IN THE SUPREME COURT OF FLORIDA

ANDREA HICKS JACKSON,

Appellant,

v. CASE NO. 87,345

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This is an appeal from a remand for a new sentencing order pursuant to this Court's decision in Jackson v. State, 704 So.2d 500 (Fla. 1998). References to the record will use the pagination that has assigned the resentencing record, which includes records from the previous resentencing, and will be cited as volume and page number in parentheses.

CERTIFICATE OF TYPE SIZE AND STYLE

Undersigned counsel certifies that this brief has been prepared using 12 point Courier New.

STATEMENT OF THE CASE AND FACTS

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

Detective John Bradley was called to the scene on May 17, 1983, to investigate the death of Officer Gary Bevel. During the course of his investigation, he had occasion to observe Andrea Hicks Jackson and testified that on May 17, 1983. Jackson was neither drunk nor high. (Vol. II 192-3, 207, 217). Although he smelled alcohol on her, she was not intoxicated and understood what was happening. (Vol. II 193, 208, 217).

Anna Allen testified that at approximately 6:30 p.m., she heard glass breaking and saw Jackson smashing the car windows with a crowbar. (Vol. II 238). She saw Jackson pulling wires out from under the hood of the car; remove items from the car, and remove the auto tag. (Vol. II 238). She observed Jackson's behavior and testified that Jackson did not appear to be intoxicated. (Vol. II 243). When Officer Bevel came over to their house to ask whether she had seen anything that evening, she saw Jackson go to the side of the patrol car. Jackson was walking normally. She alerted Officer Bevel who turned to Jackson and yelled, "Hey lady, what are you doing in my bar?" (Vol. II 249). As Bevel approached the car he informed Jackson that she was being arrested for making a false report. (Vol. II 250). Jackson then got violent with the officer. Jackson lunged at Bevel and started hitting him. (Vol. II 251).

After Jackson hit the officer, he grabbed Jackson's hands and tried to move her to the back door of the car. (Vol. II 252). Officer Bevel asked her to get into the car. Jackson said "she was not going to." A struggle ensued and Ms. Allen heard Jackson say, "You made me drop my damn keys." (Vol. II 252). Bevel backed away to help pick up the keys. Ms. Allen heard the first shot. There was a pause and then four more shots were heard (Vol. II 256); Officer Bevel fell into the car; Jackson pushed the officer over and then Jackson got out of the car and ran behind the apartments nearby. (Vol. II 257). On cross-examination, Ms. Allen testified that she heard Jackson say, "Why are you manhandling me?", but further observed that Officer Bevel never frisked or handcuffed Jackson. (Vol. II 279). Officer Bevel was never on top or lying down on Jackson until after he was shot. (Vol. II 286).

Leanderaus Fagg's testimony was read to the jury. Mr. Fagg heard and saw the shooting of Officer Bevel. (Vol. II 294). He overheard the conversation between Officer Bevel and Jackson regarding the towing of Jackson's car and heard Jackson say to the officer, "I told you don't take my god damn car nowhere." (Vol. II 298). Mr. Fagg heard Officer Bevel tell Jackson that he was arresting her for false information. He attempted to place her into the police car. (Vol. II 298). Jackson responded, "You ain't taking my anywhere", and Mr. Fagg heard her yell, "You made my drop my keys." (Vol. II 299-300). His testimony revealed that Jackson

was in a sitting position with her feet hanging out in the back seat of the patrol car. Officer Bevel stepped back and the first shot was fired. Four shots later Officer Bevel fell forward into the car. (Vol. II 300). Jackson then slid out from underneath the body and ran to the house across the street from his location. (Vol. II 301). The struggle occurred between the officer and Jackson after Jackson was told that she was under arrest and after the officer tried to place her into the police car. (Vol. II 308-09).

Mabel Coleman also observed the shooting on May 17, 1983. She testified that she saw Jackson destroying the car; taking the license tag off; opening the trunk and taking stuff out of the car. (Vol. II 316-17). Ms. Coleman said Jackson did not appear to be drunk. (Vol. II 317). On the third time Jackson returned from the house, Coleman saw Jackson place a gun in her pants' pocket or waistband. (Vol. II 322-23). In response to the officer telling her that she had to go downtown, Jackson responded, she was not going anywhere. (Vol. II 324). Ms. Coleman heard Jackson say something about keys, saw the officer reach down and, then, heard five shots. (Vol. II 334-35). Coleman testified that Bevel was never on top of Jackson prior to the shooting. The officer fell forward after he was shot. (Vol. II 341).

The State also called Adam Gray, who testified that on May 16, 1983, Jackson came to Rocket Motors to complain about car trouble.

When told she was going to have to pay for repairs, Jackson told Gray that she would rather “drive the car over the Main Street Bridge” than pay any more money to have it fixed. (Vol. III 388). Mr. Gray observed that Jackson was not intoxicated nor high on drugs. (Vol. III 391).

Shirley Freeman testified that she saw Jackson on May 17, 1983, when she arrived at her house at approximately 1:30 a.m., covered with blood. (Vol. III 429). Jackson indicated that she needed her clothes washed to get the blood out and stated that she had “just shot a cop.” (Vol. III 431). Jackson told Freeman that she was “not going back to jail” and that was the reason why she did it. (Vol. III 431). Freeman observed that Jackson was sober and was not high. (Vol. III 431). She further observed that Jackson had a gun and took the gun with her when she left the apartment. (Vol. III 432). On cross-examination, Ms. Freeman again affirmed that Jackson was sober, although she had been drinking there. (Vol. III 432). Jackson became hysterical when she talked about shooting the cop and said that she was sorry it happened. (Vol. III 434). Jackson asked Ms. Freeman to call the hospital to find out whether the officer had died and cried when she found out he had. (Vol. III 436). Ms. Freeman testified Jackson had told her that she, Jackson, was abused as a child and someone had tried to rape her. (Vol. III 437).

Carl Lee, a cab driver, picked up Jackson on May 17, 1983, around 4:15 or 4:20 a.m. He testified that she seemed okay and was not high or drunk. (Vol. III 446-48). When Jackson was arrested by Officer Dipernia, she told him "she did not shoot no policeman." She did not appear to be high or intoxicated.

The defense called the following witnesses:

Dr. Lenora Walker, a clinical and forensic psychologist specializing in the study of women and family violence, examined Jackson on March 29, 1989, for the first time. (Vol. III 506). Dr. Walker covered the battered woman syndrome and family violence and, her belief that battered woman syndrome is a sub-category of post-traumatic stress syndrome. (Vol. III 532, 576).

After examining Jackson, Dr. Walker opined that at the time of the offense, Jackson suffered from battered woman syndrome. (Vol. III 524). Jackson told Dr. Walker that she was sexually abused by her step-father starting at age eight or nine and at ten or eleven she was raped by him. (Vol. IV 602). Dr. Walker observed that Jackson was a good athlete and used sports to cope with the sexual abuse at home. Jackson became more aggressive. Jackson also started using alcohol and drugs to dull the pain of the sexual abuse. (Vol. IV 608). Her medical history reflects that Jackson developed migraine headaches and had vaginal infections likely the result of the sexual abuse. (Vol. IV 616-17).

Dr. Walker detailed how in late 1982, Jackson left Shelton (her husband) and started living sometimes with her mother, sometimes in hotel rooms. (Vol. IV 637). Based on a combination of drugs and the post-trauma syndrome, Dr. Walker believed Jackson could not recall everything that happened the day of the murder. (Vol. IV 641). Although Jackson was able to recall details leading up to the shooting, even to the point of returning to the apartment and getting the car registration, Dr. Walker concluded that when Jackson came back out of the apartment and saw her car gone, she "did not recognize the police car as a police car." (Vol. IV 655-56). Jackson did not even recognize the police officer as a police officer. (Vol. IV 656). The "blackout" began and Jackson "experienced a rape." Dr. Walker stated Jackson told the officer to stop and not to touch her. Jackson heard her blouse rip, heard the buttons pop and felt her breasts being touched. The officer had his hands between her legs and, she heard her keys drop. (Vol. IV 657-58). When the officer fell on top of her, Dr. Walker surmised that Jackson thought he had ejaculated because she felt a warm liquid on her. (Vol. IV 659). Dr. Walker observed that Jackson had no actual memory of the shooting and only after she tried to wiggle out from under the officer did she begin to realize what had happened. Jackson's next memory was going to the telephone booth and calling Joi. (Vol. IV 660). When Jackson

finally saw Joi, she realized she "shot a police officer." (Vol. IV 661).

In Dr. Walker's opinion, Jackson's emotional reasoning interfered with her thinking and she suffered from battered woman syndrome. (Vol. IV 669-70). Dr. Walker believed that at the time of the shooting, Jackson had a flashback and "thought" she was going to be sexually abused. Dr. Walker also stated that Jackson had "no serious mental illness except the post-traumatic stress syndrome." (Vol. IV 666). Jackson could not conform her conduct to the requirements of law nor appreciate the criminality of her conduct. She suffers from childhood abuse and domestic violence. Jackson was alcohol dependent and an abusive drug user. (Vol. IV 681). Dr. Walker stated Jackson was not sane at the time of the murder, did not know the difference between right and wrong and could not conform her conduct to the requirements of law based on the drug usage, her alcohol usage and the post-traumatic stress syndrome suffered at the time of the crime. (Vol. IV 704-05). Dr. Walker admitted that this assessment was contrary to the Dr. Mutter's and Dr. Miller's conclusions. (Vol. IV 704).

Dr. Charles Mutter, a forensic psychiatrist, examined Jackson on January 29, 1988. (Vol. V 882). He performed a hypnotic regression on Ms. Jackson to determine why she committed the homicide. (Vol. V 907-941). He found Ms. Jackson competent and sane. (Vol. V 852, 857).

Dr. Mutter's assignment was to determine "what Jackson was thinking at the time of the crime." (Vol. V 835). He admitted that hypnosis is only as good as the hypnotist doing it and that it is subject to suggestive influences. (Vol. V 865).

In reviewing Jackson's background prior to the hypnosis session, Dr. Mutter observed that there was no mental disturbance or psychosis present in her background (Vol. V 895-6), and informed Jackson that he was there to determine the reasons for her inability to remember the crime. (Vol. V 896). He uncovered that Jackson was born in Jacksonville, Florida, the eldest of four children. She had a tenth grade education and had married at age twenty. She had two sons, ages nine and eight, and during her lifetime had several head injuries. She had no history of prior psychiatric illness. (Vol. V 897-98). Jackson used drugs, including marijuana, LSD, Mescaline, Quaaludes and alcohol. (Vol. V 898). Jackson had a prior record for writing bad checks and a prior assault. (Vol. V 899). Jackson suffered no schizophrenia nor did she hallucinate; she could do abstract thinking and thought in an organized manner. (Vol. V 900-01). In detailing the events leading to the murder of Officer Bevel, Jackson recalled that she was under the influence of alcohol and drugs, having drunk malt beer and taken pills that day and did recall an altercation. She remembered lying to the police and the police telling her she was under arrest for making a false report. She remembered nothing

after that (Vol. V 903). After the murder, she told Dr. Mutter she recalled being in a frenzy, running to a friend's house and getting out of her clothes. (Vol. V 903). She knew she had shot someone but did not know why. (Vol. V 903). Dr. Mutter testified Jackson told him that she had no conscious recollection of pulling the trigger but recalled returning to the crime scene and being placed under arrest. (Vol. V 905). Jackson was then hypnotized and the questions and answers which followed were videotaped. (Vol. V 907-941).

Dr. Mutter opined that Jackson knew what she was doing, she knew it was wrong, she felt guilty but did not want to remember because of her traumatic childhood. Jackson perceived that she was being assaulted and that perception was a result of a flashback of being raped at age ten. He speculated that she was responding out of fear and was under extreme emotional distress. Although she knew what she was doing was wrong, it was a painful circumstance for her. She was suffering from post-traumatic stress syndrome. (Vol. V 945-49). Dr. Mutter also reaffirmed that Jackson was not insane or incompetent (Vol. V 946), and believed she fled because she knew she did something wrong. (Vol. V 951). Dr. Mutter would not comment as to whether the murder was cold, calculated or premeditated. (Vol. V 950). He believed that Jackson's ability to appreciate the criminality of her conduct was impaired and that she was under extreme emotional disturbance at the time of the crime.

(Vol. V 956). He observed that Jackson suffered a grave misconception of the officer's actions, which explained her actions based on her earlier experiences. (Vol. V 950).

On cross-examination, Dr. Mutter admitted that hypnotic regression was still controversial (Vol. V 963), and that, under hypnosis, a person could lie and distort information. (Vol. V 970-71). **He noted that on the fourth time questioning Jackson about the murder, she mentioned she thought she might be raped.** (Vol. V 978). **Defense counsel passed Dr. Mutter a note - to ask her more questions about this. Dr. Mutter admitted that defense counsel had spoken previously to his client about this.** (Vol. VI 980-1).

Contrary to the testimony of Dr. Walker, Dr. Mutter stated Jackson recognized Officer Bevel as a police officer (Vol. VI 986); told Dr. Mutter she shot the officer (Vol. VI 989); and she did not want to go back to jail. (Vol. VI 989). Jackson also exhibited some desire to get away (Vol. VI 990), and knew at all times what was happening. (Vol. VI 990-91). Dr. Mutter also observed that Jackson was immature and exhibited violent tendencies. (Vol. VI 1003-05).

When specifically addressing Jackson's "flashback", Dr. Mutter stated the flashback was a "split second" (Vol. VI 1022) **and that Jackson shot Officer Bevel the moment she became aware of a possible assault.** (Vol. VI 1023). **He testified the flashback lasted as long as it took to unload the gun.** (Vol. VI 1025).

The defense motion to introduce the hypnotic regression videotape was again denied at the close of Dr. Mutter's testimony. (Vol. VI 1027).

Dr. Ernest Miller, a psychiatrist, evaluated Jackson in May 1990. (Vol. VI 1041). In a one hour session, he evaluated Jackson to determine her competency. (Vol. VI 1042). He determined Jackson was competent to stand trial. (Vol. VI 1043). He found that at the time of the shooting, Jackson was in a highly agitated state and was not thinking clearly. (Vol. VI 1043). He believed she might be suffering from either chemical amnesia or recent blows to the head which caused memory problems. (Vol. VI 1056-57). When Jackson shot the police officer, her thought process was at a basic emotional level. He did not believe she could have formulated the cold, calculated and premeditated intent to commit the murder. (Vol. VI 1059-61). Based on her condition and her background it was his observation that Jackson suffered from a misconception of the arrest, that her mental capacity was impaired and that she was under extreme mental disturbance. (Vol. VI 1062-63). Although he did not diagnose flashbacks, he said it could have happened. (Vol. VI 1064).

On cross-examination, he noted that she was found competent and further observed that if she purposefully dropped her keys, <u>that</u> would lend credibility to the likelihood that she committed the murder in a cold, calculated and premeditated manner. (Vol. VI

1066-69). Dr. Miller testified that he did not agree with Dr. Walker's report nor Dr. Macaluso's report with regard to Jackson's state. (Vol. VI 1072-73). In observing and reviewing the hypnotic regression session by Dr. Mutter, it was Dr. Miller's observation that the questions used might be leading or suggestive. (Vol. VI 1077).

Joi Shelton testified that when she saw Jackson May 16, 1983, Jackson told her that she had "killed a cop" because he was "trying to arrest her." (Vol. VII 1163). Jackson told Ms. Shelton that when the officer tried to put her into the back seat, she shot him. (Vol. VII 1172). Ms. Shelton gave Jackson money for a cab and observed that Jackson took the gun with her when she left. (Vol. VII 1169). While the clothes were being washed, Jackson told Ms. Shelton that she was "going out of town." (Vol. VII 1168).

The jury recommended a sentence of death by a vote of 12-0. (Vol. VIII 1406).

The trial court, following remand for the preparation of a new sentencing order in "compliance with Campbell[1] and its progeny," found two statutory aggravating factors proven beyond a reasonable doubt:

> 1. the murder was, as merged, committed for the purpose of avoiding arrest or effectuating an escape; committed to disrupt law enforcement and was committed against a law

[1] Campbell v. State, 571 So.2d 415 (Fla. 1990).

> enforcement officer engaged in the performance of his duty,

(Vol. I 89-90),

and,

> 2. the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(Vol. I 90-93).

In mitigation, the Court rejected the two tendered statutory mitigating factors, specifically Sec. 921.141(6)(b), Fla.Stat., that Jackson was under the influence of extreme mental or emotional disturbance (Vol. I 94-101), and Sec. 921.141(6)(f), Fla.Stat., that Jackson could not appreciate the criminality of her conduct or conform her conduct to the requirements of law (Vol I 101-102).

As for non-statutory mitigation, the Court concluded that:

- There was no credible evidence of childhood abuse and therefore the evidence was not established by a preponderance of evidence (Vol. I 102);
- Very little weight was assigned to the mitigation that Jackson suffered from physical and domestic abuse (Vol I 103);
- Little weight was assigned to the mitigation that Jackson was physically and psychologically dependant on alcohol (Vol. I 103-04);
- Little weight was assigned to the mitigation that Jackson was physically and psychologically dependant on drugs (Vol. I 104);

- Some weight was assigned to the mitigation that Jackson was under the influence of drugs and alcohol (Vol. I 104);
- There was no credible evidence that Jackson was suffering under a misconception that the police officer was trying to rape her (Vol. I 105);
- Very little weight was assigned to the mitigation that Jackson was remorseful immediately after the murder (Vol. I 105).

The Court held: "the weight of the two statutory aggravating factors is substantially greater than the weight of all of the statutory and non-statutory mitigating factors, and that death is, therefore, the appropriate sentence in this case." (Vol. I 1060).

Sentencing memoranda were provided by both the State (Vol. I 27-41), and the defense (Vol. I 50-78). **The defense's memorandum did not include any of the articles listed in Jackson's Appendix to the Initial Brief of Appellant.** Specifically those articles were not provided by the defense to the trial court in any written pleadings to the court below. (Note: Appendix E, F, G and H).

SUMMARY OF ARGUMENT

ISSUE I: Based on the limited remand pursuant to Campbell v. State, 571 So.2d 415 (Fla. 1990), the trial court did not err in denying Jackson's *pro se* motion for transport, because first she did request to attend resentencing but rather wanted to be moved back to Jacksonville; and second and more importantly she is barred from asserting entitlement to an expanded remand since she did not argue her rehearing in Jackson v. State, 704 So.2d 500 (Fla.1997), about the "limited remand."

ISSUE II: The trial court complied with this Court's remand order and weighed the aggravation and mitigation in his written sentencing order pursuant to "Campbell and its progeny." The trial court did not err in rejecting the statutory mitigation and some non-statutory mitigation which were clearly negated the the facts and circumstances of the case.

ISSUE III: The cold, calculated and premeditated aggravator was properly found and proven beyond a reasonable doubt. The trial court properly found the facts at trial to support all aspects of this aggravator.

ISSUE IV: Jackson's case is a death case. Similarly situated cases such as Valle v. State, 581 So.2d 40 (Fla. 1991); Reaves v. State, 639 So.2d 1 (Fla. 1994), and Jones v. State, 580 So.2d 143 (Fla. 1991), support such a finding. The aggravators are weighty

and the mitigation while present is weak. No other result but death is appropriate based on the facts of this case.

ISSUE V: The question of whether the remarks made by the prosecutor were erroneous has been decided in Jackson v. State, 704 So.2d at 507, and not subject to further review.

ISSUE VI: The victim impact evidence presented was appropriate in this case. The statute, specifically Sec. 921.141(7), Fla.Stat. (1993), is constitutional.

ISSUE VII: The issue of whether the videotape of they hypnotic regression by Dr. Mutter of Jackson should have been admitted into evidence was decided by this Court in Jackson v. State, 704 So.2d at 507-8, adversely to her. She is procedurally barred from rearguing this claim herein.

ISSUE VIII: Jackson's last argument that the trial court erred at resentencing in not allowing her to hire a pathologist is procedurally barred from further review here. In Jackson, 704 So.2d at 508, the issue was decided contrary to Jackson's position. This limited remand did not open the door for re-review of claims previously decided on appeal.

ARGUMENT

Issue I

THE TRIAL COURT DID NOT ERR IN RESENTENCING JACKSON WITHOUT A HEARING AND IN DENYING HER REQUEST TO BE PRESENT AT SENTENCING IN VIOLATION OF DUE PROCESS OF LAW.

Jackson first argues that the scope of this Court's remand was something more than a "remand to reweigh the aggravating and mitigating circumstances and resentence Jackson in compliance with Campbell and its progeny." Jackson v. State, 704 So.2d 500, 508 (Fla. 1997).

First, the issue is not properly before the Court because of the limited remand. Hill v. State, 643 So.2d 1071, 1073 (Fla. 1994); Funchess v. State, 399 So.2d 356 (Fla. 1981) (limited scope of remand to Gardner v. Florida, 430 U.S. 349 (1977) relief); Davis v. State, 589 So.2d 896 (Fla. 1991) (limited remand to Hitchcock issue):

> Funchess makes a number of legal attacks on the propriety of instructions given to the jury at the sentencing proceeding of his first trial, arguing that the order remanding for so-called 'Gardner relief' should have included a mandate for reconvening an advisory jury. We reject all of these contentions. The purpose for our remand was to comply with the dictates of the United States Supreme Court in Gardner v. Florida; it wanot to provide an entirely new sentencing proceeding at which a new advisory jury could be convened. (Cite omitted). Complying with out mandate, the trial court properly rejected all legal points raised by Funchess' counsel.

399 So.2d at 356.

Second, it is not clear from the *pro se* Motion Requesting Transportation (Vol. I 16-18), what Jackson was requesting. Based on the wording of the motion, Jackson appears to want to be considered like other inmates in "normal Presentence Custody" because she is "not a Death Row Inmate any longer and therefore should not be held in a Special Restrictive Status." (Vol. I 16).

It is the State's contention that Jackson is procedurally barred in either circumstance, since the remand is not of the nature that would permit her presents and she certainly did not espouse any concerns in her rehearing in Jackson v. State, 704 So.2d 500 (Fla. 1997), authorizing the limited remand.[2] Moreover, the authorities cited by Jackson in her current pleadings were all available to her at the time of the decision was rendered. Note: Scull v. State, 569 So.2d 1251 (Fla. 1990); Oats v. State, 472 So.2d 1143 (Fla. 1985); Mann v. State, 453 So.2d 784 (Fla. 1984), and Menendez v. State, 419 So.2d 312 (Fla. 1982). Additionally, a cursory review of each demonstrates that each is distinguishable from the instant case.

This Court stated:

> . . . Because the instant sentencing order does not meet that requirement [a thoughtful and comprehensive analysis of the mitigating evidence in the record], we remand to the

[2] It is further submitted that the trial court was without authority to enlarge the scope of the remand unless there appeared to be confusion as to the scope of remand. See Funchess v. State, 399 So.2d at 356.

> trial court for a reweighing and resentencing to be conducted within 120 days. We direct the trial court to reweigh the aggravating and mitigating circumstances, and if the trial court again determines that death is the appropriate penalty, the court must prepare a sentencing order that expressly discusses and weighs the evidence offered in mitigation. . .

704 So.2d at 507.

Based on the foregoing, Jackson is not entitled to any relief, specifically a new "sentencing" hearing.

Issue II

> THE TRIAL COURT DID NOT ERR IN EVALUATING THE MITIGATING EVIDENCE.

Jackson argues that the trial court erred because "[I]n the current sentencing order, the trial judge has provided explanations for rejecting the mitigating circumstances. . . . [H]owever, this order now reveals that the court rejected mitigation without substantial competent evidence in the record to justify the decision. . . . The court reached factual conclusions based upon improper and unfounded speculation and inferences. . . .", citing Alamo Rent-A-Car v. Phillips, 613 So.2d 56 (Fla. 1st DCA 1993).[3]

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[3] It is submitted that this decision is not relevant to the circumstances *sub judice*. The circumstances in the Alamo case reflect:

> 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

The trial court rejected the two statutory mitigating circumstances proposed by the defense, that Jackson was under the influence of extreme mental and emotional disturbance (Sec. 921.141(6)(b), Fla.Stat.), and that Jackson could not appreciate the criminality of her conduct or conform her conduct to the requirements of law (Sec. 921.141(6)(f), Fla.Stat.) (Vol. I 94-101). As to non-statutory mitigation, the court gave "some" to "little" weight to all the non-statutory mitigation tendered except that he found no credible evidence that:

> 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.

1) Jackson suffered from childhood abuse; and

2) Jackson was suffering under a misconception that the police officer was trying to rape her. (Vol. I 102, 105).

The trial court held that weighing the two aggravating circumstances against "all statutory and non-statutory factors," . . . death was the appropriate sentence. (Vol. I 106).

Jackson challenges the trial court's rejection of Dr. Mutter's, Dr. Walker's and Dr. Miller's testimony to the extent that each provided findings that were contrary to the facts of the case and contrary to Jackson's own actions and statements at the time of the crime. She also argues that the court should have found that the statutory mitigating factor that her capacity to appreciate the criminality of her conduct or conform her conduct to the requirements of law were impaired. Lastly, she argues the trial court should have given some "mitigation weight" to the fact of her childhood sexual abuse.

Initially, the State would submit portions of this argument are improper and should be stricken because the defense never provided the trial court in any sentencing memorandum any information regarding articles by David Finkelhor, The Trauma of Child Sexual Abuse, Published as Chapter 4 in Lasting Effects of Child Sexual Abuse, Edited by Elizabeth Wyat and Gloria Johnson Powell, Sage Publications, Copyright 1988; Excerpts from Trauma and Recovery, by Judith Lewis Herman, Basic Books, Copyright 1992;

Memories of Fear, by Bruce Perry, Published as a chapter in Splintered Reflections: Images of the Body in Trauma, Edited by J. Goodwin and R. Attius, Basic Books, Copyright 1999; and excerpts from DSM-IV on Post-Traumatic Stress Disorder, which are now being submitted as authority to negate the trial court's findings. Jackson has included these articles as part of her appendix to the initial brief. In fact such inclusions violate Rule 3.220 Fla.R.App.P., which specifically provide that the "purpose of an appendix is to permit the parties to prepare and transmit copies of such portions of the record deemed necessary to an understanding of the issues presented." (Emphasis added). The appendix should not be used as an attempt to present non-record materials that were never before the trial court below.[4]

The trial court in rejecting the application of Sec. 921.141(6)(b), Fla.Stat. (1995), reviewed in detail the testimony of Drs. Mutter, Walker and Miller. (Vol. I 94-101).

Dr. Mutter first performed a mental evaluation and examination of Jackson some 5 years after the murder. The purpose of his examination was to "determine why defendant committed the murder." Dr. Mutter used hypnosis to assist Jackson so that she could "recall" the murder. Following a discussion of Dr. Mutter's

[4] Undersigned counsel has not moved to strike those portions of the instant brief or the appendix noted above, because no further delay should result from this limited remand. The State would submit this Court should disregard any arguments relying on the aforenoted sources.

techniques, and what he discerned Jackson said, the Court found the following:

> Dr. Mutter stated that his opinion was based on what the defendant had told him, including that she had been raped by her stepfather when she was ten years old. Dr. Mutter testified that information obtained from the person cannot simply be taken at face value, but must be compared to the facts of the incident to determine if the information is reliable, and that if the information is not consistent with the facts it should be discarded. Dr. Mutter testified that if what the defendant had told him about being raped by her stepfather when she was ten years old were not true, then his opinion would be useless. Dr. Mutter admitted that a person under hypnosis can still distort, falsify, lie or confabulate information. Dr. Mutter admitted that he was not familiar with the actual facts of this case.
>
> This Court rejects Dr. Mutter's opinions for the following principles reasons. First, Dr. Mutter lead the defendant to the conclusion that she was being raped by telling her that the victim was on top of her before she shot him, and then lead her to say that she had previously been raped. Second, the facts provided by the defendant in support of her claim that she was raped are totally inconsistent with the actual credible evidence of the facts of this case (indeed, her statements of what occurred are even inconsistent within themselves). Third, the only claim of rape that the defendant had made when she was nine to ten years of age was against three male classmates, who were actually arrested, which a physical examination proved to have been a lie. Fourth, Dr. Mutter testified that he considered the defendant's statements to be reliable because she did not immediately state that she had been raped when she was put under hypnosis - which people who were simply making up excuses for their actions generally did.

> Dr. Mutter's ignorance of the facts of this case obviously includes his ignorance of the fact that the defendant did, in fact, state that very excuse to Joi Shelton shortly after the murder. Indeed, Dr. Walker testified that the defendant had told her that she had told a number of people that the victim had tried to rape her. Further, despite Dr. Mutter telling the defendant at the end of the hypnosis session that she would not remember this alleged rape by her stepfather which was allegedly so traumatic that she could not recall it without hypnosis) after they finished the session, the defendant was not only able to subsequently tell Dr. Walker about this alleged rape by her stepfather when she was ten years old, the defendant was able to relate even more details of this allegedly *ongoing* rape by her stepfather, as well as alleged rapes by former boyfriends and her ex-husband in the back of a car. This Court finds that the defendant did not experience a flashback, but rather, she has attempted to make up a reprehensible excuse for her actions, which is totally inconsistent with the actual credible evidence in this case.

(Vol. I 97-98).

The trial court next discussed the testimony of Dr. Lenora Walker, who examined Jackson 6 years after the murder. Dr. Walker stated Jackson said she had been raped by her stepfather 3-4 times a week and had been assaulted by her ex-husband and a former boyfriend who raped her in the back seat of a car. Dr. Walker, an expert in battered woman syndrome, had little actual knowledge of the facts and attributed Jackson's actions as part of a flashback to a time when Jackson's stepfather assaulted her. In rejecting Dr. Walker's testimony, the trial court found:

> This Court rejects Dr. Walker's testimony for the following principle 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 actual 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 previously been 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 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 step daddy 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 credible facts of this case.

(Vol. I 99-100).

The trial court found that, the third mental health expert, Dr. Miller, examined Jackson some 7 years after the murder for approximately 1½ to 2 hours. Dr. Miller testified that if Jackson correctly told him about the amount of drugs and alcohol she used at the time of the murder, "although she was aware that the victim

was a police officer and that she was being arrested, her level of thinking had been impaired to the primitive level of thinking and, therefore she was incapable of the highest level of thinking - which would be necessary for cold, calculated premeditation." (Vol. I 100). The court observed that Dr. Miller disagreed with Dr. Mutter's and Dr. Walker's opinions regarding "some type of PTSD flashback at the time of the murder. (Transcript page 1413)." (Vol. I 100).

In rejecting Dr. Miller's analysis, the trial court found:

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

(Vol. I 101).

Jackson urges that the trial judge was not free to reject the existence of these mental mitigating circumstances proven by substantial evidence which the State could not rebut. The State would disagree. See Walls v. State, 641 So.2d 381 (Fla. 1994); Foster v. State, 679 So.2d 747 (Fla. 1996).

In Walls v. State, this Court was faced with a similar contention as to whether the trial court improperly rejected expert opinion testimony as to whether Walls suffered extreme emotional disturbance and whether his capacity to conform his conduct to the

requirements of law were substantially impaired. The Court observed:

> . . . In Florida, as in many states, a distinction exists between factual evidence or testimony, and opinion testimony. As a general rule, uncontroverted factual evidence cannot simply be rejected unless it is contrary to law, improbable, untrustworthy, unreliable, or contradictory. E.g., Brannen v. State, 94 Fla. 656, 114 So. 429 (1927). This rule applies equally to the penalty phase of a capital trial. Hardwick, 521 So.2d at 1076.
>
> Opinion testimony, on the other hand, is not subject to the same rule. Brannen. Certain kinds of opinion testimony clearly are admissible -- as especially qualified expert opinion testimony -- but they are not necessarily binding even if uncontroverted. Opinion testimony gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking. A debatable link between fact and opinion relevant to a mitigating factor usually means, at most, that a question exists for judges and juries to resolve. See Hardwick, 521 So.2d at 1076. We cannot conclude that the evidence here was anything more than debatable. Accordingly, this Court may not revisit the judge and jury's determination on appeal.

641 So.2d at 390-91.

In reaffirming this notion, the Court, in Foster v. State, 679 So.2d 747, 755-56 (Fla. 1996), affirmed the trial court's rejection of the statutory mental mitigator of extreme mental or emotional disturbance and other nonstatutory mitigation:

> . . . During the penalty phase, Foster presented expert testimony that he was under the influence of extreme mental or emotional

> disturbance and that his capacity to conform his conduct to the requirements of law was substantially impaired. Foster claims that since this expert testimony was uncontroverted, the trial court should have found this statutory mitigator. Additionally, Foster claims that the trial court should have found the nonstatutory mitigators that he came from an abused background; was mentally retarded; had a deprived childhood and poor upbringing; has organic brain damage; and is an alcoholic and was under the influence of alcohol at the time of the homicide.
>
> The decision as to whether a mitigating circumstance has been established is within the trial court's discretion. (Cite omitted). Moreover, expert testimony alone does not require a finding of extreme mental or emotional disturbance. (Cite omitted). **Even uncontroverted opinion testimony can be rejected, especially when it is hard to reconcile with the other evidence presented in the case. (Cite omitted). As long as the Court considered all of the evidence, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion.**

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

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

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

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

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

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

679 So.2d at 756.

In the instant case, as previously detailed, both State and defense witnesses testified that on May 16 and 17, 1983, Jackson was not impaired via drugs or alcohol. While her history demonstrated that she may have been abused as a child[5] and may have

[5] The State would submit that even if this Court determines that the trial court should have found "credible evidence" of childhood sexual abuse, little weight could be afforded this mitigation. The failure to find same by the trial court was harmless error in light of all the evidence in aggravation and

suffered domestic violence at the hands of her husband, the record reflects that none of these events had anything to do with the facts and circumstances of Officer Bevel's murder. The three doctors that testified in Jackson's behalf contradicted one another as to what exactly was going on the day of the murder and, more importantly, contradicted one another as to the "reasons" why Jackson did the things she did. Dr. Walker found her incompetent, insane and suffering from battered woman syndrome. Dr. Mutter, through his hypnotic regression, was able to eek out, after four tries, that Jackson thought she might be sexually assaulted and therefore she suffered a "split-second" flashback while she emptied her .22 caliber gun into Officer Bevel. Dr. Miller stated his disagreed with Dr. Walker and was not to confident that Dr. Mutter was correct with regard to this split-second flashback concept.

Lay witnesses such as Edith Croft, testified that Jackson had told her that Jackson's step-father had sexually abused her as a child (Vol. VI 1113), and that Shelton and Jackson has marital problems and would fight. (Vol. VI 1114). Edith Croft was heavy into drinking and drugs and related that Jackson would do drugs and alcohol and used T's and Blue's with her. (Vol. VI 1115-16). Just prior to Jackson's arrest, she returned to her ex-husband's house where she met up with Edith Croft. Jackson told her that the police are "mad because I killed a police officer" minutes before

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mitigation. See Wickham v. State, 593 So.2d 191, 194 (Fla. 1992).

the police arrived and arrested her. (Vol. VI 1125). Ms. Croft testified that although Jackson might have been high she knew what she was doing and what was happening. She said Jackson would get mean when she started using drugs. (Vol. VI 1127). Joi Shelton, also a defense lay witness, testified that she and Jackson were close friends and that she saw Jackson every day. (Vol. VII 1157). It was Ms. Shelton's testimony that she only saw Jackson do drugs once and that Jackson did not do any drugs the night after the murder. (Vol. VII 1158-1159).

Lister Griffin, who knew Jackson as a child (Vol. VII 1176), testified that Jackson would stay with her while Jackson's mother was at work. It was her testimony that Jackson never mentioned any sexual assaults by her step-father. (Vol. VII 1179).

Kevin Hicks, Jackson's brother, testified that he was closest to Jackson when they were growing up. (Vol. VII 1183). He recalled that Jackson got into trouble at school fighting, but he had no knowledge of whether she was using drugs or alcohol. (Vol. VII 1185). Mr. Hicks testified that when Jackson went to junior high school, she started acting differently and got meaner, although Jackson made the basketball team, her mother made her quit because Jackson was a disciplinary problem. (Vol. VII 1186-87). Mr. Hicks recalled that Jackson fought with her step-father Eddie Brown (Vol. VII 1190), and confirmed that the older Jackson got, the meaner she got. (Vol. VII 1192). Beverly Turner, a distant

cousin of Jackson's, would babysit for her when Jackson was a child. (Vol. VII 1196-98). Ms. Turner remembered that there were times when Jackson did not want to go home and in her early teens she started running away. (Vol. VII 1199-1200). It was her view that Jackson was an unhappy child but she lost touch with Jackson after Jackson got married. (Vol. VII 1202).

The defense also introduced documents reflecting that Jackson was born on February 26, 1958, and married October 14, 1977. (Vol. VII 1220). The affidavit of her deceased brother Marvin Hicks was read to the jury and revealed that Jackson did not deal with life normally and, that she was into drugs early on. He claimed the neighborhood they lived in for the exposure to drugs, the fact that it was full of low income people. (Vol. VII 1221). He detailed how Shelton's family was into drugs and that he had seen Jackson use heroin. He recalled how, when Jackson was pregnant, he lived with her because the neighborhood was a bad area. (Vol. VII 1223).

The affidavit of Barbara Hicks was also read to the jury. Barbara Hicks, Jackson's mother, stated that she loved her daughter and that the shooting of the officer hurt her greatly. (Vol. VII 1223-24). She stated that Jackson had the burden of carrying the fact that her mother could not name Jackson's father because he was a married man and a member of the church. (Vol. VII 1224). For the most part, Jackson was raised by her aunt who took care of her while her mother worked. Jackson's mother observed that Jackson

was a smart child but started getting headaches at age eight and also had numerous bladder infections. (Vol. VII 1226). She detailed how Jackson's grades started slipping in the third and fourth grade and that she was called by the juvenile authorities because Jackson was a problem in school. (Vol. VII 1227). By the time Jackson was fifteen she was living with Shelton and she finally married him in 1977. They had two sons, however Jackson's mother believes that the marriage was not good. (Vol. VII 1227-28).

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

> In considering allegedly mitigating evidence the Court must decide if 'the facts alleged in mitigation are supported by the evidence,' if those established facts are 'capable of mitigating the defendant's punishment, i.e., . . . may be considered as extenuating or reducing the degree of moral culpability for the crime committed', and if 'they are of sufficient weight to counterbalance the aggravating factors.' (Cites omitted). 'The

> decision as to whether a mitigating circumstance has been established is within the trial court's discretion.' Preston, 607 So.2d at 412. The judge carefully and conscientiously applied the Rogers standard and resolved the conflict in the evidence, as this was his responsibility. (Cite omitted). The record supports his conclusion that the mitigators either had not been established or were entitled to little weight. Preston; Ponticelli v. State, 593 So.2d 483 (Fla. 1991), vacated on other grounds, __ U.S. __, 113 S.Ct. 32, 121 L.Ed.2d 5 (1992).

614 So.2d at 478-79.

The trial court did not err in concluding that the two statutory mitigating factors argued by Jackson were not applicable and further did not err in determining that some of the nonstatutory mitigating evidence concerning Jackson's childhood sexual abuse did not rise to the level of mitigation based on the facts and the testimony presented at resentencing.[6] All relief

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

Moreover, it is clear that evidence rejected for the statutory mitigators was considered and given "weight" as to non-statutory mitigation, for example, the court found Jackson was under the influence of drugs and alcohol; was physically and psychologically dependant on drugs and alcohol and suffered from physical and domestic abuse.

should be denied as to this claim. See Wuornos v. State, 644 So.2d 1000, 1010 (Fla. 1994).

ISSUE III

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

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

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

684 So.2d at 89.

In Walls v. State, 641 So.2d 381, 387-88 (Fla. 1994), the court reaffirmed Jackson, finding four specific elements which the State must prove beyond a reasonable doubt before affirming a CCP aggravating factor:

> . . . The first is that 'the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage.' . . .

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

641 So.2d at 387-88.

The trial court in this new sentencing order, following remand and in accord with Campbell v. State, 571 So.2d at 419, concluded the murder was committed in a cold, calculated and premeditated manner without any moral justification. (Vol. I 90-93). Following a recital of pertinent facts, the Court found:

> . . . The defendant's actions toward Officer Bevel were similarly cold, calculated and premeditated. The eyewitnesses established that the defendant was calm when talking to the two officers about her destroyed car, that she lied to the officers about how the destruction had occurred, and that she conversed with Officer Bevel while sitting in his police car without any screaming or shouting by either Officer Bevel or the defendant. 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. The defendant's premeditated intent to use lethal force to prevent her arrest was the product of cold, calm and calculated reflection.

(Vol. I 91).

The Court further found:

> . . . When the defendant went back downstairs and Officer Bevel was not at his car, the defendant went into the car to look at the reports Officer Bevel had written so as to confirm her knowledge or suspicion that Bevel intended to arrest her. When Officer Bevel approached his car and asked the defendant what she was doing in the car, the defendant denied being in the car. When Officer Bevel told the defendant that he was going to arrest the defendant, she did not turn and run; instead, the defendant made the defiant statement, 'I'm not going any damn where.' 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. . . . when the defendant continued to resist being put in the back of the car, Officer Bevel reached down and grabbed the defendant by the back of the knees causing her to sit back into the seat of the car, with the legs and feet still outside of 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 area 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. The defendant then pushed Officer Bevel's body to the side and fled the scene with the murder weapon still in her right hand. . . .
>
> Although the defendant has alleged that her actions have a pretense of moral or legal justification, in the nature of self defense in that she alleges she was having a flashback at the time of the murder to an alleged prior rape by her stepfather, this Court finds that the evidence refutes this claim beyond any reasonable doubt. The testimony of all of the four eyewitnesses that was presented to the instant jury established that Officer Bevel did not yell at the defendant, that he did not hit the defendant, that the defendant was never lying on her back in the back of the police car prior to the shooting, and that Officer Bevel was never on top of the defendant in the back of the police car until after he had ben shot and fell forward onto the legs of the defendant. The fact that the defendant said, 'You made me drop my keys,' negates any suggestion that her mind was overcome by a flashback and that she was not cognizant of what was, in fact, occurring. Further, there is not one shred of commonality between the alleged facts of the alleged rape by the defendant's stepfather and the facts of this case. Finally, the jury and this Court have the defendant's own admissions that she committed this murder because she was not going back to jail . . .

(Vol. I 92-93).

This Court, in Jackson v. State, 704 So.2d 500, 504-506, exhaustively detailed the facts of this case that supported the CCP aggravator. Nothing in the trial court's order on remand or presented in the defense's memorandum below changes the circumstances regarding the facts that were and presently are before the court. Consequently, the finding that the CCP factor had been proven beyond a reasonable doubt is unassailed. The court opined:

> First, we find Jackson's actions were cold. Jackson alleges her actions were not the result of calm and cool reflection because at the time of the murder she was outraged by her predicament, as evidenced by her actions toward her car. When Officer Bevel told Jackson she was under arrest, Jackson alleges, her anger intensified and led her to engage Officer Bevel in a struggle, during which she had a flashback to a sexual assault and shot the officer.
>
> Although Jackson alleges a loss of emotional control, we find there is competent, substantial evidence in the record supporting the trial court's finding to the contrary. Several witnesses testified that in her interactions with Officer Bevel prior to the struggle, Jackson appeared calm. For example, Officer Griffin testified that before the shooting Jackson calmly volunteered her story to and cooperated with the officers. Additionally, we note that Jackson was able to devise a plan to catch Officer Bevel off guard (i.e. dropping her keys). This is not the type of activity performed by a person in a frightened or panicked state. Rather, her actions amounted to an execution-type murder which we have found is by its very nature a 'cold' crime. See Walls, 641 So.2d at 388.

With regard to the calculation element, the evidence demonstrated that Jackson carefully planned the murder. Jackson witnessed Officer Bevel filling out the police report as she sat with him in the police car. She then returned to her husband's apartment and placed a gun into her waistband. When Jackson returned downstairs she began looking through the papers in Officer Bevel's car. When Officer Bevel attempted to arrest Jackson, she struck him in the chest where his bulletproof vest was located. She then dropped her keys which gave her the opportunity to shoot the officer in the head.

We find that the facts of the present case, which support this element, are similar to the facts of Valle v. State, 581 So.2d 40 (Fla.), cert. denied, 502 U.S. 986, 112 S.Ct. 597, 116 L.Ed.2d 621 (1991), where this Court found the cold, calculated, and premeditated aggravator invalid. In Valle, an officer stopped the defendant for a traffic violation. The defendant sat in the officer's car until the officer began conducting a license plate check. Id. at 43. The defendant then walked back to his car, obtained a gun, and shot the officer. Id. In upholding the cold, calculated, and premeditated aggravator this Court found the facts sufficient to support the trial court's findings. Id. at 48. The trial court in its sentencing order found:

> After the defendant heard the information about the car come on the radio, he returned to his car and told Mr. Ruiz that he would have to waste the officer. He got the gun and concealed it along the side of his leg and slowly walked back to the car. He fired at Officer Pena from a distance of 1½ to 3 feet from the officer, hitting him in the neck. He purposefully said "Officer" in order to get a better shot. . . .

> The court finds that these actions establish not only a careful plan to kill Officer Pena to avoid arrest, but demonstrate the heightened premeditation needed to prove this aggravating circumstance. This was, without any doubt an execution style murder. . . . Officer Pena did nothing to provoke or cause the defendant's actions.

Id. at 48. As in Valle, the officer's murder in the instant case was not an afterthought. It was part of a careful plan to kill the officer and avoid arrest. Accordingly, we find that the trial court did not abuse its discretion in finding the calculation element was proven beyond a reasonable doubt.

Next, the evidence in the instant case established that Jackson killed Officer Bevel with heightened premeditation. Jackson, as indicated by her decision to go upstairs and retrieve a gun, made a deliberate and conscious choice to shoot Officer Bevel. Jackson could have left the scene, but instead she purposely returned to confront the officer. Jackson did not act on the spur of the moment but rather acted out the plan she had conceived during the extended period in which these events occurred.

As to a pretense of moral or legal justification, Jackson alleges this element was not proven because she perceived Officer Bevel's attempt to arrest her as an attempted rape. In support of her claim, Jackson relies on several cases in which this Court found factual evidence or testimony supported a colorable claim of self-defense. See Christian v. State, 550 So.2d 450 (Fla. 1989), cert. denied, 494 U.S. 1028, 110 S.Ct. 1475, 108 L.Ed.2d 612 (1990), Banda v. State, 536 So.2d 221 (Fla. 1988), cert. denied, 489 U.S. 1087, 109 S.Ct. 1548, 103 L.Ed.2d 852 (1989); Cannady v. State, 427 So.2d 723 (Fla. 1983). In each of these cases, though, the victim had threatened violence to the defendant and

> caused the defendant to fear for his life. The same is not true in the instant case where Officer Bevel had not threatened or harmed Jackson. Cf. Arbelaez v. State, 626 So.2d 169, 177 (Fla. 1993), cert. denied, 511 U.S. 1115, 114 S.Ct. 2123, 128 L.Ed.2d 678 (1994). Moreover, we note that Jackson's belief that she was about to be raped was purely subjective. We have repeatedly rejected claims that the purely subjective beliefs of the defendant, without more, could establish a pretense of moral or legal justification. Walls, 641 So.2d at 388. Consequently, we find that, unlike the murder that occurred in Christian, Banda, and Cannady, no pretense of legal or moral justification for this murder exists.
>
> Based on the foregoing, we conclude that the trial judge correctly found that the murder was cold, calculated, and premeditated. The trial court did not abuse its discretion in rejecting the expert testimony to the contrary, as that testimony was inconsistent with the facts of this case.

704 So.2d at 503-505.

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

> . . . We agree with the conclusions of the trial court:
>
> > The evidence indicates this Defendant was armed throughout this entire event or armed herself when she went to her home to obtain the papers relating to the car. It

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

498 So.2d at 412.[7]

Jackson divides her argument into several prongs, she challenges the conclusions drawn from the evidence by the trial

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

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

648 So.2d at 90.

court[8] (Appellant's brief pps. 71-81), argues the evidence fails to establish the elements of CCP (Appellant's brief pps. 81-84), and finally argues that cases compared to hers mandate that CCP should not be an aggravating factor based on the facts herein. (Appellant's brief pps. 84-91).

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

The State presented a detailed accounting of the facts and circumstances developed at the resentencing, regarding what transpired on May 16-17, 1983. Every state witness and some of the defense witnesses stated that Jackson was not drunk nor high, although there was some evidence that she had been drinking, at the time leading to and following the murder. John Bradley, an investigator for the Sheriff's Office, testified that on May 17, 1983, he did not believe Jackson was intoxicated when he saw her, although she smelled alcohol on her breath. She did not appear to be high and he observed that she walked okay, did not stagger, and

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[8] Jackson argues that the trial court incorrectly concluded, based on speculation, that 1) she had prior knowledge of impending arrest; 2) she armed herself based on the possibility that she would be arrested; 3) she armed herself and then confronted Officer Bevel; 4) she devised a plan to kill the officer; 5) she intentionally dropped her keys; 6) the court rejected the opinions of three mental health experts, and 7) she did not admit the murder in her comments about not wanting to return to jail.

This Court, in Jackson v. State, 704 So.2d at 504-505, made similar findings regarding each of the aforenoted "speculations" by the trial court below. Nothing changed regarding these facts from the time this Court assessed them in 1997, to the time the trial court reviewed them in his order in 1998.

was able to converse in a normal voice without slurring her speech. (Vol. II 192-3, 207-08, 217). Gina Rhoulac looked out her mother's window and saw Jackson vandalizing her car. (Vol. II 224). She testified that Jackson did not appear high and was walking and talking with the officer unremarkably. (Vol. II 226-7). Anna Nelson testified that Jackson had no problems speaking with Officer Bevel and did not appear to have any problems walking. (Vol. II 243). Prior to Jackson retrieving the car registration, she saw Jackson and Officer Bevel talking and there was no evidence of any violence. (Vol. II 245-46). It was only after Officer Bevel told Jackson that he was going to arrest her that she got angry and lunged towards the officer and started struggling. (Vol. II 250-1). Mabel Coleman observed on May 16, 1983, Jackson banging on her car and taking tires out of the trunk, removing the license plate from the car and yelling for assistance to remove the battery. (Vol. II 314-17). Ms. Coleman stated Jackson was not stumbling nor did she appear drunk or high. (Vol. II 317-18).

Officer Griffin, who also appeared at the crime scene to assist Officer Bevel, testified that he talked to Jackson and that she appeared fine. There was no slurred speech and she did not appear to be under the influence of any drugs or alcohol. (Vol. II 373-76). Although she had a faint smell of alcohol on her (Vol. III 383), he described Jackson as cooperative at the time, volunteering that she thought she knew who had vandalized her car.

(Vol. II 378). Officer Griffin testified that Bevel sat down with Jackson in the front seat of the patrol vehicle and prepared a report. (Vol. II 378). Adam Gray, a salesman at Rocket Motors, revealed that on May 16, 1983, he talked to Jackson concerning repairs to her car. She was mad because the car broke down and said that if they did not fix the car she would "run it off the Main Street Bridge." (Vol. III 388). Although Jackson used profanity (Vol. III 389), Mr. Gray observed that Jackson acted "pretty straight" and did not appear to be on drugs. (Vol. III 390-1).

Shirley Freeman, who lives with Joi Shelton, recalled that after the murder, Jackson came to their abode and washed her bloodied clothes. (Vol. III 429-30). Jackson told her that she, Jackson, "had killed a cop and that she was not going back to jail." Ms. Freeman specifically said that Jackson did not appear to be on drugs (Vol. III 431), although she smelled of alcohol. (Vol. III 432). Carl Lee, the cab driver who picked Jackson up as a fare at approximately 4:15 a.m., that day, testified that Jackson did not appear drunk or high. (Vol. III 448, 450).

Officer Dipneria arrested Jackson at approximately 4:45 a.m., May 17, 1983. When he saw Jackson, she said "she didn't shoot no policeman" but more importantly she did not appear to be drunk or high at the time. (Vol. III 463).

The defense called Deputy George Barge who testified he assisted in the arrest of Jackson. Although he could detect a slight odor of alcohol on her (Vol. V 780), she was not high or intoxicated and did not seem impaired in any way. (Vol. V 783-4). Roy Blighton, called by the defense, testified that as custodian for the University Medical Center, he reviewed the records of May 17, 1983, regarding Jackson. Jackson, on that day, complained of knee pain and had a laceration on her forehead. At approximately 6:30 a.m., that day, she was treated and ultimately released. The records reflect no indication of intoxication or drugs and, in fact, no actual injury was found. (Vol. V 807).

When Jackson could not reach Joi Shelton immediately following the murder, she tried to flag down a car. (Vol. VI 1030). David Lee stopped and picked her up. He noted that her shirt was open and she seemed excited, her hair was all messed up and she seemed agitated. (Vol. VI 1030-31). Jackson smelled of alcohol and said something to the effect that "she didn't want to do it." (Vol. VI 1032). Jackson walked okay and had no problem talking or providing directions as to where she wanted to go. (Vol. VI 1035-37). Joi Shelton, called by the defense, also testified that although Jackson was excited when she arrived at her home, Jackson told her that "she had shot a cop." (Vol. VII 1149). While at Ms. Shelton's house, Jackson had some vodka (Vol. VII 1154), and had to be calmed down once she found out that the officer had died. (Vol.

VII 1155). Ms. Shelton noted that she had only seen Jackson do drugs once and, Jackson did not do any drugs, that night after the murder, at her house. (Vol. VII 1158-59). Jackson phoned her and was able to tell Ms. Shelton where she, Jackson, was located after the murder. She did not seem to have any memory loss or a blackout. (Vol. VII 1162). Jackson said that she killed a copy and to "look at her," she was covered with blood. (Vol. VII 1162). Jackson said that Officer Bevel was trying to arrest her. (Vol. VII 1163). Ms. Shelton testified that Jackson knew she was in trouble and that she "could not believe she had done it." (Vol. VII 1164-66). Jackson asked for money and said that she needed to get out of town because she was not going back to jail. (Vol. VII 1168-69).

The record reflects that, with the exception of her doctors' testimony, witnesses who observed her before, during and after the murder, testified that she was acting in a calm fashion. The fact that she was perturbed that her car did not work and then was caught in a lie to Officer Bevel, evidences nothing more than what Dr. Mutter and Dr. Miller concluded was Jackson's immature behavior. Indeed, her conduct was the product of cool and calm reflection. The very things that Jackson now points to - the fact that she was enraged and vandalized her car - all dissipated once she started talking to the police officers in a calm and rational fashion. As Officer Griffin noted, she appeared to be very

cooperative. Finally, it is clear from the Jackson opinion itself, 648 So.2d at 89, that the court contemplated that the "act prompted by emotional frenzy, panic or a fit of rage" was something more than breaking windows in a car that would not start. See, clearly distinguishable, Richardson v. State, 604 So.2d 1107, 1109 (Fla. 1992) (Richardson's actions were spawned by an ongoing dispute with girlfriend. "Richardson appeared angry, crazy and mean when he shot Newton."). Moreover, in Jackson v. State, 704 So.2d at 505, the court held:

> Based on the foregoing we conclude that the trial judge correctly found that the murder was cold, calculated, and premeditated. The trial court did not abuse its discretion in rejecting the expert testimony to the contrary, as that testimony was inconsistent with the facts of this case.

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

Jackson points to several reasons why she believes that the homicide was not carefully planned. She points to the fact that she did not know she would be arrested when she went to Shelton's apartment for the last time before the shooting. Such a contention is not based on the record before the Court. The record reflects that she lied purposefully to the police officers regarding who vandalized her car and, upon her return back to Officer Bevel, Mabel Coleman testified that she saw Jackson put a pistol in her waist. (Vol. II 322). Jackson had an opportunity to look at

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

Anna Nelson testified that, while Officer Bevel was talking to her, she turned to him and said, "Hey Gary, that lady is going into your car." (Vol. II 249). Ms. Nelson saw Jackson looking through papers in the patrol car. (Vol. II 249). Bevel asked Jackson what she was going in his car, at which point she got out and came towards him. (Vol. II 250). Bevel then told her he was going to arrest her for making a false report and she lunged towards him. (Vol. II 251). As he tried to restrain her and put her in the back seat of his car, Jackson struggled and asked why he was "manhandling her." (Vol. II 251). Ms. Nelson then heard Jackson say, "You see what you've made me do? You made me drop my keys." (Vol. II 252). She saw Officer Bevel bend down as he was going to get the keys (Vol. II 255). She heard one shot and then five other shots. (Vol. II 255-56). Ms. Nelson testified that Jackson pushed the officer off her and ran. (Vol. II 257, 286).

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

Jackson also argues that no significance can be placed on the fact that Mabel Coleman saw Jackson place a gun in her waistband as

she came downstairs following Jackson's discussion with the police. She argues that there was evidence that she carried the gun around for her own protection and therefore, no significance can be made of her arming herself. To the contrary, Jackson had been over at her ex-husband's apartment and did not have the gun on her person, even though Shelton tried to "hit her up" for sex that very day. When she went over to Rocket Motors to complain about her car, there was no evidence that she was carrying her gun. When she first went out to talk to Officer Bevel and Officer Griffin, she was carrying no weapon. **The only conclusion that can be drawn from her arming herself was that she did so in anticipation of trouble with Officer Bevel**.[9]

The trial judge found that Jackson knew Officer Bevel wore a bullet-proof vest. She argued that although there was no evidence from Officer Bradley regarding the bullet-proof vest, that it was improper for the trial court to assign any weight or attribute any "planning" to this fact. **The fact that Officer Bevel was shot in the head and, that occurred only after Jackson put up a struggle about getting into the back seat of the car, are valid facts in this record and can be considered for the CCP finding**.

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[9] The record also reflects that she kept her weapon after she murdered Officer Bevel, and had it with her when she was with Carl Lee, the cab driver, following her stay at Joi Shelton's house. (Vol. III 432, 448; Vol. VII 1166). A .22 caliber 6-shot revolver was found nearby where Jackson was captured by police.

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

III. No Pretense Of Moral Or Legal Justification Existed

Jackson concludes that because of her perceived circumstances "that she was about to be raped," she had a pretense of moral or legal justification. The facts presented by the defense as to why she reacted as she did are all over the board. Dr. Walker stated that Jackson was insane and incompetent and that she did not know who the officer was or that she was being placed in a police car. Dr. Mutter, through his "suggestive" hypnotic regression, finally got Jackson to state she thought she might be assaulted. Dr. Mutter, when questioned, said he disagreed with Dr. Walker's findings that Jackson was insane and incompetent. More importantly, he stated that the flashback theory occurred in a "split second,' just long enough for her to put six bullets in Officer Bevel's body. Dr. Mutter admitted that if the facts were

as the State said rather than the facts as the defense stated, this murder could be cold, calculated and premeditated. Finally, Dr. Miller testified that Jackson was neither insane nor incompetent but was disturbed. When questioned, Dr. Miller very reluctantly agreed that Dr. Mutter's flashback theory was plausible. In essence, there was clearly no uniform theory as to Jackson's mental state by defense witnesses.[10] After reviewing all the State witnesses who were either at the scene or saw Jackson before or right after the murder, it is apparent that Jackson was not high, intoxicated or impaired. She was angry at her car and was not going to be arrested once she was caught in her lies to the police about the car.

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

> Approximately eight minutes elapsed between the initial stop and the murder of Officer Pena. After the Defendant heard the information about the car come on the radio, he returned to his car and told Mr. Ruiz that

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

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

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

Jackson could have absconded at any time. She did not. She admitted to the doctors, and the eyewitnesses testified, that she was the one that smashed her car; she was the one that made a false report and she lied to the police officers. Jackson knew she was in trouble; and she made statements about not wanting to go back to jail and told witnesses **after the murder** that that was the reason why she shot the officer. Jackson armed herself, and returned to

the area where her smashed car had been parked. Officer Bevel told her that she was under arrest and Jackson indicated that she was not going anywhere with him. As he attempted to place her in the police car, she pulled out her .22 caliber weapon and shot six bullets into his body. See also Jones v. State, 612 So.2d 1370 (Fla. 1993); Fotopoulos v. State, 608 so.2d 784 (Fla. 1992); Henry v. State, 613 So.2d 429 (Fla. 1992), and Cruse v. State, 588 So.2d 983, 992 (Fla. 1991) (witnesses testified Cruse acted in calm and controlled manner).

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

Jackson cites to Banda v. State, 536 So.2d 221 (Fla. 1988), and argues that she felt threatened by the police officer when he placed her under arrest. Thus, she had a pretense of legal or moral justification for the murder. Banda is distinguishable from the instant case in that Banda believed that the victim was going to get him. In Christian v. State, 550 So.2d 450 (Fla. 1989), also cited by Jackson, the defendant had a "misguided" belief that he

was going to be killed by the victim. In Cannady v. State, 427 So.2d 723 (Fla. 1983), also cited by Jackson, the Court held CCP was erroneously found because Cannady believed the victim was "jumping at him."

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

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

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

Likewise, no credible evidence exists that Jackson believed she had a moral or legal justification for the murder. Evidence derived by Dr. Mutter through the hypnotic regression session proved to be suggestive and both Dr. Mutter and Dr. Miller acknowledged that if the fact scenario were such as reflected by

the State's witnesses, Jackson's conduct was logical and calculated although perhaps done by an "immature individual." The underlying facts upon which Dr. Walker premised her conclusion are faulty and not reflective of the facts and circumstances surrounding the instant murder. Dr. Walker's findings were discredited by Dr. Miller and Dr. Mutter regarding her suggestion that Jackson was neither sane nor competent at the time of the murder.

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

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

Moreover, in Hill v. State, 515 So.2d 176 (Fla. 1987), relied upon by Jackson, the facts of a robbery and escape gone awry, reflect the absence of any evidence that Hill carefully planned or prearranged to kill a person or persons during the "course of this robbery." Likewise, Pietri v. State, 644 So.2d 1347 (Fla. 1994), is distinguishable since the murder was the culmination of a short chase where the officer walked up to Pietri's truck, at which point Pietri shot Officer Chappell from a distance of 3 to 8 feet. Moreover, Street v. State, 636 So.2d 1297 (Fla. 1994), is equally distinguishable because, following the officers' response to a disturbance call, a struggle ensued between Street and the officers, at which point Street, otherwise unarmed, obtained Officer Boles' gun and shot Officer Strzalkowski three times, killing him, and then shot at Boles three times, before running out of ammunition.

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

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

> imprisoned who fashioned her opportunity to escape and then acted accordingly.

And correct in Jackson v. State, 704 So.2d at 505, when it again concluded:

> Consequently, we find that, unlike the murders that occurred in Christian, Banda, and Cannady, no pretense of legal or moral justification for the murder exists.

Therefore, the trial court was correct in finding that the murder of Officer Bevel was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. See especially Wuornos v. State, 644 So.2d 1000, 1008-09 (Fla. 1994).

Issue IV

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

Jackson argues that the death sentence is disproportionate and must be reversed because there may be only one statutory aggravating factor, should this Court strike the CCP aggravating factor.[11] The death penalty is proportional in this case because

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[11] Jackson does not even acknowledge that this Court resolved that the CCP aggravating factor would be appropriate based on the facts of this case. Jackson v. State, 704 So.2d 500, 505-05 (Fla. 1997). The record in the instant case has not changed, the facts are the same and, in the sentencing memorandum prepared by defense counsel on remand, no additional argument was presented that would alter the conclusion by this Court that the CCP factor was appropriate. On remand, the issue was not whether a given aggravating factor existed, rather the court remanded for a reweighing of "the aggravating and mitigating circumstances and

there are two strong statutory aggravating factors and the trial court concluded: ". . . that [the] weight of the two aggravating factors is substantially greater than the weight of all of the statutory and nonstatutory mitigating factors, and that death is, therefore, the appropriate sentence in this case." (Vol. I 106).

Even assuming for the moment that "only" one statutory aggravating factor is left, to-wit: the combined aggravating factor that the murder was committed to avoid arrest, disrupt law enforcement and the person killed was a law enforcement officer, is sufficient to overcome the lack of any significant mitigation in Jackson's case. See Duncan v. State, 619 So.2d 279 (Fla. 1993), and Ferrell v. State, 680 so.2d 390, 391 (Fla. 1996), wherein the court held:

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

680 So.2d at 391. The facts in the Ferrell case are very similar to the instant case in the sense that the nature of the crime was very similar and the lone aggravating circumstance was weighty. See also Armstrong v. State, 642 So.2d 730 (Fla. 1994); Bello v. State, 547 So.2d 914 (Fla. 1989); Windom v. State, 656 So.2d 432 (Fla. 1995) (as to murders of two of the victims, the only

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resentence Jackson in compliance with Campbell and its progeny." 500 So.2d at 508.

aggravating factor was prior violent felony conviction, based on contemporaneous crime; in mitigation, trial court found no significant criminal history, extreme mental disturbance, substantial domination of another person, help in the community, was good father, saved sister from drowning, saved another person from being shot over twenty dollars); Cardona v. State, 641 So.2d 361 (Fla. 1994) (mitigation included extreme emotional disturbance, daily use of cocaine and substantial impairment therefrom, rape as a child, did not meet father until she was twelve), and Grossman v. State, 525 So.2d 833 (Fla. 1988).

The mitigation considered by the trial court herein and detailed in the August 17, 1998, sentencing order, reflects that although rejecting the two statutory mitigating factors of Sec. 921.141(6)(b), and Sec. 921.14196)(f), Fla.Stat. (1995), the Court found, based on the evidence presented:

> 1) Little weight should be assigned to Jackson's claim of physical and domestic abuse at the hands of her husband;
>
> 2) Little weight should be assigned to Jackson's physical and psychological dependency on alcohol;
>
> 3) Little weight should be assigned to Jackson's physical and psychological dependency on drugs;
>
> 4) Some weight should be assigned to the fact that at the time of the offense Jackson was under the influence of drugs and alcohol;
>
> 5) Very little weight should be assigned to Jackson's remorse immediately after the crime.

(Vol. I 93-105).

Beyond per adventure, the weighty aggravators outweighed the mitigation found by the trial court; the death penalty is proportional; Jones v. State, 580 So.2d 143, 146 (Fla. 1991) (Ultimately, three aggravators and no proven mitigation was found):

> Jones argues that the court should have found statutory and non-statutory mitigators but '[t]he resolution of factual conflicts is solely the responsibility and duty of the trial judge, and, as the appellate court, we have no authority to reweigh that evidence.' (Cite omitted). Although cultural deprivation and a poor home environment may be mitigating factors in some cases, sentencing is an individualized process. We cannot say the trial court erred in finding the evidence presented insufficient to constitute a relevant mitigating circumstance. (Cites omitted). Therefore, the trial court's conclusion that death is the appropriate penalty in this case is affirmed.

580 So.2d at 146.

Reaves v. State, 639 So.2d 1 (Fla. 1994) (Deputy Sheriff murdered responding to 911 call from phone both near convenience store. Two aggravators, previously convicted of violent felony; avoid or prevent arrest were found; non-statutory mitigation that Reaves was honorably discharged from military; good reputation up to age 16 and considerate son and good to siblings - were found). Although appellate court struck HAC found by trial court, "[w]e find this error harmless, in view of the two other strong aggravating factors found and relatively weak mitigation. . . ." 639 So.2d at 6. Valle v. State, 581 So.2d 40 (Fla. 1991) (Traffic stop, where officer

shot by Valle when he retrieved gun from auto. Court found in aggravation prior violent felony; combined murder of law enforcement officer with avoid arrest and hinder law enforcement and CCP. No mitigation was found):

> Next Valle contends that the judge did not properly consider the mitigating factors. Valle was found to have an IQ of 127, and his examining psychologist testified that there was no evidence of brain damage or major mental problems. He further said there was no indication of any addiction to drugs or alcohol. Nonetheless, he expressed the opinion that Valle was under the influence of extreme mental or emotional disturbance at the time of the crime and that his ability to conform his conduct to the requirements of law was substantially impaired. He based his opinion upon the stress occasioned by dysfunction within Valle's family as he grew up, his father's harsh discipline, and his own failure to live up to expectations.
>
> The judge referred to this testimony as well as that of a social worker on the subject but concluded that the two statutory mental mitigating factors did not exist. Valle does not quarrel with the rejection of the two statutory mental mitigating factors. He contends that the judge failed to give the testimony weight as nonstatutory mental mitigating evidence. With respect to nonstatutory mitigating evidence, the judge stated in his order:
>
> > The defense presented testimony of six expert witnesses to the jury to prove the defendant, if given a life sentence would either be a model prisoner in the future and/or would be a non-violent prisoner, and/or would be a salvageable or rehabilitatible prisoner. The Court has considered their opinions, weighed the evidence concerning

> these witnesses' opinions, as well as the State's evidence in rebuttal. The Court does not find that this mitigating circumstance reasonably exists.
>
> The Court heard testimony from his family, including his sister Georgina, his father and his niece Ann. These witnesses testified concerning his life prior to the murder. This included his lack of love and attention by his parents, the methods his father used to discipline him and life during his teenage years. The Court also heard from witnesses who knew the defendant in high school. The Court additionally heard from the defendant outside the presence of the jury concerning his current remorse over the killing, wherein he accepts full responsibility for his actions.
>
> Considering all the evidence which the defense has presented concerning these circumstances, the Court does not find these circumstances to be relevant mitigating circumstances. Even if they were established, the Court finds that they are outweighed by the aggravating factors.

> The mere fact that the judge made no further reference to Valle's mental state at the time of the crime does not mean that the court gave it no consideration. We conclude that the judge considered and properly weighed all relevant mitigating evidence.

581 So.2d at 48-49.

In the instant case, the trial court detailed a rationale basis for rejecting proposed statutory mitigation, but gave some weight to those factors as nonstatutory. In viewing the statutory

aggravating factors and the non-statutory mitigating factors, the trial court properly concluded death was the appropriate sentence in this case.

Issue V

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

In Jackson v. State, 704 So.2d at 507, this Court found the alleged errors described below were not error. Jackson has failed to acknowledge that this claim is procedurally barred from further review because it was decided adversely to her. Moreover, the scope of the remand did not reopen issues which were ruled upon and decided on the merits. Funchess, supra; Davis, supra. This Court found that Jackson misinterpreted the prosecutor's remarks as to the merger of the three aggravators and further found that when the prosecutor "encouraged the jury to base its sentencing decision on the need to send a law and order message to the community," a careful review of record revealed "we do not find the prosecutor's comments amounted to error."

During closing argument, the prosecutor, in discussing the merger of the three law enforcement aggravating circumstances into one, informed the jury that "great weight" may be given these merged factors. An objection arose when the State argued:

> . . . Can you imagine? We'd have chaos. We would cease to exist as a nation. So what I

> submit to you, even though all three of these aggravators have to be merged, that this aggravator has go so much weight that no matter how much mitigation you believe this aggravator alone will outweigh that.

(Vol. VII 1294-95).

The objection was overruled and the prosecutor further argued: "This aggravator alone will outweigh that because there is no mitigation here, and if there is, well we'll talk about that mitigation in a minute." (Vol. VII 1295).

Citing to two problems that exist with regard to these remarks, Jackson argues that this instruction "negated the fact that the three law enforcement circumstances merge into a single aggravating circumstance" (Appellant's brief p. 95), and that the jury is to base "its sentencing decision on the need to send a law and order message to the community." (Appellant's brief, p. 95).

The record reflects that at sentencing, the trial court read to the jury the following instructions:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:
>
> 1. The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody.
>
> 2. The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. In order for you to consider this aggravating factor, you must find the murder was cold, and calculated, and premeditated, and that there was no

pretense of moral or legal justification. “Cold” means the murder was the product of calm and cool reflection. “Calculated” means that the defendant had a careful plan or prearranged design to commit the murder. “Premeditated” means the defendant exhibited a higher degree of premeditation than that which is normally required in a premeditated murder. A “pretense or moral or legal justification” is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.

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

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

As you may have observed, three of the aggravating factors I have defined for you are law enforcement related. These are the following: The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody; the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of law; the victim of the capital felony was a law enforcement officer engaged in the performance of his official duties.

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

> activity was to arrest her; therefore, the same aspect of the offense is being used to justify those factors.
>
> Likewise, if you find that either of those two aggravating circumstances existed, it would follow, at least in this case, that the victim was a law enforcement officer in the performance of his duties.
>
> Therefore, if you find any or all of these law enforcement-type aggravating circumstances to exist, you are to treat them as only one aggravating factor. This is the same way the law requires me to consider these three aggravating circumstances in deciding what sentence to impose.

(Vol. VIII 1391-93).

The jury was properly instructed as to how they were to consider the merging of these three aggravating factors, if found. Moreover, these instructions were provided long after the prosecutor's remarks and after defense counsel also explained to the jury what the merger of these three aggravating factors meant. (Vol. VIII 1337-39). Indeed, a review of defense counsel's closing argument reveals that he read the jury instruction the trial court ultimately gave to the jury.

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

present, it must consider the two facts as one, . . .” 597 So.2d at 261.

Defense counsel did not make a specific objection to the statement made by the prosecutor, rather he merely argued that the argument was improper. The State did not argue that in some fashion this aggravator should become a super-aggravator, rather the State argued there was substance to this aggravator.[12] Such an argument is appropriate and does not violate the legal principal set out in Provence v. State, 337 So.2d 783 (Fla. 1976), or White v. State, 403 So.2d 331 (Fla. 1981).

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

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

Jackson's reliance on this Court's recent decision in Campbell v. State, 679 So.2d 720 (Fla. 1996), is distinguishable. Clearly, the statements by the prosecutor in Campbell specifically used the "message to the community" terminology in closing argument. The Court concluded that the error was not harmless under State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), because "on this record, it is entirely possible that several jurors voted for death, not out of reasoned sense of justice but out of a panicked sense of self-preservation."

Based on the foregoing, all relief should be denied as to this claim.

ISSUE VI

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

Citing Windom v. State, 656 So.2d 432, 438 (Fla. 1995), the Court, in Jackson, 704 So.2d at 507, found this claim to be without merit. Jackson has cited nothing new, but rather has shortened her previous argument as to this claim. She is procedurally barred from raising this claim based on two grounds - 1) it was previously raised and decided adversely to her, and 2) the remand was limited and the instant issue was not the subject matter of the remand. See Hill v. State, supra.

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

> (7) **Victim Impact Evidence**. -- Once the prosecution has provided evidence of the

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

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

In Bonifay, this Court observed:

> Clearly, boundaries of relevance under the statute includes evidence concerning the impact to family members. Family members are unique to each other by reason of the relationship and the role each has in the family. A loss to a family is a loss to both the community of the family and to the larger community outside the family.

680 So.2d at 419-20.

In the instant case, the trial court provided the following jury instruction:

> You are now instructed that the victim impact evidence offered by Nathanial Glover, Etta

> Bevel, Jerry Thomas and T.C. O'Steen, during the penalty phase of this trial shall not be considered as an aggravating circumstance but may be considered in making your decision.

(Vol. VIII 1397).

The "victim impact" evidence came from four State-called witnesses. Nathanial Glover read a prepared statement reflecting that on a person and professional level he knew the victim. Gary Bevel was a nice person, a good friend, a committed public servant who recruited a number of people to become law enforcement officers. Mr. Grover stated that it was important to have minorities in the police department and stated on a personal level he had competed together with Gary Bevel in sports and that Gary Bevel was always smiling and a helpful person. Nathanial Glover said he was fortunate to know Gary Bevel. On cross-examination, the defense brought out that Nathanial Glover was Sheriff Nathanial Glover and that Sheriff Glover did not know anything about Jackson; knew nothing about her upbringing and knew nothing about the circumstances that caused the murder. Gratuitously, defense counsel opined that he and the Sheriff had also played sports together and further elicited from the Sheriff that he would miss defense counsel in the same way if he were gone. Defense counsel went on:

> Q: It's not so much that you played sports with him that causes you to be here testifying today about the loss, it's the fact you knew him personally and the fact he was a police officer?

> A: Well, I did know him personally, I also knew him as a police officer, but I also miss him as a friend, and as a fine individual that he was. I think mankind lost when Gary Bevel died.

Later in the State's case, Eda Bevel, Officer Bevel's mother, testified that Officer Bevel was her son and he was one of six children that she reared. He was born in Hartsfield, South Carolina and had been involved in sports. He loved his family and he always looked out for his siblings. He went to Massey College until he joined the Sheriff's Office. (Vol. III 484). Ms. Bevel testified that she was proud of her son and that he had matured into a fine young man. He had high morals, was respectful and friendly. She observed that he never forgot birthdays or holidays and that she thinks about him daily. She observed that his death has been a tremendous impact on her. (Vol. III 485-6).

Jerry Thomas testified that he knew Officer Bevel to be an energetic, friendly and compassionate person. Officer Bevel was an athlete and he was also willing to lend a helping hand and worked with underprivileged youth. He assisted in helping turn young men and their lives around and helped the elderly. Jerry Thomas said he was left without a good friend. (Vol. III 487-8). On cross-examination, Mr. Thomas testified that Officer Bevel had at one time expressed reluctance about becoming a police officer. When asked, Mr. Thomas said he did not know anything about Jackson. (Vol. III 489).

Lastly, T.C. O'Steen, a detective in the Jacksonville Sheriff's Department, testified that he worked as a Correctional Officer with Officer Bevel and they were close friends. (Vol. III 490). He observed that Officer Bevel always had a smile on his face and had the utmost respect for everyone. Officer Bevel attended church with Mr. O'Steen and their friendship grew. (Vol. III 491). Officer Bevel was a great athlete and an influence on everyone he came across. (Vol. III 491). Detective O'Steen was the one that got Gary to become a police officer and he observed that Officer Bevel was a hard worker and he enjoyed police work. (Vol. III 492). They played basketball, softball and football together (Vol. III 492), and although Officer Bevel had had an uphill climb, Bevel was proud of his accomplishments. (Vol. III 492). Detective O'Steen stated that he lost a true friend who was an asset to the police department. He observed that he had recently met Officer Bevel's son and felt said when he realized that the boy would grow up without a father. (Vol. III 493).

On cross-examination, defense counsel asked Detective O'Steen whether he knew that Jackson had children; whether he knew anything about her background and whether he knew about the terrible things that have happened to her. (Vol. III 494).

As observed in Windom, victim impact evidence is limited to that which is relevant to demonstrate the victim's uniqueness and the loss to the community's members by the victim's death. In the

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

ISSUE VII

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

Jackson reargues that the trial court should not have disallowed the introduction of the videotape of the hypnotic regression by Dr. Mutter of Jackson.

In Jackson v. State, 704 So.2d at 507-8 (Fla. 1997), the Court addressed this claim for a second time and again discerned that Jackson was entitled to no relief. The Court held:

> . . . As in Jackson's prior sentencing proceeding, much of Dr. Mutter's testimony was based upon his hypnotic regression of Jackson. In Jackson III, we addressed this issue at length and determined the trial court did not abuse its discretion in denying admittance. 648 So.2d at 90-1. After reviewing the record in this most recent sentencing proceeding, we reach the same conclusion.

704 So.2d at 507-8.

It is submitted that Jackson is procedurally barred from rearguing this claim on review from the limited remand to the trial

court to provide a sentencing order comporting with Campbell. 704 So.2d at 708.

Although the videotape itself was not played during the course of the resentencing, Dr. Mutter freely read from the transcript of the videotape of the hypnotic regression and references were made by both Dr. Walker and Dr. Miller to the videotape. Jackson reargues the same argument she made in her brief in 1996 as Issue VI, that:

> In ruling that the videotape of the hypnotic regression as inadmissible for the jury's consideration and failing to view the tape itself, the trial judge denied Jackson her due process rights to present a defense and, consequently, her death sentence violates the Eighth and Fourteenth Amendments of the United States Constitution and Article I, Section 9, 16 and 17 of the Florida Constitution.

(Appellant's Brief p. 98). Additionally, the argument herein is identical to that presented in Jackson v. State, 648 So.2d 85, 90-1 (Fla. 1994). In Jackson, supra, this Court found:

> The trial court in this case allowed the expert opinion testimony but would not allow the videotape to be admitted into evidence because of the State's inability to cross-examine Jackson. Instead, the court allowed Dr. Mutter to explain the basis of his opinion by giving a detailed account of the procedure used and by reading extensively from the transcript of the regression session. Under these circumstances, the trial court did not abuse its discretion in refusing to admit the videotape as the basis for Dr. Mutter's opinion. Similarly, because Dr. Mutter was allowed to go into great detail concerning the procedure used and the questions asked during the session, we find no error in connection

> with the trial court's ruling that the videotape could not be admitted to rebut the State's charges that the hypnotic session was somehow flawed.
>
> Finally, we also find no error in the trial court's refusal to admit the videotape as mitigating evidence. If we were to rule otherwise, defendants in capital cases could present as mitigating evidence videotaped statements to mental health experts, and thereby preclude cross-examination by the State.

648 So.2d at 91.

Jackson has demonstrated no basis upon which to suggest she can overcome being procedurally barred from asserting this claim and has argued no new facts that would suggest a different outcome could occur. Relief should be denied because the claim has been twice-previously decided and she is barred from raising the issue here.

ISSUE VIII

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

Jackson argues that the trial court erred in not granting her motion for request to appoint a forensic pathologist to assist in the preparation of their defense.[13] She notes that in previous resentencings, the State sought the assistance of the medical

[13] The Court, in Jackson v. State, 704 So.2d at 508, decided this claim adversely to Jackson. She is procedurally barred from rearguing it here.

examiner to provide insight regarding the position of the victim at the time of the shooting.

How Officer Bevel died is not at issue. Six gunshot wounds to his body killed him. (Vol. III 409). The only point of contention raised by Jackson was whether Jackson was in a position that put her above Officer Bevel when the shots were fired. The record reflects that virtually every other witness to the murder testified that Officer Bevel was bending down to pick up Jackson's keys after she made the statement, "Look what you've made me done, you've made me drop my keys." As he took a step backwards and bent down to retrieve the keys, Jackson took the .22 caliber gun from her waistband and fired six bullets into Officer Bevel. Dr. Floro, the medical examiner, testified that the trajectory was from above and consistent with Officer Bevel bending down. (Vol. III 418). He further testified that based on the nature of the shots, Officer Bevel would have fallen forward and that the wounds were inconsistent with Jackson laying down or that Officer Bevel was on top of her. (Vol. III 420). Defense counsel cross-examined Dr. Floro with regard to the bullet that went into the doorjamb (Vol. III 422), and whether Officer Bevel would have been in the car at the time he sustained the wound to his shoulder. (Vol. III 423). On cross-examination, Dr. Floro testified that the gunshot wounds were from one to two inches away (Vol. III 425), and he admitted that he could not reconstruct exactly how the shots entered the

body or how Officer Bevel's body would have been positioned after the first shot. (Vol. III 425-6). On redirect, Dr. Floro testified that one would have to rely on the witnesses who testified as to what they saw at the time of the murder. (Vol. III 427).

In the instant case, the nature of the discussion with regard to whether Jackson was laying down or Officer Bevel was on top of her is not supported by the testimony of any of the witnesses at trial. Note: Burch v. State, 522 So.2d 810 (Fla. 1988) (where Court found the trial court did not err in not appointing a specific expert on the use of PCP).

The Court concluded that "we do not find that the trial court abused its discretion in denying Jackson's request where any additional information a second pathologist could have offered in this particular case was merely speculative and most likely cumulative. See Martin v. State, 455 So.2d 370 (Fla. 1984)." Jackson, 704 So.2d at 508.

Conclusion

Based on the foregoing, all relief should be denied.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to W.C. McLain, Office of the Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this _____ day of April, 1999.

_____
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