea in 1990. (T12: 1378-1382) He was originally appointed at the State's request to serve as a State's expert. (T12: 1382) Miller reviewed depositions and various reports including the hypnotic regression performed by Dr. Mutter. (T12: 1383) After his examination, Miller concluded that Andrea, at the time of the shooting was "a very disturbed lady." (T12: 1384) Miller said that Andrea suffered from a personality disorder, to which her history of childhood sexual abuse contributed. (T12: 1386-1387) Additionally, he diagnosed her with a substance abuse disorder involving both alcohol and drugs. (T12: 1387) Andrea had a history of excessive use of

various street drugs and alcohol. (T12: 1387-1389) Miller explained that the toxic effects of such drug use poisons the processing of ideas and behavior. (T12: 1389-1390) He stated that one of the most consistent results of chronic drug use is the development of paranoid thinking. (T12: 1390-1391) This will cause the individual to misperceive circumstances. (T12:1391-1392) 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. (T12:1394-1395) Andrea told Miller that she had no conscious memory of the shooting of Officer Bevel. (T12:1397) He concluded that she could have suffered chemogenic amnesia due to the drug and alcohol use. (T12:1398-1399) He also stated that Andrea could have dissociated at the time of the shooting and could not remember. (T12:1399) Miller explained that dissociation is common where individuals are faced with a horrifying situation and remembering or confronting it is too painful. (T12:1399) There is psychological block of the memory, at least temporarily, to protect the individual psychologically. (T12:1399)

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. (T12:1402-1405) He responded that that was unlikely due to the emotional level she was operating on at the time of the crime. (T12:1402-1405) 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.

(T12: 1402-1405, T12: 1420-T13: 1431) Miller was also of the opinion that the mitigating factor of substantially impaired capacity at the time of the crime was applicable. (T12:1406, 1420-1421)

Dr. Lenora Walker, a clinical forensic psychologist specializing in domestic and family violence and battered women, examined Andrea and testified. (T9: 843-T10: 896) Walker is the director of the Domestic Violence Institute and holds a faculty position at the University of Denver School of Psychology. (T9:846) Her research lead to the development of the "Battered Woman Syndrome." (T10: 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. (T9: 847; T10: 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. (T9: 847-T10: 907) Walker examined Andrea again on April 19 and September 30, 1991. (T10: 939) She also viewed the videotape of the hypnotic regression and examined various police reports, depositions, and reports of other experts. (T10: 939-942) She interviewed some family members, including Andrea's estranged husband, Shelton Jackson. (T10: 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. (T10: 942) Andrea was the oldest of four children. (T10: 942) She never knew or lived with her natural father. (T10: 942) Her mother

began living with Eddie Brown and had three other children. (T10: 942) When Andrea was about 8 or 9 years-old, Brown began sexually abusing her. (T10: 943) He began fondling her, and at about age 10, he raped her. (T10: 943) He continued to rape her two or three times a week until she was 15 or 16 years-old. (T10: 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. (T10: 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. (T10: 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. (T10: 945-946) The first incident was extremely traumatic for her as she described the event to Walker, the pain was still present. (T10: 943-944) As Andrea retrieved those memories, she also retrieved the traumatic feelings which Walker noted as she related the story. (T10: 943-944) Andrea said that Brown took her into his bedroom, had her undress and lay down. (T10: 943) He had placed a towel on the bed, and he put her on the towel. (T10: 943) Brown put a pillow over Andrea’s face, got on top of her and inserted his penis into her vagina. (T10: 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. (T10: 943-944) She remembers the extreme pain, and when

Brown let her up, she noted "white stuff" all over her legs. (T10: 943-944) As she reported this story to Walker, she also said there was Vaseline on her. (T10: 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. (T10: 946) She said she was unable to sleep facing that wall, even when Brown was not in the bedroom. (T10: 947) She remembered the pain of being forced into intercourse when she saw the wall. (T10: 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. (T10: 947-948) Before she left home at the age of 15 or 16, Andrea had also been raped two other times by different individuals. (T12: 1269) She finally left home to live with Shelton Jackson, whom she later married. (T10: 955) Shelton confirmed Andrea's childhood sexual abuse and said she would have flashbacks when he and Andrea had sex. (T10: 961)

Andrea coped with the rapes in different ways. (T12: 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. (T10: 949) She would dissociate -- separate her mind from what was happening to her body. (T9: 867; T10: 949) Walker explained that dissociation is a common response when individuals have been raped as children. (T9: 867) Andrea began drinking alcohol at the age of 10 years as a way to numb her feelings. (T10: 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. (T10: 958) Andrea's drug and alcohol use escalated. (T10: 949-957) As Andrea got older, she began to exhibit angry and belligerent behavior. (T10: 956) Because of her heightened sense of vulnerability, she was quick to interpret situations as possibly dangerous. (T10: 957) This was almost a paranoid-type reaction. (T10: 956-957)[4]

Andrea's and Shelton's marriage was a tumultuous one. (T10: 958-968) They both used alcohol excessively and various drugs. (T10: 960) Shelton was abusive, violent and battered her. (T10: 960) On at least one occasion, Shelton beat Andrea to unconsciousness and she required hospital treatment and over 15 stitches to close the wounds. (T10: 960) The violence escalated to life-threatening encounters. (T10: 962) Shelton beat Andrea when she was pregnant with her second child. (T10: 963) The first time Shelton choked Andrea was when she was pregnant. (T10: 965) He also chased her with a loaded gun. (T10: 965-966) Andrea tried to get her brother to get her a gun, but he would not give her one. (T10: 966) The police were called to Shelton's and Andrea's fights several times. (T10: 966) Andrea tried to avoid confrontations with Shelton. (T10: 963) She went to her mother, but her mother sent her back to Shelton. (T10: 964) Her mother believed that Andrea simply had to stay in the marriage and make it work. (T10: 964) Finally, shortly before the shooting of Officer Bevel, Andrea separated from

[4]Andrea's brother, Kevin Hicks, confirmed this behavioral change when he noted that as Andrea got older she got meaner. (T13: 1533)

Shelton. (T10: 962) However, she was not free of him. (T10: 980-981) He continued to pressure her to return and to have sex with him. (T10: 981-982) This persisted right up through the day of the shooting of Bevel. (T10: 989-991) Andrea began carrying a gun for protection. (T10: 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. (T10: 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. (T10: 989-995) Andrea's depression, a common symptom of PTSD, was becoming worse. (T10: 994-995) She had attempted suicide a few days earlier. (T10: 982) Andrea drank alcohol and abused drugs extensively that day. (T10: 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. (T10: 991) When she lay down in Shelton's apartment to take a nap because she was tired and intoxicated, Shelton again pressured her to have sex with him. (T10: 991-992) She left, but her car would not start. (T10: 991) Andrea began to smash her car in anger and frustration. (T10: 992-998) This ultimately lead to the confrontation with and shooting of Officer Bevel. (T10: 995-1002)

Walker testified about her conclusions about Andrea's mental state the time she shot Officer Bevel. (T10: 987-1023) First, she said that Andrea suffered from PTSD, rape trauma syndrome, and impairment from the use of drugs and alcohol. (T10: 1002-1020) During her struggle with Officer Bevel, Andrea had a flashback

and misperceived Bevel's actions as an attempted rape. (T10: 1019-1021) At that time, Walker was of the opinion that Andrea was not capable of coldly calculating a premeditated murder. (T10: 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. (T10: 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. (T10: 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. (T13: 1517-1520) When Andrea was ten to twelve years-old, she would frequently come to Griffin's house. (T13: 1519) Andrea would not want to go home. (T13: 1519) Griffin encouraged Andrea and asked her why she did not want to stay at her home. (T13: 1519) Andrea replied, "You just don't know what I have to go through there." (T13: 1519-1520) Griffin's daughter, Beverly Turner, now an elementary school teacher, remembered Andrea as a child of nine or ten. (T13: 1539-1540) She said Andrea was an unhappy child. (T13: 1542-1543) Andrea was a restless, nervous child. (T13: 1542) She chewed and sucked her tongue and bit her lip. (T13: 1542) She also pulled at her clothes. (T13: 1542) Turner also remembered the times when Andrea did not want to return home. (T13: 1542-1543) Turner also learned of Andrea's being abused by her husband and her drug and alcohol use. (T13: 1544-1550)

Marvin Hicks and Kevin Hicks are Andrea's brothers. (T13: 1522-1523, 1561) Marvin died before this trial, but his affidavit was admitted in evidence. (T13: 1561) He confirmed that Eddie Brown was a heavy drinker and violent. (T13: 1562) Andrea became involved with drugs at a young age, and when she was eleven-years-old, her mood changed. (T13: 1563) Marvin knew Shelton Jackson and his sisters to be junkies when Andrea began associating with them. (T13: 1563) Andrea used heroin with Shelton for at least a year. (T13: 1563) Shelton was violent toward Andrea. (T13: 1564) Marvin stayed with Andrea when she was pregnant in case she needed help. (T13: 1564) Kelvin Hicks remembered Andrea as smart and athletic as a child. (T13: 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. (T13: 1525) When Andrea started junior high, her school performance and behavior changed.[5] (T13: 1526-1527) She got meaner. (T13: 1526) Hicks said he suspected drug use. (T13: 1526) He found little envelopes, a syringe with a spoon and a rubber band. (T13: 1526-1529) Andrea moved in with Shelton Jackson when she was in the Th or 10th grade. (T13: 1529) He was also aware of the abuse she suffered in that relationship. (T13: 1529-1530)

An affidavit Andrea's mother prepared in 1989, was read the jury. (T13: 1564) Barbara Hicks said she could never name Andrea's father because he was married and a prominent figure in the church. (T13: 1565) She left college to raise Andrea. (T13:

[5]Andrea's school records confirmed a significant drop in school performance and increased absences in junior high years. (T11: 1131-1139)

1565) Later, she lived with Eddie Brown off and on until his death. (T13: 1567) He had another family, and they could never marry. (T13: 1567) Brown drank a great deal. (T13: 1567) Ms. Hicks said that Andrea developed health problems when she was around eight years-old -- terrible headaches and a series of bladder infections. (T13: 1567) Andrea started off well in school, but later her grades slipped. (T13: 1568) Ms. Hicks knew Andrea's marriage to Shelton was a problem, but she told Andrea she had to go back to Shelton and make the marriage work, even though she knew Shelton was beating her. (T13: 1569) She expressed regrets for giving Andrea that advice. (T13: 1569-1570)

SUMMARY OF ARGUMENT

1. This Court vacated Jackson's death sentence and remanded to the trial court for resentencing. Before the resentencing, Jackson filed a *pro se* motion requesting transportation from Broward Correctional Institution to Jacksonville for the resentencing. The court denied the motion stating that no hearing would be held and that Jackson would not be present. The trial court received sentencing memorandums from the State and the Defense. Judge Moran then issued a sentencing order resentencing Jackson to death. Resentencing Jackson to without her presence and without a hearing violated her due process rights and rendered the death sentence unconstitutional.

2. This Court reversed the trial court's previous sentencing decision because the order summarily rejected

statutory and nonstatutory mitigating circumstances without explanation. The previous order rejected this mitigation without even referencing the testimony of three mental health experts who all concluded that the statutory mental mitigators applied in this case. In the current sentencing order, the trial judge has provided some explanations. However, this order now reveals that the court rejected mitigation without substantial competent evidence in the record to justify the decision. See, e.g. Nibert v. State, 574 So.2d 1059 (Fla. 1990). The order erroneously rejects the substantial mitigation in this case, and the death sentence has been unconstitutionally imposed.

3. In the previous appeal of this case, this Court held that the trial court did not abuse its discretion in finding the aggravating circumstance that the homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Even though this Court held the trial court did not abuse its discretion in finding the CCP circumstance in the previous sentencing order, the trial judge, in this new sentencing order now before this Court for review, made new and additional findings in support of the CCP factor. Since the sentence now imposed on Andrea Jackson is the one which can be carried out and not the previously imposed one, e.g.,Lucas v. State, 417 So.2d 251 (Fla. 1982), the propriety of the trial court's new findings regarding CCP are again subject to review in this Court. See, Mann v. State, 453 So.2d 784 (Fla. 1984). This Court is now constitutionally required to review these findings of fact in reviewing the propriety of the death sentence. See,

Amends. V, VIII, XIV U.S. Const.; Parker v. Dugger, 498 U.S. 308 (1991).

4. 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. Assuming the premeditation aggravating circumstance was properly found, the two aggravating circumstances are of insufficient weigh to overcome the significant mitigation. Jackson's death sentence has been improperly imposed.

5. The prosecutor made improper closing arguments to this jury which invited the jurors to rest their recommendation on invalid considerations. First, the prosecutor told the jury that the three law enforcement related aggravating circumstances which were merged into a single aggravating circumstance, were actually based on three statutory aggravating circumstances and the one factor was entitled to enhanced weight. Second, the prose-cutor 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.

6. 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.

7. The trial court improperly excluded the videotape of the hypnotic regression session Dr. Mutter performed with Jackson. This videotape 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.

8. 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 stated the request for an expert was without merit because the medical

examiner's testimony had no relevance to aggravating or mitigating circumstances.

ARGUMENT

ISSUE I
THE TRIAL COURT ERRED IN RESENTENCING JACKSON WITHOUT A HEARING AND IN DENYING JACKSON HER REQUEST TO BE PRESENT AT SENTENCING IN VIOLATION OF DUE PROCESS OF LAW.

This Court vacated Jackson's death sentence and remanded to the trial court for resentencing. Jackson v. State, 704 So.2d 500, 508 (Fla. 1997). Before the resentencing, Jackson filed a *pro se* motion requesting transportation from Broward Correctional Institution to Jacksonville for the resentencing. (RES1:16) The court denied the motion stating the following:

> ... The Supreme Court of Florida reversed the defendant's death sentence and remanded the case back to this Court for the sole purpose of entering a new written sentencing order, setting forth this Court's evaluation of each of the sentencing mitigators pursuant to the court's decision in Campbell v. State, 571 So.2d 415 (Fla. 1990). No additional hearings will be held and this Court will not be entertaining any new evidence beyond that which is already in evidence. Accordingly, the defendant's presence is neither necessary nor required. Sinks v. State, 661 So.2d 303 (Fla. 1995).

(RES1:21) The trial court received sentencing memorandums from the State and the Defense. (RES1:27-41, 50-81) Judge Moran then issued a sentencing order resentencing Jackson to death. (RES1:82-107)(App. A) Resentencing Jackson to death without her presence and without a hearing violated her due process rights under the Eighth and Fourteenth Amendment of the United States Constitution, and Article I, sections 9, 16 & 17 of the Florida Constitution.

Initially, the trial court may have misunderstood the nature of this Court's remand. In the above quoted order denying Jackson the right to be present, the trial court wrote:

> ...The Supreme Court of Florida reversed the defendant's death sentence and remanded the case back to this Court for the sole purpose of entering a new written sentencing order ....

(RES1:21) In fact, this Court's remand directed that Jackson be resentenced. This Court wrote:

> ...we vacate Jackson's sentence and remand to the trial court to reweigh the aggravating and mitigating circumstances and resentence Jackson in compliance with *Campbell* and its progeny.

Jackson, 704 So.2d at 508. The trial court's actions in this case was a resentencing. Jackson was entitled to all of the procedural rights and safeguards applicable to a sentencing.

Florida Rules of Criminal Procedure require that every sentence be pronounced in open court; that the defendant must be given an opportunity to show legal cause why a sentence should not be pronounced; and that the defendant must be given an opportunity to present mitigating evidence. Fla. R. Crim. P. 3.700 & 3.720. These rules are mandatory, Mask v. State, 289 So.2d 385 (Fla. 1973); Small v. State, 371 So.2d 532 (Fla. 3d DCA 1979), and apply with equal force at a resentencing proceeding. State v. Scott, 439 So.2d 219 (Fla. 1983); Westberry v. Cochran, 118 So.2d 194 (Fla. 1960); McRae v. State, 400 So.2d 175 (Fla. 5th DCA 1981); Walker v. State, 284 So.2d 415 (Fla. 2d DCA 1972); Thacker v. State, 185 So.2d 202 (Fla. 3d DCA 1966); Neering v. State, 164 So.2d 29 (Fla. 1st DCA 1964). The denial of any of

these basic protections is a violation of due process under the Florida and United States Constitutions.

Rules 3.700 and 3.720 expressly apply to capital and noncapital proceedings. Additionally, Rule 3.780, applicable only to capital cases, specifically requires the trial judge to allow both parties to present evidence and argument at "all proceedings based on section 921.141, Fla. Stat." A defendant's rights to be present, to be heard, to be represented, and to present evidence are even more critical when the defendant is facing a death sentence. In a death penalty case, the trial judge's sentencing discretion is circumscribed by the requirements of Section 921.141, Florida Statutes. Resentencing involves much more than "cleaning up the language of the order." See Lucas v. State, 417 So.2d 25 (Fla. 1982)(Lucas II). Resentencing because of incomplete factual findings, as was ordered here, requires the trial judge to reconsider the evidence, make new findings of fact, draw legal conclusions, and perform *de nova* the process of weighing aggravating and mitigating factors. The judge must rethink the decision, not merely provide an after-the-fact rationale for his constitutionally deficient initial decision.

A capital defendant is entitled to the same protections at resentencing to which he was entitled at his original sentencing. This Court set forth the procedure to be followed by the judge, after the jury's advisory verdict has been rendered, in Spencer v. State, 615 So.2d 688 (Fla. 1993). Under Spencer, once the jury has rendered its advisory verdict, the trial judge must hold

a separate hearing at which the defendant, his counsel, and the state must be allowed to present additional evidence and argument. The defendant must be given an opportunity to be heard in person. The trial judge must then recess the proceedings to consider the appropriate sentence, and hold another hearing to impose sentence and contemporaneously file the written sentencing order. Spencer, at 690-691. On resentencing before the judge only, a defendant is entitled to the procedural protections as set forth in Spencer.

In this case, the trial court resentenced Jackson to death without holding hearing and without her presence. This procedure violated her due process rights under the Rules of Criminal Procedure and the United States and Florida Constitutions to be present and have the opportunity to be heard before being sentenced.

Jackson acknowledges that this Court has held that a defendant is not entitled to present new evidence at a judge-only resentencing. Crump v. State, 654 So.2d 545 (Fla. 1995); Davis v. State, 648 So.2d 107 (Fla. 1994), cert. denied, 116 S.Ct. 94, 13 L.Ed.2d 50 (1995); Lucas v. State, 613 So.2d 408 (Fla. 1992)(Lucas V), cert. denied, 510 U.S. 845, 114 S.Ct. 136, 126 L.Ed.2d 99 (1993). These decisions, however, failed to acknowledge or distinguish a long line of precedent to the contrary. See Scull v. State, 569 So.2d 1251 (Fla. 1990)(expressly directing that both sides be permitted to present new evidence at judge-only resentencing); Lucas v. State, 490 So.2d 943 (Fla.1986)(Lucas III)(holding trial court erred in

refusing to allow defendant to present new evidence at judge-only resentencing); Oats v. State, 472 So.2d 1143 (Fla.1985)(approving sub silento judge-only resentencing procedure at which state was permitted to present new evidence to prove aggravator not found at original sentencing), cert. denied, 474 U.S. 865, 106 S.Ct. 188, 88 L.Ed.2d 157 (1985); Mann v. State, 453 So.2d 784 (Fla. 1984)(approving judge-only resentencing at which state was allowed to prove aggravator it failed to prove at original sentencing), cert. denied, 469 U.S. 1181, 105 S.Ct. 940, 83 L.Ed.2d 953 (1985); Menendez v. State, 419 So.2d 312 (Fla. 1982)(approving judge-only resentencing procedure at which both sides were permitted to present new evidence; reducing sentence to life based in part on new evidence).

Crump, Davis, and Lucas V are indistinguishable from Scull, Lucas III, Oats, Mann, and Menendez. All were remanded because of error in the trial court's findings. All involved resentencing before the judge only. All required the trial judge to make new factual findings or reweigh the aggravating and mitigating circumstances.

In Scull, the Court held the defendant's due process rights were violated where the trial court imposed a new death sentence one day after mandate issued and just three days after defense counsel had returned from a Christmas vacation. This Court had remanded for resentencing because the trial court initially had sentenced Scull to death based on aggravating factors the Court determined were unsupported by the evidence. The resentencing in

Scull, therefore, was before the judge only. In concluding the resentencing procedure violated due process, the Court said:

> The essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered. Tibbetts v. Olsen, 91 Fla. 824, 108 So. 679 (1926). Due process envisions an law that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parties. State ex rel. Munch v. Davis, 143 Fla. 236, 244, 196 So. 491, 494 (1940). In this respect the term "due process" embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals. See art. I, s. 9, Fla. Const.

569 So.2d at 1252.

The Court in Scull further held the defendant need not show he was actually prejudiced by the deficient proceeding:

> [T]he appearance of irregularity so permeates these proceedings as to justify suspicion of unfairness. This, we believe, is as much a violation of due process as actual bias would be. Accordingly, we must vacate the sentence and remand for another sentencing hearing in compliance with this opinion and with the dictates of due process.

Scull, at 1252; see also Huff, 622 So.2d at 984 (when procedural error reaches level of due process violation, it becomes a matter of substance; overriding concern is appearance of impartiality, not actual prejudice).

Based on Scull, a defendant who is being resentenced before the judge only is entitled to a hearing, effective assistance of counsel, and an opportunity to present new evidence. See also Lucas III, Oats, Mann, Menendez. This Court's cases to the contrary -- Lucas V, Crump, and Davis -- failed to recognize, or erroneously distinguished, this precedent. Instead, the Court looked only to the terminology used in the opinion remanding the

case, without considering the reason for remand. Furthermore, in Lucas V, Crump, and Davis, the Court did not address due process or Eighth Amendment requirements.

Jackson was entitled to a full Spencer hearing and all the concomitant procedural protections. Sentencing Jackson to death without a hearing and without giving him an opportunity to be heard in person and by counsel was a violation of due process of law under Article I, sections 9 and 16, of the Florida Constitution, and the Fourteenth Amendment of the United States Constitution.

ISSUE II
THE TRIAL COURT ERRED IN EVALUATING THE MITIGATING EVIDENCE, BASING FACTUAL CONCLUSIONS ON SPECULATION AND THE COURT'S PERSONAL OPINIONS WHICH CONTRADICTED WELL ESTABLISHED PSYCHOLOCIAL PRINCIPLES, AND REJECTING MITIGATING CIRCUMSTANCES WITHOUT SUBSTANTIAL COMPETENT EVIDENCE TO SUPPORT THE DECISION TO REJECT THE MITIGATING FACTOR.

This Court reversed the trial court's previous sentencing decision because the order summarily rejected statutory and nonstatutory mitigating circumstances without explanation. Jackson v. State, 704 So.2d 500, 506-507 (Fla. 1997). The previous order rejected this mitigation without even referencing the testimony of three mental health experts who all concluded that the statutory mental mitigators applied in this case. Ibid. In the current sentencing order, the trial judge has provided explantions for rejecting the mitigating circumstances. (RES1:93-105)(App. A) However, this order now reveals that the court rejected mitigation without substantial competent evidence in the record to justify the decision. See, e.g. Nibert v. State, 574 So.2d 1059 (Fla. 1990). The court reached factual conclusions

based upon improper and unfounded speculation and inferences. The court violated due process in rejecting opinions of mental health experts based on the court's personal opinions about psychology and behavior which contradicted the accepted principles in the field upon which the experts relied. See, Alamo Rent-A-Car v. Phillips, 613 So.2d 56 (Fla. 1st DCA 1993). The order erroneously rejects the substantial mitigation in this case, and the death sentence has been unconstitutionally imposed. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const. Jackson now asks this Court to reverse her death sentence.

LEGAL STANDARDS

In a capital case, the trial court and this court are constitutionally required to consider any mitigating evidence found anywhere in the record. Amends. V, VIII, XIV U.S. Const.; Parker v. Dugger, 498 U.S. 308 (1991); Art. I Secs. 9, 17 Fla. Const.; e.g., Santos v. State, 591 So.2d 160 (Fla.1991); Campbell v. State, 571 So.2d 415 (Fla.1990); Rogers v. State, 511 So.2d 526 (Fla.1987). This Court addressed the duties of the sentencing court to find and consider mititation in Rogers v. State, 511 So.2d 526. Acknowledging the command of Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982), this Court defined the trial judge's duties as follows:

> ...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 has 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. In Campbell v. State, 571 So.2d 415 (Fla. 1990), this Court reiterated the duties outlined in Rogers and added the requirement that the trial court fully explain with clarity its evaluation of each mitigating factor in its sentencing order.

In Nibert v. State, 574 So.2d 1059 (Fla. 1990), this Court stated that a trial court does have the discretion to reject a mitigating circumstance asserted by a capital defendant. However, the trial court can reasonably exercise that discretion only where the record contains competent substantial evidence refuting the mitigating circumstance:

> A trial court may reject a defendant's claim that a mitigating circumstance has been proved, however, provided that the record contains "competent substantial evidence to support the trial court's rejection of these mitigating circumstances." Kight v. State, 512 So.2d 922, 933 (Fla.1987), cert. denied, 485 U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 262 (1988); Cook v. State, 542 So.2d 964, 971 (Fla.1989) (trial court's discretion will not be disturbed if the record contains "positive evidence" to refute evidence of the mitigating circumstance);see also Pardo v. State, 563 So.2d 77, 80 (Fla.1990) (this Court is not bound to accept a trial court's findings concerning mitigation if the findings are based on a misconstruction of undisputed facts or a misapprehension of law).

Nibert, 574 So.2d at 1062.(This Court, in Nibert, concluded that the trial court had improperly rejected mitigating circumstances based on Nibert’s mental condition).

When expert testimony and opinion support a mitigating circumstances, a sentencing judge can reject the opinion, provided the record contains substantial competent evidence to reject it. See, Walls v. State, 641 So.2d 381 (Fla. 1994); Foster v. State, 679 So.2d 747 (Fla. 1996); Nibert v. State, 574 So.2d 1059 (Fla. 1990). However, the sentencing judge cannot reject the opinion of the expert relying on the judge's personal opinion or lay experience to reject the basis of the expert's opinion. See, Alamo Rent-A-Car v. Phillips, 613 So.2d 56 (Fla. 1st DCA 1993); Romero v. Waterproofing Systems of Miami, 491 So.2d 600 (Fla. 1st DCA 1986); Jackson v. Dade County School Board, 454 So.2d 765 (Fla. 1st DCA 1984).

THE TRIAL COURT'S SENTENCING ORDER

A. THE TRIAL COURT ERRED IN REJECTING THE UNREBUTTED OPINIONS OF THREE MENTAL HEALTH EXPERTS TO REACH THE CONCLUSION THAT THE STATUTORY MITIGATING CIRCUMSTANCE THAT THE DEFENDANT SUFFERED FROM AN EXTREME MENTAL OR EMOTIONAL DISTURBANCE WAS NOT APPLICABLE.

1. The Trial Court Erred In Rejecting The Testimony Of Dr. Charles Mutter

The trial court rejected the testimony and opinion of Dr. Mutter claiming: (1) Dr. Mutter lead the defendant during the hypnosis session to the conclusion that the officer was on top of her and she thought she was going to be raped; and (2) Andrea fabricated her childhood rape history and her allegation of an attempted rape was an excuse. (RES1:97-98)(App. A) First, the court relies on a single statement Mutter made during the entire hypnosis session as *the* improper leading event. (RES1:95-96)(T12: 1264, 1269-1270) Furthermore, the court misreads the comment and takes it out of context. Also,

the trial court came to these conclusions without ever having viewed the best evidence of Mutter's hypnosis technique -- the videotape of the hypnotic regression. See, Issue VII, *infra*. Nothing in the record indicates that the trial judge even read the entire transcript of the hypnosis session. (Copy of this transcript is attached to this brief, Appendix C) Second, the court concluded that Andrea's childhood sexual abuse history was a fabrication. However, on the indentical record, the court found, in the previous sentencing order, that Andrea suffered from a sexual abuse history. (R2: 236-237)(App. B)

The trial judge concludes that Mutter lead Andrea during the hypnosis session to conclude that the officer was on top of her and that she was about to be raped. (RES1:95-97) In his order, the trial judge relies on the following comment from the portion of the transcript of the hypnotic session Mutter read during his testimony:

> Doctor: "All right. Let's stop at this moment. Let your mind, you're back where you are in the car and you got the gun in your hand, you're okay, you can remember, he is on you, he won't get off, you have the gun in your hand, what happens with you and the gun? You're right there. Pay attention to that experience, your mind knows, let it come out."

(T12: 1264)

Contrary to the trial court's conclusion, when placed in context, the above comment was not leading. Mutter was merely resetting the scene as Andrea herself earlief described it. (T12: 1248-1264)[6] After Andrea first described the event

[6] For this Court's convenience, pages 1247 through 1270 are reproduced in the appendix to this brief, App. D.

under hypnosis (T12: 1248-1256), Mutter used the technique of focusing Andrea on the crucial point of the events -- the point where she pulled her gun -- in an attempt to recover further repressed memories from her. (T12: 1256-1257) Shortly before Mutter's comment, Andrea made similar references to the actions of the officer before the shooting. (T12: 1257-1264) She said,

* "He's got his hands on me, he won't get up." (T12: 1260)

* "He's just over me. Over me. His hands are on my neck and he won't get up." (T12: 1260)

* "I'm trying to push him off me." (T12: 1260)

* "I get this hand on his shoulder. Around the sleeves and he won't move or get up off me." (T12: 1260)

* "He won't let me go." (T12: 1262)

* "He let my hand go and he goes back, he leaned back and I tried to get up and I get up, he grab me. Go back on my feet, he tried to grab my hands. I get my gun and he's on me, get up off me, he won't move. I see his cap, his cap comes off. He is on me. It's warm. Get up off me." (T12: 1262-1262)

As these few references show, Andrea provided the information about the officer being on her and not getting off of her. Mutter's comment did not lead Andrea to any conclusion because she had already described that memory before Mutter's comment.

According to the trial court, Mutter lead Andrea to the conclusion that the officer was on top of her before the shooting which then lead Andrea to the conclusion that the officer was about to rape her. (RES1:96-97) This reasoning, even assuming Mutter had improperly lead Andrea to the conclusion that the officer was on top of her, is faulty

because the reasons Andrea gave for her belief that she was about to be raped included much more than officer merely being on top of her. Andrea stated,

> 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."

(T12: 1276-1278)

As a second reason for rejecting Dr. Mutter's opinion, the trial judge concludes that Andrea fabricated her sexual abuse history and was merely attempting to make up an excuse. (RES1:97-98) The judge rejected the opinion that Andrea experienced a flashback because of this fabrication. (RES1:98)

The court first rejects Mutter's opinion because he did not know that Andrea had told Joi Shelton on the night of the murder that she thought the officer was going to rape her. (RES1:97) This fact does not diminish Mutter's view that Andrea's statements about being raped as a child were reliable because she did not immediately mention she had been raped as a child when first place under hypnosis. Moreover, Andrea had repressed much of her memory about the traumatic shooting event. (T12: 1242-1246) Such repression of memories of traumatic events is common. (T12: 1283-1284) She apparently did not remember telling Joi Shelton that she thought the officer was going to rape her. (T12: 1242-1246)

As a second reason for concluding Andrea fabricated her sexual abuse history, the court states that later Andrea was able to relate details about the childhood rape even though Dr. Mutter said she would not remember it after the hypnosis session. (RES1:98) The court misinteprets the facts. There was never any indication that Andrea did not remember the childhood sexual abuse prior to the hypnosis session. The hypnosis was aimed at recovering repressed memories about the traumatic events surrounding the shooting of the officer. (T11: 1198, 1224 T12: 1237) ***Mutter asked Andrea if she wanted to remember the shooting incident, not the childhood rape***. (T12: 1280-1281) Furthermore, Mutter never told Andrea she ***would not remember*** any of the memories recovered during the hypnosis session, ***he said she would only remember those she was capable of handling emotionally***. (T12: 1280-1281) Mutter testified, as read from the transcript of the hynosis session, as follows:

> Doctor: "Anything else, is there anything else? That's okay."
>
> Andrea: (no answer)
>
> Doctor: "Do you wish to remember this?"
>
> Andrea: "No at this point."
>
> I said, "All right, you will only remember that which you were able to deal with emotionally, everything else let it fade out but let what memory come forth and will ask you to fade out soon.
> In your mind moves forward into the present time in 1988, do you you now in 1988, believe that the man was trying to rape you?
>
> Answer: "I don't know."
>
> Doctor: "Okay. Let that fade out. And you will only remember that which you can handle emotionally like we are put into a suitcase and closing it up. Back

> in the suitcase closing it up. And when that's done, when those memories fade out just nod your head slightly like you've done it before so I'll know. And when that happens your body will welcome[sic] more relaxed and those memories will fade. Let it all go back out and wait, let it leave, let the suitcase memories be closed back again. You do not need to remember anything you don't want to remember, your mind will protect you."

(T12: 1280-1281)

2. <u>The Trial Court Erred In Rejecting The Testimony Of Dr. Lenora Walker</u>

In rejecting the opinion of Dr. Walker, the trial judge stated three reasons:

> ...First, her conclusion is based on the defendant's self-serving statements to her as what happened, which this Court finds to be void of credibility, and are inconsistent with the facts of what occurred in this case. Second, it defies logic to say that the defendant coped with allegedly being raped by getting involved with other men; the defendant did not have flashbacks and attempt to kill her former boyfriends or her ex-husband, nor did the defendant ever try and kill a police officer when she had been previously arrested and placed in the back of a police car. Third, both Dr. Mutter and Dr. Walker testified that the defendant would not have any further flashbacks with police officers unless the specific circumstances in this case occurred again. This ignores the fact the[sic] during the hypnosis session, which was supposed to be the revelation of why the defendant committed this murder, the defendant stated that she had been raped by her stepdaddy at age 10, despite the fact that Dr. Mutter had specifically asked the defendant has, "Any man ever raped you before in your whole life." (Transcript pages 1364, 1367) The facts of the alleged rape by the defendant's stepfather when she was ten years old are in no way similar to the specific circumstances(the actual facts) of this case. This Court finds the defendant's claim of a flashback to be a fabrication and totally unsupported by the actual facts of this case.

(RES1:99-100)(App. A) These reasons are based on speculation, bare conclusions and the trial judge's personal opinion and views about psychology and behavior which contradict

established psychological principles upon which the experts base their opinions.

The judge's first reason is nothing more that a bare statement that he did not believe anything Andrea said. (RES1:99) Although the judge says Andrea's statements are "void of credibility" and "inconsistent with the actual facts", he does not explain his basis for these conclusions. (RES1:99)

As a second reason, the judge states "it defies logic to say that the defendant coped with allegedly being raped by getting involved with other men." (RES1:99) Here the judge has improperly substituted his personal opinions about psychology for the well established understanding of the principles of human behavior relied upon by the experts. See, Alamo Rent-A-Car v. Phillips, 613 So.2d 56. In fact, childhood sexual abuse survivors commonly become sexually promiscuous as teenagers and adults. See, David Finkelhor, The Trauma of Child Sexual Abuse, in Lasting Effects Of Child Sexual Abuse, edited by Gail Elizabeth Wyatt & Gloria Johnson Powell, Sage Publications copywright 1988, pp. 61, 72-73. (Reproduced in appendix to this brief, App. E) Survivors of sexual abuse often engage in behaviors similar to the abuse itself as a way of somehow working out the emotional turmoil brought on by the abuse. In her classic book on post-traumatic stress disorder, Trauma and Recovery, Dr. Judith Lewis Herman states:

> Adults as well as children often feel impelled to re-create the moment of terror, either in literal or in disguised form. Sometimes people reenact the traumatic moment with a fantasy of changing the outcome of the dangerous encounter. In their attempts to undo the traumatic moment, survivors may

> even put themselves at risk of further harm. Some reenactments are consciously chosen....
>
> * * * *
>
> More commonly, traumatized people find themselves reenacting some aspect of the trauma scene in disguised form, without realizing what they are doing....

Trauma And Recovery, by Judith Lewis Herman,M.D., Basic Books copywright 1992, pp. 39-40. (Reproduced in the appendix to this brief, App. F)

A trial court is not free to reject an expert's opinion relying on the judge's on personal opinions which contradict the principles of the expert's field. In Alamo Rent-A-Car, 613 So.2d 56 (Fla. 1st DCA 1992), the First District Court of Appeal reversed a decision of a Judge of Compensation Claims where the judge rejected the opinion of a medical doctor that the claimant's streptococcal pneumonia would not be aggravated by cold or wet conditions. The judge rejected the opinion stating, "I know better from personal experience." 613 So.2d at 57. Concluding that the claims judge impermissibly relied on personal opinion to reject the medical doctor's opinion, the appellate court reversed stating:

> Moreover, there is another reason why the JCC's findings must be rejected. The JCC appears to have impermissibly relied on his personal experience to conclude that claimant's pneumonia was aggravated by his working conditions. The question whether claimant's pneumonia was caused by or aggravated by his working conditions is essentially a medical one which is most persuasively answered on the basis of the medical evidence provided, rather than a matter falling within the sensory experience of a lay person.See Romero v. Waterproofing Systems of Miami, 491 So.2d 600, 602-603 (Fla. 1st DCA 1986) (citing Jackson v. Dade County School Board, 454 So.2d 765, 766 (Fla. 1st DCA 1984)). With respect to the causation of streptococcal pneumonia, even claimant's expert witness, Dr. Alexander, testified that the

> disease is caused by inhalation of the particular bacteria. Although Dr. Alexander testified that claimant's pneumonia could "get worse" if he returned to work while still suffering from the disease, it is not clear whether the JCC's findings reflect a preference for Dr. Alexander's opinion over that of Dr. Brumer (even assuming the JCC was giving fair consideration to Dr. Brumer's opinion), or whether the JCC was simply giving undue weight to his own unqualified lay opinion on the aggravation question. In such a case, we are reluctant to conclude that the JCC's findings are supported by competent, substantial evidence.

Alamo Rent-A-Car, 613 So.2d at 58. In this case, the judge has likewise violated Jackson's due process rights by employing his own personal views for that of the experts. The trial court's decision rejecting the testimony of Dr. Walker is not supported by substantial competent evidence.

The third reason the court provides for rejecting Dr. Walker's testimony also suffers from the same problem. In rejecting that Andrea suffered a flashback, the judge has again relied on his personal opinion about flashbacks which contradict the well established understanding of the psychology of flashbacks employed by the experts. Contrary to the judge's view, flashbacks are not dependent on the person experiencing a factually similar event. The cues which can prompt a flashback are frequently quite subtle and often *seemingly* unrelated to the prior traumatic event. Dr. Judith Herman writing in Trauma And Recovery, *supra*. at 37, stated:

> Long after the danger is past, traumatized people relive the event as though it were continually recurring in the present. They cannot resume the normal course of their lives, for the trauma repeatedly interrupts. It is as if time stops at the moment of trauma. The traumatic moment becomes encoded in an abnormal form of memory, which breaks spontaneously into consciousness, both as flashbacks

> during waking states and as traumatic nightmares during sleep. Small, seemingly insignificant reminders can also evoke these memories, which often return with all the vividness and emotional force of the original event. Thus, even normally safe environments may come to feel dangerous, for the survivor can never be assured that she will not encounter some reminder of the trauma.

In the DSM IV, under the diagnostic criteria for Post-Traumatic Stress Disorders, reexperiencing the traumatic events in various ways, including flashbacks, are features of PTSD:

> The traumatic event is persistently reexperienced in one (or more) of the following ways:
> (1) recurrent and intrusive distressing recollections of the event, including images, thoughts, or perceptions. Note: In young children repetitive play may occur in which themes or aspects of the trauma are expressed.
> (2) recurrent distressing dreams of the event. Note: In children, there may be frightening dreams without recognizable content.
> (3) acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative flashback episodes, including those that occur on awakening or when intoxicated). Note: In young children, trauma-specific reenactment may occur.
> (4) intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.
> (5) physiological reactivity on exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.

Diagnostic And Statistical Manual Of Mental Disorders, American Psychiatric Association, copywright 1994, section 309.81, p. 428. (Reproduced in the appendix to this brief, App. H)

Bruce D. Perry, M.D.,Ph.D., in his work Memories of Fear, published as a chapter in Splintered Reflections: Images of the Body in Trauma, edited by J. Goodwin and R. Attias, Basic Books (1999), writes about the how the brain processes traumatic events:

> The physiological hyper-reactivity of post-traumatic stress disorder is a cue-evoked ‘state’ memory .... The brain has taken a pattern of neuronal activation previously associated with fear and now will ‘act’ in response to this false signal. The ‘recall’ of the traumatic state memories underlies many of the abnormal persistent characteristics of the once-adaptive response to threat.... This persistent ‘fear’ state and the ability of now non-threatening cues to become paired to a full blown threat response is related to the remarkable capacity of the human brain to make associations.

Memories of Fear, *supra*. (Reproduced in the appendix to this brief, App. G) Dr. Walker’s testimony was correctly premised on this understanding of the flashbacks as documented in research in the field.

3. The Trial Court Erred In Rejecting The Testimony Of Dr. Ernest Miller

Dr. Miller expressed an opinion that Andrea was suffering from a personality disorder which was exacerbated by substance abuse disorder involving drugs and alcohol. (T12: 1383-1395) He concluded that Andrea was very disturbed at the time of the shooting due to her mental impairments and toxic condition due to drug and alcohol use. (T12: 1388-1399, 1402-1405, 1420-1431) The trial court rejected Dr. Miller’s opinion with one conclusory sentence:

> This Court rejects Dr. Miller’s conclusion because the overwhelming evidence presented through twelve witnesses(including four eyewitnesses to the actual murer) establish beyond any reasonable doubt that the defendant’s mental faculties were not impaired before, during or even after the defendant committed the murder.

(RES1:101)

The court's order did not discuss the evidence about Andrea's drug and alcohol use, presented through several witnesses, which supports the basis for Dr. Miller's opinions:

Edith Croft used drugs and alcohol with Andrea on a daily basis. (T13: 1456-1464) On the day of the homicide, Croft said she and Andrea began the day between 7:00 and 8:00 a.m. using T's and Blues, drinking liquor and smoking marijuana. (T13: 1459-1463) This usage continued into the late afternoon. (T13: 1463-1464) Croft was present at the apartment where Andrea was later arrested. (T13: 1464-1466) She said Andrea was still "glowing." (T13: 1466)

Richard Washington drank alcohol with Andrea between 10:00 a.m. and 1:30 p.m. on the day of the homicide. (T13: 1446-1447) He said Andrea had been drinking before they met that morning. (T13: 1447)

Adam Gray, the auto salesman, testified that Andrea did not appear to be on drugs to him when she was in his office. (T9: 730-732) This contact occurred in the afternoon of May 16, 1983, several hours before the homicide which occurred in the early morning of May 17. (T8: 525; T9: 732)

Gina Rhoulac stated that Andrea did not stagger and seemed to be able to talk to Officer Bevel. (T8: 567-568) However, Rhoulac's observations were from a distance. (T8: 572) She was not close enough to hear what Andrea said or to detect any odor of alcohol. (T8: 572)

Anna Nelson testified that Andrea's speech did not appear slurred and Andrea did not fall down or slip when walking. (T8:

584-585) Nelson admitted that her observations were from 60 feet away and she was not concerned with determining if Andrea was under the influence of drugs or alcohol. (T8: 599-600) She was not close enough to tell if Andrea smelled of alcohol. (T8: 613)

Mable Coleman did not see Andrea stumble and she said Andrea did not appear drunk. (T8: 658-659) Coleman admitted that she was not close enough to determine if Andrea smelled of alcohol. (T9: 682) Coleman also stated she has no idea how someone on drugs acts. (T9: 683)

Officer Griffin, who assisted Officer Bevel, stated that Andrea smelled of alcohol when he talked to her. (T9: 724) He said that Andrea did not slur her speech or stumble when she walked. (T9: 715-717) Griffin admitted that it would be hard to determine the behavior of someone who was under the influence of alcohol, marijuana, cocaine and T's and Blues taken on the same day. (T9: 722-723) Furthermore, Griffin said if he had seen someone smashing a car and cursing it like a person that such irrational behavior would cause him to suspect the person was under the influence of some substance. (T9: 723-724)

David Lee, the firefighter who gave Andrea a ride shortly after the homicide, testified that Andrea seemed excited and "fumbled" as she got into his truck. (T12: 1371, 1376-1378) When Andrea got inside the truck, Lee saw that she was hysterical and smelled of alcohol. (T12: 1372-1377)

Joi Shelton, Andrea's friend who picked her up from Lee's truck, said Andrea was excited , nervous and upset. (T13: 1486) Joi asked Andrea if she had been drinking. (T13: 1487)

Shirley Freeman saw Andrea at least an hour after the homicide. (T9: 769-770) Freeman testified that Andrea smelled of alcohol but she did not slur her speech or have trouble walking. (T9: 772-773) Freeman had been using pain medication herself that day. (T9: 779) **Joi Shelton**, who was also present, testified that Freeman drank vodka with Andrea while they were at Joi's house. (T13: 1495)

Carl Lee, the taxi driver who drove Andrea away from Joi's house, testified his first impression of Andrea was that she was high or sleepy. (T9: 791) He said that she did not appear normal. (T9: 791) After she entered the car, he concluded that Andrea was not drunk or high because she could converse with him. (T9: 789) Lee saw Andrea at 4:15 a.m., about four hours after the homicide. (T9: 787)

Officer Dipernia arrested Andrea at 4:45 a.m. (T9: 796) Andrea ferociously fought the officer in an irrational manner. (T9: 808) However, Dipernia said he did not smell alcohol on Andrea and in his opinion, she was not intoxicated. (T9: 804, 808) **Officer Barge**, who assisted with the arrest, also said he did not think Andrea was intoxicated, but he smelled alcohol on Andrea. (T11: 1121, 1124)

John Bradley, the investigator who observed Andrea at the time of her arrest, testified that Andrea was under the influence of alcohol or drugs. (T8: 548-549) He did not

believe she was intoxicated to the point she could not "understand the English language" or communicate with the him. (T8: 557-558)

Records of the medical screening done at the detention center right after Andrea's arrest indicated that Andrea was hostile, admitted using various drugs, and her pupils were dilated and had little reaction to light. (T11: 1157-1164) Andrea stated she blacks out when she drinks and loses control of her actions. (T11: 1165) Records from the University Hospital, where she was taken for treatment after her arrest (over five hours after the homicide), indicated Andrea was belligerent. (T11: 1145, 1149-1148) **Pamela Ferreira**, the nurse who saw Andrea at the hospital, said Andrea was belligerent and stared off with a set expression. (T13: 1579) Although Ferreira at first said she did not think Andrea was intoxicated (T13: 1579-1580), she said she would have suspected influence of drugs had she realized Andrea had dilated pupils with little reaction to light. (T13: 1583) Ferreira had not examined Andrea's eyes. (T13: 1584-1585)

B. THE TRIAL COURT ERRED IN REJECTING THE STATUTORY MITIGATING CIRCUMSTANCE THAT THE DEFENDANT'S CAPACITY TO APPRECIATE THE CRIMINALITY OF HER CONDUCT WAS SUBSTANTIALLY IMPAIRED

The trial court rejected this mitigating circumstance because,

> The evidence in support of this claim was in the form of the defendant's own self-serving statements to the mental health evaluators hired by the defendant and through the testimony of her friends and convicted felons Richard Washington and Edith Croft.

(RES1:101) This order never discussed the testimony of the various witnesses, as discussed above, to their impressions of Andrea's drug and alcohol use. Additionally, the court disparages the mental health expert to whom Andrea related her drug and alcohol abuse as "hired by the defendant." (RES1:101) In fact, Dr. Miller, the expert who testified as the expert in substance abuse, was hired by the State to perform the examination of Jackson. (T12: 1382) The evidence does support the the conclusions of the mental health experts that Andrea's mental condition qualified for this mitigating circumstance.

C. THE TRIAL COURT ERRED IN REJECTING AS A NONSTATUTORY MITIGATING CIRCUMSTANCE THAT JACKSON SUFFERED FROM A HISTORY OF CHILDHOOD SEXUAL ABUSE

The trial judge again improperly substituted his personal opinion and views about psychology to reject the opinions of the mental health experts on this issue. See, Alamo Rent-A-Car v. Phillips, 613 So.2d 56. Additionally, the court disparaged the experts as "mental health experts that [Jackson] hired." (RES1:102) In his order, the trial judge wrote:

> The only evidence presented to this Court is support of this claim is the defendant's own self-serving statements presented through the mental health experts that she hired, and the assertion that the defendant's grades went down in school at the time when the defendant's stepfather allegedly began to have sex with her at the age of ten (a particularly spurious piece of speculation given that the stepfather was only at home for approximately three months out of the year). In order to discount the fact that the defendant has numerous sexual relations with boyfriends and her ex-husband (most or all of whom the defendant alleges raped her), including moving in with her ex-husband at the age of 15, rather than *avoiding* this alleged traumatic conduct (i.e. sex), the defendant contended (through Dr. Walker) that she coped with the rapes by her

> stepfather through the use of alcohol and by getting involved with other men.

(RES1:102)

Later in his order, the judge diminished Andrea's addiction to drugs and alcohol stating:

> The defendant allegedly turned to drugs and alcohol to cope with the alleged sexual assaults by her stepfather. These sexual assaults stopped when she was 15 years old and she moved in with her ex-husband. At the time of the murder, the defendant was 25 years old, she had had two children and she had not lived with her ex-husband for approximately 4-6 months. Not only was there no impetus for the defendant to abuse alcohol at the time of the murder, her children provided her with the impetus not to abuse drugs or alcohol.

(RES1:103-104)

Again, the trial judge has demonostrated his lack of knowledge about childhood sexual abuse and its effects. A judge is not expected to know all things about subjects which become involved in court litigation. Expert witnesses are used to provide this information to the court. However, the judge violates the litigant's right to due process when he substitutes his uninformed personal opinion for that of the experts and uses that opinion to reject the expert's testimony. See, Alamo Rent-A-Car v. Phillips.

Contrary to the trial court's conclusions, the impact of sexual abuse on a child does not stop when the abuse temporarily stops. The child is often traumatized for life , particularly where the abuse is recurring. See, D. Finkelhor, The Trauma of Child Abuse, *supra*. (Reproduced as App. E) Assuming that Andrea's stepfather only raped her for three months out the year, that fact does not mean Andrea's trauma

did not effect her all year long and affected her school performance. Additionally, the fact that Andrea became involved with men and abused alcohol is consistent with the expected symptoms of someone sexually abused as a child. Promiscuity and alcohol and drug addiction are quite high among survivors of childhood sexual abuse. The Trauma of Child Abuse, *supra*.

The trial court abused its discretion in rejecting the significant unrebutted mitigating evidence in this case. Moreover, the court did so by substituting his personal opinions for that of qualified experts in the field which violates due process of law. The death sentence was unconstitutionally imposed. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII XIV U.S. Const.

ISSUE III
THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

In the previous appeal of this case, this Court held that the trial court did not abuse its discretion in finding the aggravating circumstance that the homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Jackson v. State, 704 So.2d 500, 504-505 (Fla. 1997). Even though this Court held the trial court did not abuse its discretion in finding the CCP circumstance in the previous sentencing order, the trial judge, in this new sentencing order, made new and additional findings in support of the CCP factor. (RES1:90-93)(App. A) Since the sentence now

imposed on Andrea Jackson is the one which can be carried out and not the previously imposed one, e.g.,Lucas v. State, 417 So.2d 251 (Fla. 1982), the propriety of the trial court's new findings regarding CCP are again subject to review in this Court. See, Mann v. State,453 So.2d 784 (Fla. 1984). This Court is now constitutionally required to review these findings of fact in reviewing the propriety of the death sentence. See, Amends. V, VIII, XIV U.S. Const.; Parker v. Dugger, 498 U.S. 308 (1991)(appellate review of death sentence constitutionally infirm when appellate court relied on erroneous view of what trial judge found). Since this Court did not reach a final decision regarding the sentence in the previous appeal, the law of the case doctrine is not applicable and this Court's previous decision regarding the CCP factor does not bar review of the CCP circumstance in the current appeal. See, Wells Fargo Armored Services v. Sunshine Security and Detective Agency, 575 So.2d 179 (Fla. 1991). The trial court's expanded findings regarding CCP, now reveal what was not clear in the previous sentencing order -- the trial court's findings were not supported by record evidence, improperly relied on speculation and the trial judge's personal opinion regarding psychological principles. (RES1:90-93)(App. A)(R)(App. B) The cold, calculated and premeditated aggravating circumstance was improperly found. Jackson's death sentence has been unconstitutionally imposed must now be reversed. Art. I, Secs. 9, 16, 17 Fla. Const.; Amend. V, VI, VIII, XIV U.S. Const.

LEGAL STANDARDS

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:

> 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 pre-arranged design to commit murder before the fatal incident." Jackson, ...
>
> * * * *
>
> Third, Jackson, requires "heightened premeditation," which is to say, premedi-tation 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). When circumstantial evidence is used, the defense is entitled to the benefit of any reasonable inference from the evidence which negates the CCP aggravating circumstance. E.g., Mahn v. State, 714 So. 2d 398 (Fla. 1998), Geralds v. State, 601 So.2d 1157 (Fla. 1992), after remand 674 So.2d 96 (Fla. 1996). A trial court cannot rely on speculation to provide proof of an

aggravating circumstance. See, e.g., Knight v. State, Case No. 87,783 (Fla. November 12, 1998); Hartley v. State, 686 So.2d 1316 (Fla. 1996); Mahn, Geralds. Moreover, when expert testimony is involved, the trial court is not free to reject the uncontradicted opinion without record support for rejecting it. See, Walls v. State, 641 So.2d 381 (Fla. 1994); Foster v. State, 679 So.2d 747 (Fla. 1996); Nibert v. State, 574 So.2d 1059 (Fla. 1990). Additionally, the trial judge is not free to substitute his personal opinion or his lay understanding of the principles used in the expert's field to reject the expert's opinion. See, Alamo Rent-A-Car v. Phillips, 613 So.2d 56 (Fla. 1st DCA 1993); Romero v. Waterproofing Systems of Miami, 491 So.2d 600 (Fla. 1st DCA 1986); Jackson v. Dade County School Board, 454 So.2d 765 (Fla. 1st DCA 1984).

PROBLEMS WITH THE TRIAL COURT'S SENTENCING ORDER

The trial judge found the CCP aggravating circumstance in this resentencing.(RES1:90-93)(App. A) Contrary to the judge's finding, the evidence was insufficient to support this aggravating circumstance. The judge's order improperly filled voids in the evidence with speculation, Knight; Hartley; Geralds. and improperly substituted the judge's personal opinions about psychology to diminish well established psychological principles in order to reject the expert's opinion testimony. See, e.g., Alamo Rent-A-Car v.Phillips.

(1) *Speculation That Andrea Had Prior Knowledge Of Impending Arrest*.

Initially, the court's order reached a conclusion that Andrea knew the officer was about to arrest her before she went

back upstairs to her husband's apartment, and she armed herself with a pistol with this knowlege and the intent she would not be arrestd. (RES1:90-91) The evidence did not support this conclusion, and the trial judge engaged in improper speculation to fill the gaps. In the order, the court stated,

> ...The defendant obviously either knew or began to suspect that Officer Bevel did not believe her story as to how her car had been damaged, either because she was able to see him write, "Suspect possibly made false police report on criminal mischief to her vehicle," on one of the report forms as she sat right next to him in the front seat of his patrol car, or by Officer Bevel's conversation with her while writing out the reports. As a result of that knowledge or suspicion, the defendant exited the police car and went back upstairs and armed herself with a revolver, with the clear intent that she would not be arrested and taken back to jail.

(RES1:91) (App.A)

One witness, Mable Coleman, testified that Andrea sat in the patrol car while Bevel wrote something before Andrea walked back upstairs. (T8: 662) The last entry on Bevel's report was the comment regarding his suspicions about the possibility that Andrea made a false report. (T8: 531-532) However, there is no evidence that Andrea read the entry on the report or that Bevel even made that entry before Andrea left. Moreover, there is no evidence about the conversation between Andrea and Bevel while she sat in the car at that time. The trial court improperly speculated from the above facts that Andrea learned about a possible arrest by reading a report or in a conversation with Bevel. See, Knight; Geralds.

Other evidence, which the trial court does not mention in its order, supports the inference that Andrea did not know of

her impending arrest until Bevel arrested her. First, Bevel did not make a decision to arrest Andrea until he confirmed his suspicion that she damaged her own car when he talked to a neighbor -- after Andrea went back to the apartment. (T8: 568, 591, 639, 665; T9: 681) Second, when Andrea returned and went to the patrol car, her first reaction upon being confronted was to ask, "Where is my damn car?" (T8: 665) Bevel advised that the car had been towed, and then, he told her, "Get in the car I have to take you downtown." (T8: 665) The trial court was required to give Andrea the benefit of the inference from the above evidence which indicates Andrea did not have prior knowledge or suspicion about a pending arrest. Geralds.

(2) *Speculation That Andrea Armed Her With The Intent To Prevent Her Arrest*

From the improper speculation that Andrea knew or suspected that she was about to be arrested, the trial court then concludes Andrea armed herself with "...the clear intent that she would not be arrested...":

> As a result of that knowledge or suspicion, the defendant exited the police car and went back upstairs and armed herself with a revolver, with the clear intent that she would not be arrested and taken back to jail...

(RES1:91)(App. A) The conclusion that Andrea armed herself to avoid arrest is flawed in two respects. First, it is based on the speculation about Andrea's knowledge of an impending arrest as discussed above. Second, the conclusion about her state of mind while arming herself ignores other evidence in the record about Andrea's practice of carrying a pistol for her

protection. (T10: 965-967) Again, Andrea was entitled to the inference from the evidence which negates the finding of the aggravating circumstance. Geralds.

(3) *Speculation That Andrea Armed Herself And Confronted The Officer With The Knowledge That He Intended To Arrest Her*

Next, the court in its order concludes "...the evidence shows that the murder was the product of calculated and heightened premeditation not only to avoid arrest but to kill Officer Bevel." (RES1:91) This conclusion is likewise the product of improper speculation. First, the court stated,

> The defendant could have simply avoided arrest by exiting the apartment by way of the back stairs. Instead, she armed herself with a revolver and went back down to confront the very person she knew or suspected would be responsible for the decision to arrest her and send her back to jail.

(RES1:91-92) This finding rests on the speculative, improper inference that Andrea knew or suspected she was about to be arrested as discussed above. Additionally, the fact that Andrea left the apartment and went to the police officer's location indicates that Andrea had no idea she was going to be arrested. Indeed, for someone attempting to avoid an arrest, leaving in the opposite direction, away from the police officer, is the logical course of conduct.

(4) *Speculation That Andrea Confirmed That The Officer Intended To Arrest Her, And During Her Confrontation With Him, She Devised A Plan To Kill Him By Shooting Him In The Head*

Regarding the sequence of events which occurred during the confrontation between Andrea and Bevel, the trial court again reaches improbable conclusions not supported by evidence and

based on improper speculation and inferences. (RES1:92)(App. A) First, the court stated,

> ... the defendant went into the [patrol car] to look at the reports Officer Bevel had written to confirm her knowledge or suspicion that Bevel intended to arrest her.

(RES1:92) (App. A) This presumes that Andrea knew or suspected she was about to be arrested. There is also no evidence that Andrea actually read or saw a report in the patrol car. (T8: 590-591, 601-603, 664) Furthermore, this conclusion ignores the evidence of what Andrea said upon first being confronted by Bevel. Mabel Coleman, the eyewitness upon whom the State and the court heavily relied, testified that Andrea first asked Bevel, "Where is my damn car?" (T8: 665) Bevel told Andrea the car had been towed, and he then told Andrea he had to "take [her] downtown." (T8: 665) Coleman's testimony that Andrea's initial concern was the location of her car leads to the stronger inference that Andrea looked in Bevel's car in an effort to find out what happened to her car -- not confirm Bevel's intent to arrest. The trial judge's order never mentioned Coleman's testimony about Andrea's statment in the sentencing order. (RES1:92)

The second conclusion the trial court makes about the confrontation between Andrea and Bevel is the following:

> When Officer Bevel approached the defendant to take her into custody, the defendant did not remove the gun and start shooting at Officer Bevel, instead the defendant lunged at Officer Bevel and struck Bevel in the chest area, thereby revealing that he was wearing a bullet proof vest and letting the defendant know that she would have to shoot him in the head.

(RES1:92)(App. A) Initially, the fact that Andrea did not pull her gun and immediately shoot the officer negates, rather than supports, the notion that she preplanned to kill Officer Bevel. A conclusion that Andrea struck Bevel, discovered that he wore a bullet proof vest, and then, cleverly devised a plan during the struggle with the officer, who was much larger than she, to shoot him in the head is simply not supported in the evidence. The only evidence about the bullet proof vest came from Officer Bradley who testified that Bevel wore such a vest, and he rendered an opinion that someone striking Bevel in the chest could feel it. (T8: 513-514) This testimony does not establish that Andrea felt the vest and recognized what it was when she struck the officer. Furthermore, even if she did recognize the bullet proof vest, this does not lead to the conclusion that she devised a plan to shoot the officer in the head.

(5) *Specualation That Andrea Intentionally Dropped Her Keys As A Ploy To Distract Bevel In Order To Shoot Him*

The trial court concluded that Andrea dropped her keys during the struggle with Officer Bevel to create a an opportunity to shoot him. (RES1:92) In the order, the court wrote:

> When the defendant continued to resist being put in the back of the car, Officer Bevel reached down and grabbed the defendant by the backs of the knees causing her to sit back onto the seat of the car, with her legs and feet still outside the car. When Officer Bevel then said, "Lady, please get in the car," the defendant said, "You made me drop my keys," knowing that Bevel would bend back over or would bend over further to look for or pick up her keys. When Officer Bevel took a step back and bent back over or bent over further, the defendant seized the opportunity that she had created and removed the revolver from the waist of her pants with her right

> hand and shot Officer Bevel four times in the head, once in the back of the neck and once in the shoulder, emptying all six rounds from the revolver.

(RES1:92)(App.A)

The only evidence is that keys dropped during the struggle between Andrea and the officer. There is no evidence as to whether the keys were dropped intentionally or accidentally. The trial court's finding that Andrea intentionally dropped the keys is improperly founded upon mere speculation. In fact, the evidence lends stronger support to the inference that the keys were dropped accidentally. Andrea dropped the keys during a struggle and just as Officer Bevel grabbed her knees which threw her off balance making her fall back onto the backseat of the patrol car. Furthermore, it is not reasonable to conclude that the officer, while in a physical struggle with someone he has arrested, would stop to look for keys before securing the person in the car.

Anna Nelson saw Bevel struggling to get Andrea into the patrol car. (T8: 605-606) Nelson heard Andrea ask Bevel why he was manhandling her. (T8: 606) Then, Nelson saw Bevel bend down and grab Andrea's knees. (T8: 606-607) Bevel's grabbing Andrea's knees caused her to fall back onto the backseat of the patrol car. (T8: 606-607) At that point, Nelson heard Andrea mention the dropped keys. (T8: 594-595, 606-607) Leanderaus Fagg testified that Bevel bent down to place Andrea into the backseat of the patrol car. (T8: 641) After Andrea was down on the seat, Fagg heard Andrea tell the officer that he made her drop her keys. (T8: 641) Mable Coleman saw Bevel taking

Andrea to the backseat of the patrol car. (T8: 667) Coleman remembers seeing Andrea on the back seat with her feet still outside of the car when Andrea mentioned the dropped keys. (T9:675)

(6) *Relying On Personal Opinion To Reject The Opinions Of Three Experts That Andrea's Mental Condition Prevented Her From Forming A Cold, Calculated Plan To Kill*

Conspicuously absent from the court's sentencing order finding the CCP circumstance is any discussion of the testimony of the three mental health experts who testified that Andrea's mental condition at the time of the shooting rendered her incapable of forming a cold, calculated plan to kill. (RES1:90-93) (T10: 1019-1023; T12: 1287-1293; T12: 1402-1405, T:12 1420-T13: 1431) The trial court does claim the evidence refutes that Andrea had a flashback during the time of the murder. (RES1:93) Additionally, the court does discuss the opinions of the three experts later in the sentencing order regarding mitigating circumstances. (RES1:93-102) Apparently, the trial judge rejected the expert's opinions regarding the applicability of the CCP factor for the same reasons he rejected the expert's opinions regarding mitigation. In rejecting the opinions regarding mitigation, the trial judge violated due process by improperly substituting his own personal opinions regarding psychological principles for those of the experts. Amends. V, VIII, XIV U.S. Const.; Art. I, Sec. 9 Fla. Const.; see, e.g., Alamo Rent-A-Car v. Phillips, 613 So.2d 56. The argument presented in Issue II, supra., regarding the treatment of the mental health experts' opinions

on mitigation is equally applicable here and Jackson incorporates those arguments by reference.

(7) <u>Court Incorrectly Concludes Jackson Admitted She Committed The Murder To Avoid Going Back To Jail</u>

On page 12 of the sentencing order (RES1:93)(App. A), the court states,

> Finally, the jury and this Court have the defendant's own admission that she committed this murder because she was not going back to jail.

(RES1:93) This statement is not an accurate statement of the evidence and not the only conclusion from the testimony. The two witnesses who testified about Jackson commenting she did not want to go back to jail both heard the comment at Joi Shelton's house shortly after the homicide. Given the timing and context of the comment, Jackson's remarks could have been a reflection of her current state of mind after the homicide and after she realized what she had done.

Shirley Freeman, who saw Andrea at Joi Shelton's house shortly after the homicide testified as follows:

> Q. ...What did she say regarding how [she got blood on her clothes]?
>
> A. That she had killed a cop.
>
> Q. And did she say anything regarding why she shot the police officer?
>
> A. She said she wasn't going back to jail.

(T9: 772)

Joi Shelton, who picked Andrea after the homicide and drove her to her house, testified:

Q. Was she very upset?

A. Yeah. Then she went on a rampage again and she would quiet down, she was just crazy.

Q. Did she tell you what she thought the police officer had been trying to do to her when she shot him?

A. Yes.

Q. What?

A. She said he was trying to rape her. She did say that.

Q. Did she say anything about not wanting to go to jail?

A. Yes. She wasn't going to jail no more. She did not want to go.

Q. At some point did you tell her to leave?

A. Yes.

* * * *

A. She wanted money and I gave her money.

Q. For what?

A. To go.

Q. What was the money for?

A. Whatever, she wanted to go to her mothers.

(T13: 1496-1497)

This above testimony is certainly reasonably interpreted as a statement about Andrea's current state of mind ***after*** the shooting, not one about her state of mind ***before*** the shooting as the trial court concluded. Andrea was entitled to the reasonable inference from the evidence that the comment was about her current state of mind at the time of the statement.

THE EVIDENCE FAILS TO ESTABLISH THE ELEMENTS OF CCP

(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. (T8: 561, 574, 633, 651) This continued through the shooting of the officer as he physically placed Andrea into the patrol car. (T8: 591-607, 638-642, T8: 665-T9: 677) 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. Anna Nelson testified that when Bevel told Andrea she was being arrested, Andrea "got angry", "lunged" at Bevel and began hitting him. (T8: 591-592) Leandra Fagg testified that Andrea came up to Bevel in a hostile manner. She asked, "Where do you take my goddamn car?" (T8: 639) Fagg said from that point the whole confrontation between Andrea and Bevel was hostile. (T8: 639) Fagg described Andrea as intensely "hot" and angry. (T8: 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 suggested that the murder was carried out with the same measure of coolness as was

the destruction of the car. (RES1:90-91) 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. (T8: 579-580, 611-612; T8: 655-T9: 687) Nelson said that as Andrea smashed the car with crowbar, she talked to it and cursed it. (T8: 579-580, 611-612) Coleman said Andrea was angry at the car and cursed it as if it were a person. (T8: 655-T9: 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 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. See, discussion of Court's order, *supra*. This homicide was not calculated and does not qualify for the CCP circumstance.

(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.

Jackson is aware that this Court, in the previoius appeal, stated that the evidence in this case did not establish a pretense of a legal justification. Jackson, 704 So.2d at 505. Jackson urges this Court to reconsider its position on this point. This Court distinguished this case from cases such as Banda v. State, 536 So.2d 221 (Fla. 1988), Christian v. State, 550 So.2d 450 (Fla. 1989) and Cannady v. State, 427 So.2d 723 (Fla. 1983), for two reasons -- the victims in those three cases threatened violence to the defendant and Jackson's belief she was going to be raped was "purely subjective." Jackson, 704 So.2d at 504. First, although Officer Bevel had no intention of harming Jackson, he was, in fact, acting aggressively toward her. The officer was physically subduing Jackson in order to effect an arrest. This is certainly more evidence of an aggressive act on the part of the victim than the evidence an aggressive act found in Cannady v. State,for

example, where the sole evidence was the defendant's statement that the victicm "jumped at him." Cannady, 427 So.2d at 730. Second, Jackson's belief she was about to be raped was not "purely subjective." While it is true that Officer Bevel was not attempting to rape Jackson and she misperceived the motive behind Bevel's conduct, her belief that this was about to happen was not "purely subjective." Bevel did grab and hold Jackson. Given Jackson's sexual abuse history she misinterpreted these actions. This is not the same as creating a subjective belief without any action on the part of the victim. This case is not like Walls v. State, 641 So.2d 381, 388 (Fla. 1994), the case upon which this Court relied, Jackson, 704 So.2d at 504, because the victim in Walls was lying helpless and prostrate at the time of the murder and took no physical action at all against the defendant.

COMPARABLE CASES WHERE CCP DISAPPROVED

The evidence showed a spontaneous shooting during a struggle with a police officer to avoid arrest, not a preplanned homicide as the trial court's order erroneously concludes. As a result, this case is distinguishable from Valle v. State, 581 So.2d 40 (Fla. 1991), where there was clear, direct evidence that the defendant planned to kill the officer (the defendant stated prior to the shooting that he would have to "waste" the officer).

This Court has previously held that murders of police officers committed spontaneously during a confrontation during an arrest 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 pre-meditation, 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 preme-ditated.

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 mis-fired. 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 any-one. 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 testi-mony 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, calcula-ted, 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), Washing-ton, 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 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 IV
THE TRIAL COURT ERRED IN IMPOSING A SENTENCE OF DEATHSI NCE 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 III, *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). (RES1:82-107)(App. A) However, these three aggravating circumstances were merged into a single factor. 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 uncon-stitutional). 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. Duncan v. State, 619 So.2d 279 (Fla. 1993). Compelling mitigating evidence was presented in this case. Furthermore, the single aggravation circumstance, based largely on the police officer status of the victim, does not carry sufficient weight to outweigh the mitigation.

Even assuming the premediation aggravator is properly found, the death sentence remains disproportionate. The additional aggravating circumstance does not sufficiently add to the aggravation to overcome the mitigation. Each of the three mental health experts who testified concluded that Andrea's mental condition at the time of the offense qualified for the two statutory mental mitigating circumstances. Secs. 921.141(6)(b)&(f) Fla. Stat. The State offered nothing to rebut the experts' opinions. Although the trial judge's rejected of the testimony of the experts, his decision was not based on substanial competent evidence. See, Issue II, *supra.* Andrea Jackson's crime is not one of the most aggravated and least mitigated of homicides for which the death penalty is reserved.

State v. Dixon, 28 So.2d 1, 7 (Fla. 1973). Jackson urges this Court to reverse her death sentence.

ISSUE V

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 impor-tance 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 de-tain him and take him and have him be held accountable, then we would have who-ever 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.

(T14: 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. First the argument completely negated the fact that the three law enforcement circumstances merged into a single aggravating circumstance. 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).

Second, the argument 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 con-demned such arguments. See,e.g., Campbell v. State, 679 So.2d 720 (Fla. 1996); Bertolotti v. State, 476 So.2d 130 (Fla. 1985).

The improper remarks the prosecutor made have tainted the reliability of the jury's sentencing recommendation. 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.

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

Over defense counsel's objections, the trial court admitted testimony of four victim impact witnesses, three law enforcement officers and the victim's mother. (T6: 103-120; T7: 420-447; T8: 493; T9: 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. (T14: 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. (T14: 1738) Other that advising the jury that the evidence could be considered when making its sentencing decision, no other guidance was offered. (T14: 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, 680 So.2d 413 (Fla. 1996); Windom v. State, 656 So.2d 432 (Fla. 1995). Jackson is also aware that this Court addressed this issue in her previous appeal. Jackson v. State, 704 So.2d 500, 507-508 (Fla. 1997).

However, Jackson asks that this ruling be reconsidered in light of the constitutional arguments 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. Amends. V, VI, VIII, XIV U.S. Const.; Art. I, Secs. 9, 16, 17 Fla. Const.

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. Amends. V, VII, VIII, XIV U.S. Const.; Art. I Secs. 9, 16, 17 Fla. Const.

C. The Florida Constitution Prohibits Use Of Victim Impact Evidence. Art. I, Secs. 9, 16, 17 Fla. Const.

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

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.

ISSUE VII

THE TRIAL 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.[7]

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) (T6: 89-90; T12: 1276) However, the court ruled the the videotape itself was

[7]This Court addressed this issue in the previous appeal of this case, Jackson v. State, 704 So.2d at 507-508. In this resentencing, the trial judge again made credibility findings regarding Dr. Mutter's testimony without viewing the best available evidence -- the videotape. Jackson asks this Court to reconsider this issue.

irrelevant and inadmissible for any purpose. (T6: 89-90; 12: 1276) During the trial, Mutter testified, referred to the hypnotic regression and read portions of the transcript of the session to the jury. (T12: 1246-1282) On cross-examination, the State attacked the reliabi-lity of the hypnosis procedures and questioned Mutter as to whether Andrea was lying during the hypnotic regression. (T12: 1311-1343) Finally, the court instructed the jury that it was its role to assess the reliability of expert testimony pre-sented. (T14: 1731)

In his resentencing 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. (RES1:94-98)(App: A) The judge made this credibiltiy evaluation without any indication that he had viewed the video-tape of the hypnotic regression. (RES1:94-98)(App: A)

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 pro-cess 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).

ISSUE VIII
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.[8]

Before trial, defense counsel filed a motion requesting the appointment of a forensic pathologist to assist in preparation of the defense. (R1: 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. (R1: 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. (R1: 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. (R1:96) The court originally denied this request due to the costs of bringing someone from out of town. (T6: 97) Later, Defense counsel renewed and amended the request advising he court that there was no local expert available. (R1: 149)(T6: 96-98) The

[8]Jackson acknowledges that this Court addressed this issue in the previous appeal. Jackson v. State, 704 So.2d at 508. She asks this Court to reconsider the issue on this appeal.

court again denied the motion. (R1: 156)(T6: 96-98) During trial, before the medical examiner testified, defense counsel again renewed the request for appointment of a defense expert pathologist. (T9: 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 ...." (T9: 743-744)

At trial, the medical examiner did render an opinion as to the position of Officer Bevel at the time of the shooting. (T9: 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, XI VIII, V, 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.

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,

W.C. McLAIN #201170
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished to Carolyn Snurkowski, AssistantAttorney General, Criminal Appeals Division, The Capitol, PlazaLevel, Tallahassee, Florida, 32301; and a copy has been mailedto appellant, Andrea Hicks Jackson, on this ____ day of January, 1999.

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