IN THE SUPREME COURT OF FLORIDA

WILLIAM DUANE ELLEDGE,

Appellant,

v.

CASE NO. 74,789

STATE OF FLORIDA,

Appellee.

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ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

# ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 158541

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

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### OTHER AUTHORITES

## STATEMENT OF THE CASE AND FACTS

Appellee accepts Elledge's Statement of the Case. With regard to the Statement of the Facts, Appellee submits the following.

At the resentencing proceeding, the State called a number of witnesses in support of the statutory aggravating factors found. Charles Perrone was first called by the State and testified that on August 25, 1974, he was dispatched to the Resurrection Church at 441 N.E. 2nd Street in Dania, Florida, as a result of a report that a body was lying in the parking lot. He arrived at 7:33 p.m., and found a white female lying on the pavement. Her ankles were bound with extension cord and she had bruises about her face, legs and other portions of her body. Her panties were pulled down to her right ankle and her blouse had been pulled up exposing her breasts. (TR 350-351). Janet Pocis was next called and testified that on Saturday, August 24, 1974, she was a bartender at the McGowan's Bar in Hollywood, Florida. During the course of her day shift from 11:00 a.m. to 6:00 p.m. at the lounge, she observed Elledge come in and have a few drinks around 3:00 p.m. (TR 356-357). Shortly thereafter, a woman came in and sat down next to him. Ms. Pocis testified that both Elledge and the woman appeared sober. (TR 358). After having a few drinks together, they got up and left the bar. (TR 358). She recalled serving the woman two Budweiser beers and serving Elledge three Seagram's and Seven-up with no ice. (TR 359). The defense stipulated that the person she saw in the bar that day was Elledge and through pictures, Ms. Pocis identified the victim

as the woman with Elledge that day. (TR 360-361). On cross examination, Ms. Pocis said she had never seen either person prior to that day and although she did not know whether Elledge had been drinking prior to arriving at the bar, she observed that he was not acting in a manner that would suggest he was drunk or incapacitated. (TR 363-364).

Allen Devin, a sergeant with the Hollywood Police Department in 1974, testified that he investigated a murder at the Pantry Pride at 200 S. State Road 7, Hollywood, Florida, on Sunday, August 25. (TR 368). He also testified that as a result of information received, he went to the Normandy Hotel on Monday, August 26, and entered Room 3 at 609 N. Ocean Boulevard and found a woman's purse under pillows hidden in the closet. (TR 369). The purse belonged to Margaret Ann Strack. (TR 370).

With regard to the Pantry Pride investigation, Sgt. Devin stated that on August 25, at approximately 8:00 a.m., he was called to the scene of the grocery store because of a possible homicide. When he entered he found a white male lying on his back with his legs spread apart. The man's pockets were turned out and there were holes in the man's shirt where he had been shot. The store had been ransacked, broken wine bottles on the floor; there had been damage done to lockers and a donation box had been emptied. (TR 373-374). Sgt. Devin learned that Mr. Gaffney, the victim, had been locked in the store to clean during the night. The perpetrator had gained entry through a hole near the ceiling near the roof. (TR 375). He identified a photograph of Mr. Gaffney as the person found inside the store. (TR 378).

Sgt. Devin traveled to Jacksonville, Florida, on August 27, 1974, and met with Elledge at the Duval County Jail. (TR 380-381). Elledge was advised of his constitutional rights and asked whether he would speak with the police. As a result of discussions had, a taped statement was taken from Elledge at that time. Said tape was published to the jury at the resentencing proceeding. (TR 392-436). Elledge's taped statement divulged the following information.

On August 24, 1974, Elledge met Margaret Ann Strack at a bar. (TR 396). Elledge had arrived in Hollywood, Florida, a few days earlier on August 18, from Toledo, Ohio, and had worked the past four days at the Diplomat Hotel as a chef's runner. (TR 397-398). Elledge told officers that he had come to Florida with Paula Sein, age twenty, who he planned to marry as soon as he divorced his wife, Diane Marie Elledge, age nineteen. (TR 397). They had arrived in the '68 OK '69 Chevy and were living at the Alpine Village Apartments on Dania Road. (TR 398). On Friday, August 23, Elledge's day off, he and Paula had a disagreement and Elledge left. He went drinking that day and drank quite a bit. He returned to the Alpine Village Apartments at around 3:30 or 4:00 but no one was home and then left again. (TR 400). Needing a place to stay, he ultimately checked into the Normandy Hotel, Room 3, paying for three nights, (TR 401-403). He showered and slept until the next afternoon around 2:00 p.m., and then went to the beach and the bars. (TR 404). Elledge recalls that he was sitting at a bar near the hotel when a girl came up and started talking to him. He bought drinks, he had Seagrams and Seven-up

with no ice, and she drank Budweiser. (TR 405). He identified a photograph of the victim, Margaret Ann Strack as the girl who was in the bar with him. (TR 405). He admitted during the course of his statement that he killed her on August 24, 1974. (TR 406). In his statement leading up to the murder, he testified that he had nine or ten drinks and she had four or five drinks at the bar and then they left to go smoke some marijuana. (TR 406-407). He observed that he had $220.00 with him at the time.

They left the bar at 5:30 or 6:00 that afternoon, both feeling quite high, and drove to the hotel in Ms. Strack's blue '67 Camaro convertible. (TR 408-409). When they gat to the hotel, they talked awhile and smoked the marijuana. At some point shortly thereafter, Ms. Strack started sexually teasing him. He stated that she "grabbed hold of his joint and played with it." (TR 411). She then went to the bathroom and when she returned her panties were half off handing down around one knee. Elledge testified that she grinded her body against his although she was still dressed and at that point he started playing back. (TR 412-413). Ms. Strack told Elledge that she wasn't going to do anything and he told her she was. Elledge stated that she had teased him too much and he could not hold back. He grabbed her by the throat with one hand and by the wrist with his other hand. (TR 414). He forced himself on top of her and at some point she pressed her fingernails into his wrist, which made him mad. (TR 415-416). Elledge stated that he choked her as she gasped for air and stopped when she finally agreed to have intercourse with him. (TR 416). He observed that he tried to mount her however,

she again resisted and screamed at which point he grabbed her by the throat and forced himself into her. She yelled that she would call the police because he was raping her. (TR 417). Elledge said that he choked her scream off completely using his two hands around her throat. Ms. Strack started fighting, hitting the wall with her arms (TR 418). He threw her down on the floor and "totally out of control," continued to choke her for approximately fifteen minutes until she turned purple. (TR **419-420**). He observed that her eyes rolled back into her head, her nose started bleeding and he choked her until she was dead. (TR **421**). He then stood up "put his joint away" and knew he had to get **rid** of the body. The murder occurred between 6:00 and 6:30 p.m. Elledge waited until it got dark to get rid of the body and observed that he went through her purse only the next day. (TR **421**). He took the body from the living room to the bathroom and washed the blood off of Ms. Strack's face. (TR **423**). He cleaned the floor in the bathroom area af blood and after smoking a few cigarettes and waiting until dark, dragged her out and tossed the body outside the front door. (TR 423-**424**). Elledge observed that was when Ms. Strack's face was smashed. (TR **424**). He dragged her outside and into the car. He drove off and dumped her in a church parking lot. (TR **425-426**). He observed that he left her where she fell and denied ever burning her with cigarettes. (TR 427-428).

After dumping the body, he observed that he was shook up and he drove off. Some time thereafter he picked up a hitchhiker with whom he went drinking. Later, driving around, he lost

control of the car and smashed it into a fence. (TR 431). Around 12:30 or 1:00, Sunday morning, he returned to the car and then returned to his hotel room at the Normandy Hotel. He went through Ms. Strack's purse (TR 432), but found no money. He hid the purse in the closet under some pillows. (TR 433). That afternoon he went to the Greyhound Bus Station and, with cash, bought a ticket to Jacksonville, Florida.

Following the conclusion of Elledge's statement, Sgt. Devin asked Elledge whether he could read and write and whether the statement was voluntarily made. Elledge admitted it was voluntarily made. (TR 436). The tape ended at 7:00 p.m., August 27, 1974. (TR 436).

Sgt. Devin testified that after the statement was made, Elledge drew sketches of the crime scene. (TR 437). Said sketches were admitted without objection at the resentencing proceeding. (TR 439). The State also published Elledge's volunteered statement to Sgt. Devin regarding the Gaffney murder. (TR 472-505). The statement picks up from the previous statement reflecting that after dumping the body of Ms. Strack, Elledge picked up a hitchhiker with whom he went drinking. At some time around midnight or 1:00, while driving around, Elledge lost control of the car and smashed it. Since he could not get the car moving, he retrieved his gun from the car and headed out on foot. (TR 477-478). While walking around, he noticed some stores, in particular, a Pantry Pride store, and gained entry into the building through an airvent near the ceiling or roof. (TR 478). He looked around the store for a few minutes and while

walking down towards the end of an aisle, saw a man with a mop. The man took a swing at him. (TR 479). Elledge admitted he was startled, he stepped back, kicked the man in the ribs and then pulled his gun out and told the man to back up. The man gave no resistance to Elledge. (TR 479). Elledge stated that he turned away for a moment and when he turned back, he saw the man come up and he shot him twice. Elledge went through the man's pockets and found .35 to .40 cents in change. (TR 480). He found tools and tried to pry open the drawers in the office but found no money. He saw a donation box for muscular dystrophy which he emptied. (TR 482-483). He beat up a Coke machine for money but could not get any. Before he departed, he got mad and started breaking wine bottles and other items in the store. He rummaged through the store looking for possible hidden money. He found none. (TR 484-485). On his way out, he grabbed a Levi jacket hanging on a hook which had a marijuana emblem on the pocket. (TR 486-487). In discussing the Gaffney murder, he observed that he fired two shots in a downward angle at Ms. Gaffney between four and five feet away. He used a Colt .38 special blue 1½" barrel snub nose revolver which he had previously purchased. (TR 490-492). When he left the store, he walked across the parking lot to a Royal Castle Coffee Shop where he sat and drank a couple of cups of coffee. He finally returned to his hotel room at the Normandy, slept awhile and ultimately went to the Greyhound Bus Station where he caught a bus to Jacksonville, Florida. (TR 500). He made statements to detectives in Jacksonville that he had killed Gaffney. (TR 501). His statement ended at 9:08, August 27, 1974. (TR 505).

Dr. Abdullah Fattah performed autopsies on both Ms. Strack and Mr. Gaffney. As a result of the autopsy of Ms. Strack, an August 25, 1974, at approximately 1:00 p.m., he concluded that the cause of death was asphyxiation by strangulation based on the bleeding spots on the neck muscles and fracturing of the hyoid bone. He observed that there were numerous bruises on the head and extremities of the body and that all the bruises except for two were caused prior to Ms. Strack's death. (TR **455-456**). Vaginal swabs indicated that sexual intercourse had occurred at or about the time of her death **and** that she had seminal fluids in her vagina. (TR **458**). Her blood alcohol level was .06, which the doctor testified was consistent with her consumption of approximately two or three **beers** prior to her death. He observed that the alcohol level remains constant after death unless severe decomposition occurs. (TR **460**). With regard to Dr. Fattah's autopsy on August 25, at 4:00 p.m., of Mr. Gaffney, Dr. Fattah testified that Gaffney died from gunshot wounds to the chest. **(TR 463-464).**

On cross examination, Dr. Fattah testified he found fifteen needle tracks on Ms. Strack's arm (TR **466),** but found no drugs in her system. He observed that any drugs needed to be within her system within the last twenty-four hours to show up in the drug analysis. (TR **467-468**). He observed however that marijuana would not have been found in the drug analysis. (TR **468**).

Over objection **to** the testimony of Katherine Nelson based on **Booth** v. Maryland, the State called Katherine Nelson to the stand. Mrs. Nelson testified that on August 26, 1974, she was

living at the Beacon Motel, managing the motel with her husband and grandson. Sometime after they went to bed, the doorbell rang and she got up and observed a young man standing at the door wanting to rent a room. (TR **521-522).** She let him in, got the pencil and card and told him to fill it out. The man came up to the desk, pulled a gun and told her to say nothing. (TR 523). They went into the bedroom where her husband was still laying in bed. Elledge grabbed the alarm clock, pulled it out and forced Mrs. Nelson to tie her husband up with the clock wire. (TR **523).** The man then made her get on the bed and he tied her up. He told them that he wanted money and rifled through her husband's pants. Unsatisfied with the money he found (TR 524-525), he started searching around the room. He observed Mrs. Nelson's husband move and Elledge came around and said, "Don't try it, I killed two peaple already this week. If you don't believe me, read the Hollywood papers." (TR **526).** He then pointed the gun at Mrs. Nelson's head and said, "Try it again and she's dead.'' (TR 526). Elledge found more money in the nightstand. Elledge told Mrs. Nelson that he had stayed at the **Beacon** Motel a week earlier and didn't they remember him. They responded no however he **said** he was looking for his identification card. (TR 527). He kicked the poodle that was barking and then went into Mrs. Nelson's grandson's room. He brought the grandson back into the bedroom and slapped the boy around and tied him **up.** (TR 528-529). He left the room again searching for more money and when they didn't hear Elledge moving about, Mr. Nelson freed himself, He walked down **the** hallway and at that point, Mrs. Nelson heard a shot.

She heard her husband say, "Don't shoot, you got me", at which point she heard three or four more shots.

The State, at this juncture, rested after admitting certified copies of Elledge's first-degree murder convictions for the Gaffney and Nelson murders. (TR 540).

Elledge called five witnesses in his behalf, the first being George C. Kuck, a corrections officer who testified he first met Elledge in 1981 in prison on death row. (TR 542-543). Mr. Kuck said that Elledge had not caused any problems as a prisoner and that Elledge was not a trouble-maker. (TR 543-544). Defense counsel sought to elicit from Mr. Kuck whether he thought Elledge wauld continue to be a good prisoner, at which point the State objected asserting that said answer called for speculation and that Mr. Kuck was not qualified. The objection was sustained. (TR 544-545). On cross examination by the State, Mr. Kuck admitted he was unaware that Elledge had any disciplinary reports while incarcerated on death row. Defense counsel objected to the prison records reflecting the disciplinary reports asserting that he had never seen the reports prior to their being utilized by the State. After a discussion regarding the availability of the report and when Mr. Kuck was listed as a witness for the defense, the trial court overruled any objection by defense counsel regarding the use of the disciplinary reports from the prison. (TR 549).

A motion for mistrial was asserted by defense counsel arguing that Mrs. Nelson's testimony was highly emotional and improperly swayed the jury. Said motion was denied. (TR 550).

In reviewing the reports, Mr. Kuck observed that most of the infractions occurred prior to 1982, and that Elledge only had one disciplinary report after that period in 1986. Mr. Kuck stated that his mind would not have been changed even if he had known about the disciplinary reports. (TR **552**). Mr. Kuck admitted that he had access and could have read the disciplinary reports before testifying if had chosen to do so. (TR **552**).

Raymond Blye, also a correctional officer, testified that he was a guard on death row for ten years and never had any problems with Elledge. (TR 554-556).

Daniel Elledge, Elledge's younger brother by six years, testified that he last saw his brother in **1974**. (TR **557-558**). He observed that he and his brother had an older sister, Connie, and then there were three additional younger siblings. (TR **558**). He testified that his mother abused the children and on a daily basis she would take items such **as** a razor strap and beat them. She would kick them in the face and otherwise abuse the children and her husband would only occasionally stop her. (TR 559-560). Both parents were alcoholics and they would periodically leave the children alone for the weekend **and** take off to go drink. Elledge (Bill) was eleven at the time. (TR **560-561**). Daniel Elledge observed that when Bill was born he was blue and nearly **died** at birth. He had to be given goat's milk to sustain him **and** was a colic baby. (TR **562**). Daniel testified that his sister took care of him and that she had sexual intercourse with Bill but no one ever discussed it. (TR **563**). Daniel recalled that once his brother got hit with a brick and got knocked out.

Daniel Elledge testified that he had never been convicted of a felony and the first time he spoke to Elledge's current defense lawyer was three days earlier. (TR 564). The State objected to any questions asked of Daniel Elledge regarding why he thought Bill Elledge did what he did. The trial court sustained said objections. (TR 564-565).

On cross examination by the State, Daniel Elledge testified that the younger children were treated quite differently from Connie, Daniel and Bill Elledge. (TR 565). Daniel observed that his father did not beat them and was a good man and tried to keep the family together. (TR 566). Daniel Elledge testified that he has children, that he is a hard worker and good provider and that neither he nor his sister, Connie, ever committed any murders. (TR 566).

On re-direct, Daniel testified that on his twenty-first birthday, he had a conversation with his mother. (TR 568). During the conversation, his mother told him that Elledge was not his real father. (TR 570).

Dr. Glen Caddy, a clinical psychologist, testified on behalf of Elledge. (TR 582). Dr. Caddy was called and asked to review numerous records, medical and psychological reports and the like, regarding Bill Elledge. In his possession, he reviewed the reports of Dr. Lewis, Dr. Miller, Dr. Tauble, military records, reports from the California Youth Authority and information from the Colorado State Hospital. He spoke to "collateral sources'' and received information from the Department of Corrections concerning all medical records during Elledge's

incarceration. (TR **586-588).** In reviewing the total time spent in preparing for his trial testimony, he reflected he spent a total of sixteen hours. He spent 1 hour to 1½ hours talking to collateral sources; five hours reviewing the records; four to five hours speaking with Elledge and four hours speaking to Elledge's attorneys. (TR **590-592).**

Based on the information he gathered, he observed that the family relationship was very disturbing based on Elledge's extremely over-controlling, abusive, backward, alcoholic mother. (TR ***592).*** He testified that Mrs. Elledge had no sensitivity to the children and physically abused them by hitting them and emotionally abused them as well. (TR 593). Based on Elledge's statements to him, Bill Elledge was the focal point of the abuse since he was the second child and was expected to do all of the work in the house. (TR 593). The doctor observed that the father was passive and the weaker person in the relationship and only occasionally intervened to stop his wife from abusing the children. The father was a significant drinker, however it was the mother who, when upset, would beat the children. (TR 593-**594).** Based on what he observed, Dr. Caddy reasoned that Bill Elledge submitted to his mother's abuse; never rebelled and had a sense of total powerlessness with regard to this confused relationship. (TR 595). Although Elledge was a robust baby, his childhood was a love/hate relationship with **his** mother. Due to the first seven years, Elledge was predestined to have a chaotic life. Dr. Caddy was surprised that the other siblings were not similarly circumstanced. (TR 596-597). Dr. Caddy observed that

the sister had sexual problems involving Bill Elledge and that the sexual encounters continued until Bill left home. These encounters contributed to Elledge's feeling of inadequacy because he knew they were wrong. (TR 598). Elledge never developed proper sexual conduct or behavior based on his childhood history. (TR 599).

Dr. Caddy spoke to Elledge's brother Daniel, who recalled one incident where Elledge broke a guitar over Connie's head at age twelve or thirteen. The doctor also recalled an incident when Elledge, age nine, left home and was picked up by a man, raped, and then thrown over a bridge and left for dead. Fortunately, Elledge fell into a tree which saved his life. Because nobody cared about him, Elledge escaped by using alcohol. (TR 601). The alcohol calmed him down as well as made him less inhibited in social circumstances. (TR 601-602). The doctor observed that based on this history, Bill Elledge would try to overcontrol situations however, once the "rage" took over, he would be out of control. (TR 604). With regard to the Strack murder, Dr. Caddy observed that because the woman teased him, rage overtook Bill Elledge when she declined to have sexual intercourse with him and he began to choke her. Dr. Caddy observed that Elledge "reports a sense of an out-of-body experience" or a disassociation at the time of the murder. (TR 605-606).

Dr. Caddy admitted that Elledge knew the difference between right and wrong and was legally sane. Elledge knew that what he was doing was wrong but he did *not* have the ability to stop since

he had no personal control. In essence, Elledge was a "time bomb'' waiting to happen. (TR 607). Dr. Caddy diagnosed Elledge as having pathological intoxication, meaning that he was vulnerable to emotional explosions. Based on Elledge's history, being married young; having a chaotic life and disturbed when he wife deserted him (TR 609), Bill Elledge loved only a few people. It was no surprise to Dr. Caddy that he had woman problems and that the victim was a woman. (TR 610). Ds. Caddy observed that the rage resulted from Ms. Strack's rejection of him and that said rage built **up** *so* quickly that Elledge could do nothing about it. (TR 613).

Dr. Caddy interviewed Elledge fifteen years after the murder and observed that at the time of his interview, Elledge was profoundly less pathological. In the fifteen years incarcerated and his abstinence from alcohol, he was a changed person. Elledge had developed some personal relationships with other inmates on death row, and had friendships. (TR 614-616). Dr. Caddy observed that while on death row, Elledge was not a danger to any one and although there had been one altercation in prison, Elledge was full of remorse for the crimes. He pointed to the fact that Elledge confessed immediately after the murders which indicated to Dr. Caddy that Elledge was remorseful. (TR **618).**

On cross examination by the State, Dr. Caddy was questioned about information he gathered as to Mr. Elledge. Dr. Caddy's only interview of Elledge was fifteen years after the murders. In the first two hours he spent with Elledge, he gathered a life

history. At a second meeting weeks later, more information was gathered and at a third meeting, lasting approximately two more hours, imited psychological testing was done. Dr. Caddy observed that Elledge had an average IQ and was not insane nor psychotic and in fact seemed to be pretty stable. (TR 623-627). Dr. Caddy observed that at the time of the murder, Elledge suffered no psychotic disorder but rather a personality disorder. **(TR** 627).

Concerning Dr. Caddy's collection of "collateral sources," he admitted he spoke with Dan Elledge for approximately twenty to twenty-five minutes after he had made his reports to defense counsel and spoke on the telephone with Sharon Jennings, Elledge's cousin, for only thirty minutes. **(TR** 629-630). Based on a deposition taken on August 2, 1989, Dr. Caddy admitted that there was some kind of confusion as to whether Elledge ever told him Elledge had had sex with his sister, Connie. At the deposition, Dr. Caddy had said Elledge had said no. **(TR** 630). Dr. Caddy never spoke to Elledge's sister Connie nor ever attempted to speak with her. Dr. Caddy never reviewed her previous testimony in 1985. (TR 632). When questioned mare carefully with regard to whether Elledge was confused or vague with regard to the facts and circumstances how he murdered Ms. Strack, Dr. Caddy admitted that the statements made to the police officers days after the murder, were not vague on facts but rather just vague on what control Elledge had. (TR 635).

Dr. Caddy admitted that if Elledge had not told him the truth with regard to his life history, then Dr. Caddy's

observations would be erroneous. (TR **637**). Dr. Caddy never spoke to Elledge's ex-wife, Diane, and admitted that when Elledge was married at age twenty-four, that that was not necessarily young to marry. **(TR 637)**. In talking about the Gaffney murder, Dr. Caddy observed that Elledge was very remorseful for the circumstances. (TR 639). When pressed, however, Dr. Caddy admitted that rifling through Mr. Gaffney's pockets after Elledge shot him did not indicate remorsefulness. (TR 640). Dr. Caddy never interviewed police officers who investigated the murder of Ms. Strack nor any of the witnesses. He did not interview Mss. Nelson, who observed Elledge's behavior around or about the time Elledge murdered her husband. Dr. Caddy admitted that it would be helpful to talk to the witnesses but that the costs were prohibitive and did not 'outweigh the value of the information. (TR **641-644**). Dr. Caddy never reviewed information from the prior hearing in 1975 or **1977**, although he had in his possession the reports of the doctors who had previously examined Elledge. (TR 650). Dr. Caddy recalled that Dr. Miller's report in 1974, reflected that Elledge suffered from an anti-social personality disorder, and that Elledge lacked regard for human beings. Dr. Caddy did not try to contact Dr. Miller. (TR **651**). With regard **to** Dr. Tauble's report of March 7, 1975, Dr. Caddy observed that Dr. Tauble found that Elledge suffered from an anti-social personality disorder. (TR 652). Dr. **Caddy** observed that his analysis was not significantly different from those of Dr. Tauble or the other doctors who found that Elledge suffered from a sociopathic personality, to-wit: an anti-social personality

disorder. (TR 652-653). Dr. Caddy admitted he never spoke to any of the doctors who previously had examined Elledge. (TR 653-663). In reviewing the California Youth Authority reports, Dr. Caddy observed that early on those reports reflected conduct consistent with an anti-social personality disorder. (TR 664). Dr. Caddy never spoke with Paula Sein, Elledge's fiance, nor other persons who knew him. (TR 664-667).

On re-direct, Dr. Caddy testified that although Elledge's reporting skills were good, he had a bad perspective about what actually happened during the murder. (TR 672). He further observed that Elledge suffered from an impulse control disarder, specifically, a personality disorder with a number of anti-social features. This disorder was exacerbated by Elledge's extensive use of alcohol. (TR 678-679).

Sharon Jennings was the last witness called on behalf of Elledge. She testified that she was Elledge's cousin and that they grew up together. Elledge was like a brother to her. (TR 680). Ms. Jennings knew about her aunt Geneva, specifically how her aunt would punish Bill and would hit him with all sorts of items. She testified that Bill never did anything but that his mother would brutalize him for no reason. Bill's mother never showed affection towards him and she never treated any of her children very well. (TR 681-682). She recalled that at birth someone told her that Bill Elledge was a blue baby and had to have goat's milk to survive. (TR 683). She recalled an incident when her aunt was upset because Bill, at age one, was crying and that she wanted to throw him out the car window. (TR 684-685).

Ms. Jennings testified that her aunt drank but not as much as her uncle. They would go away on weekends, leaving the children to clean the house and take care of each other. The parents fought a great deal and she recalled that her mother often said that Bill Elledge needed more attention. (TR 685-686). She observed that Elledge was very meek as a child, quiet and shy. (TR 687).

At this point all testimony ended. (TR 688).

Defense counsel, in his closing argument to the jury, observed that there were nineteen possible items in mitigation to be considered. Specifically, he talked about the fact that Elledge suffered from extreme mental and emotional disturbance; that the victim participated or at least consented to some aspects of the crime; that Elledge suffered extreme duress; that his capacity to conform his conduct to the requirements of the law were substantially impaired; that he was abused as a child; that he was a chronic alcoholic; that he used marijuana; that he cooperated with police; that he evidenced remorse; that he pled guilty to the crimes; that he was a good prisoner; that remorse was a valid mitigator; that Elledge would not be eligible for parole until he was a hundred years old, and that generally they should impose mercy. (TR 768-789). The jury, after hearing all of the testimony, recommended by an 8-4 vote that death was the appropriate sentence. (TR 805).

## SUMMARY OF ARGUMENT

Elledge raises 30 issues far appellate consideration from his 1989 resentencing. His various constitutional challenges to the statute are without merit and need no further articulation. The trial court's determination that the aggravating factors proven beyond a reasonable doubt far outweighed the dearth of mitigation present clearly justifies the sentence of death imposed for the strangulation murder of Margaret Strack. Proportionately, this case is similar to other decisions rendered by this Court such as **Sochor v.** State, ____ So.2d ____ (Fla. 1991), 16 F.L.W. S297; **Hitchcock v.** State, 578 So.2d 685 (Fla. 1990), and other authorities cited in this pleading. The sentencing order preceded this Court's decision in **Campbell** v. **State, 571** So.2d 415 (Fla. 1990), therefore the controlling authority pertaining to the sufficiency of the order entered in **Gilliam v. State, ____ So.2d ____** (Fla. 1991), 16 F.L.W. S292, 293. See **also Capehart v. State, ____ So.**2d ____ (Fla. 1991), 16 F.L.W. S447, **450.**

Regarding "trial" errors, Appellee would submit no reversible error has been demonstrated. The court has wide discretion in determining the admissibility of evidence (even more so at sentencing pursuant to the statute), and Elledge has made no showing that the court's rulings as to the presentation of evidence was erroneous to the point of constituting reversible error. The evidence utilized by the State to prove prior felony conviction **was** properly admitted. The admission of hearsay evidence regarding the absent medical examiner employee is

harmless; the alleged Booth v. Maryland, 482 U.S. 496 (1987) error groundless; and Elledge's Richardson v. State, 246 So.2d 771 (Fla. 1971), contention without merit.

Elledge has asserted no claims warranting a new sentencing proceeding.

## ARGUMENT

### *POINT I*

***WHETHER THE TRIAL COURT FAILED TO FIND PROPOSED MITIGATING CIRCUMSTANCES WICH MUST BE FOUND AS A MATTER OF LAW SINCE A REASONABLE QUANTUM OF EVIDENCE, UNCONTRADICTED BY ANY COMPETENT EVIDENCE, SUPPORTS THEM***

Elledge first asserts that the trial court erred in failing to acknowledge and give "credit" to the fifteen "valid mitigating circumstances" submitted to the trial court. (TR 2691-2696, TR 2719-2728).[1]

The trial court, in his sentencing order, stated that after reviewing the evidence presented, concluded:

> Pursuant to law, this Court makes the following findings of fact:
>
> (1) The Defendant does have a significant history of prior criminal

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[1] Albeit, Elledge asserts that fourteen valid mitigating circumstances were presented in his sentencing memoranda, the record reflects that the following "mitigating circumstances" were tendered: (1) Elledge was under the influence of extreme emotional disturbance; (2) the victim participated in the criminal endeavour; (3) Elledge was under extreme duress; (4) Elledge could not conform his conduct to the requirements of law; (5) Elledge was the victim of child abuse; (6) Elledge was an alcoholic since age nine; (7) Elledge was under the influence of alcohol at the time of the murder; (8) Elledge was under the influence of marijuana at the time of the murder; (9) Elledge cooperated with police; (10) Elledge entered a guilty plea to the murder; (11) Elledge has spent fourteen years on death row without having any violent disciplinary report's; (12) Elledge will spend the rest of his life in prison because he has two other twenty-five year minimum mandatory sentences to run consecutively; (13) Elledge was raped by a homosexual when he was nine years old; (14) Elledge had sexual relationships with his sister when he was approximately thirteen years old; (15) Elledge has remorse for the murders; (16) Elledge should receive mercy from the trial court, and (17) that the death sentence is disproportionate based on the facts of the instant case. (TR 2719-2728).

activity. The Defendant has been convicted of murder in the first degree of Edward Gaffney. The Defendant has also been convicted of murder in the first degree of Paul Nelson. He has also been convicted of felonious assault in the state of Colorado. This Defendant has been confined in various institutions for a great portion of his life for various other crimes.

(2) The Defendant did not commit this murder while under the influence of extreme mental or emotional disturbance. The Defendant was examined by two psychiatrists and both stated that at the time of the crime the Defendant understood and could appreciate the nature and consequences of his acts. Neither doctor found nor reported that the Defendant was acting under the influence of extreme mental or emotional disturbance at the time of the crime. There was no indication of insanity.

(3) The victim was not a willing participant in the Defendant's conduct and did not consent to these crimes.

(4) This murder was committed while the Defendant was raping the victim or shartly after raping the victim. The murder was committed for the purpose of avoiding or preventing a lawful arrest, as the victim had threatened to notify the police of the rape and after this threat by the victim, the Defendant committed this murder.

(5) This murder as especially heinous, atrocious and cruel. The Defendant choked the victim until she was beating on the wall and gasping for air. He then threw her from the bed onto the floor and again choked her for approximately fifteen-twenty minutes. During this period of time, the Defendant was raping the victim.

After the rape and murder were completed, the Defendant then dragged the body of the victim to the door of the motel room, threw her down the stairs and dragged her to an automobile. The Defendant then drove her to a church parking lot and threw her from the car. The Defendant then abandoned her almost nude body, with the legs tied together by an electrical cord, in a church parking lot.

> In his attempt in establishing mitigating evidence, the Defendant called five witnesses to the stand. The testimony of each witness has been considered, and it is this Court's opinion that their testimony establishes neither statutory mitigating circumstances, nor any mitigation whatsoever.
>
> Based upon these findings of fact, and based further upon the advisory sentence rendered to this Court by the twelve member jury, and it being the opinion of this Court that four aggravating circumstances exist to justify the sentence of death, and this Court, being of additional opinion that NO statutory or non-statutory mitigating circumstances exist, . . . WILLIAM DUANE ELLEDGE, be sentenced to death.

**(TR 2686-2688).**

Citing Campbell v. **State, 571** So.2d **415** (Fla. 1990), Elledge argues that the trial court was obligated to find all of the mitigation tendered because it was not specifically rebutted by the State. Such a contention is without merit.

In **Nibert** v. State, **574** So.2d **1059** (Fla. 1990), the court further observed that **Campbell, supra,** intended that mitigating circumstances must be reasonably established by the greater weight of the **evidence.** 571 So.2d at **420.** In Downs **v.** State, **572** So.2d **895, 901** (Fla. 1990), the court observed that in reviewing an **order** pursuant to Campbell, **supra,** the court must "evaluate the mitigation proposed by the defendant to determine whether it is supported by the evidence and whether in the case of non-statutory mitigating factors, it is truly mitigating in nature." In Lucas v. **State, 568** So.2d **18,** 23 (Fla. 1990 **,** the court observed:

> We have previously held that the trial court need not expressly address each non-statutory

> mitigating factor in rejecting them, *Mason v. State*, 438 So.2d 374 (Fla. 1983), *cert. denied*, 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984), and '[t]hat the court's finding of fact did not specifically address appellant's evidence and arguments does not mean that they were not considered.' *Brown v. State*, 473 So.2d 1260, 1268 (Fla.), *cert. denied*, 474 U.S. 1038, 106 S.Ct. 607, 88 L.Ed.2d 585 (1985). More recently, however, to assist trial courts in setting out their findings, we have formulated guidelines for findings in regard to mitigating evidence in *Rogers v. State*, 511 So.2d 526 (Fla. 1987), *cert. denied*, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988), and *Campbell v. State*, No. 72,622, ____ So.2d ____ (Fla. June 14, 1990). We have even noted broad categories of non-statutory mitigating evidence which may be valid. *Campbell*, slip opinion at 9, n.6. However, '[m]itigating circumstances must, in some way, ameliorate the enormity of the defendant's guilt.' *Eutzy v. State* (cite omitted). We, as a reviewing court, not a fact finding court, cannot make hard and fast rules about what must be found in mitigation in any particular case. (cites omitted). Because each case in unique, determining what evidence might mitigate each individual defendants sentence must remain within the trial court's discretion.

568 So.2d at 23. **Note: Cook v.** State, ____ So.2d ____ (Fla. 1991), 16 F.L.W. S412, wherein the court observed that on a resentencing, it was harmless error for the trial court not to fully address each mitigating factor tendered as proposed in **Campbell, supra. *See* also, Gilliam v. State,** ____ So.2d ____ (Fla. 1991), 16 F.L.W. S292, 293, wherein the court held:

> Appellant's penultimate argument is that the sentencing order does not reflect reasoned judgment because it fails to enumerate the statutory mitigating factors on which he presented evidence, We find the sentencing order sufficient, The order recites the statutory aggravating circumstances that were proved, and the reasons supporting the findings. The order also recites the non-statutory mitigating circumstances that the

> court found proved. In view of the trial court's finding regarding non-statutory mitigating circumstances, we can assume he followed his own instructions to the jury in considering the statutory mitigating circumstances, despite the fact he did not enumerate them. As we noted in Johnson *v.* ***Dugger,*** **520** So.2d 565, 566 (Fla. **1988):** 'When read in its entirety, the sentencing order, combined with the court's instructions to the jury, indicates that the trial court gave adequate consideration to the evidence presented.' Appellant nevertheless argues that our recent decision in ***Campbell v. State,*** **571** So.2d **415** (Fla. 1990), issued after the order under review was rendered, requires a different result, ***Campbell*** directs that 'the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of non-statutory factors, it is truly of a mitigating nature.' *Id.,* at **419** (footnote omitted). It is unnecessary for us to reach this question whether this order complies, because ***Campbell*** is not a fundamental change in law requiring retroactive application. **As** we said in **Witt** *v.* ***State,*** **387** So.2d 922, **929** (Fla. 1980), only 'fundamental and constitutional law changes which cast serious doubts on the voracity or integrity of the original trial proceeding' -- in effect, 'jurists prudential upheavals' -- require retroactive application; 'evolutionary refinements' do not.

Sub judice, a sentencing order which issued August 28, 1989, came long before this Court's evolutionary refinement in Campbell, supra. As observed in Gilliam **v.** State, supra, and Cook v. **State, supra,** the failure to fully address each of the mitigating factors tendered is not harmful error.

As observed in **Capehart** v. **State,** ____ So.2d ____ (Fla. 1991), 16 F.L.W. S447, **450,** in considering mitigating circumstances, the court observed:

> We conclude that the judge's order reflects that he gave proper consideration to the testimony presented in mitigation and did not abuse his discretion in determining the amount of weight due the non-statutory mitigating evidence.

The record reflects that during closing argument, defense counsel argued to the jury and later to the trial court all the mitigation he herein asserts should have been found by the trial court. (TR 768-789). The State, in its closing arguments, focused on the statutory aggravating factors that existed and attempted to negate any mitigation that might be submitted. (TR **746-766).** The trial court, in its order, concluded that after listening to the testimony of the five defense witnesses, found that as to statutory mitigating circumstances, Elledge was not under the influence of extreme mental or emotional disturbance. He reasoned that the examination of two psychiatrists who interviewed Elledge contemporaneous to the murder and plea, found him to be competent and not suffering nor acting under the influence of extreme mental or emotional disturbance at the time of the crime. (TR 2687). The court also found that the victim was not a willing participant in the murder and therefore this statutory mitigating factor was not applicable (TR **2687),** and terminally, as to statutory mitigation, the defendant had a significant history of prior criminal activity and therefore this particular statutory mitigating factor did not apply. (TR **2686).** The court found that four statutory aggravating factors were applicable, that the murder was committed during the course of a sexual battery; that the murder was committed for the purpose of avoiding or preventing a lawful arrest; that the murder **was**

especially heinous, atrocious and cruel, and that the murder was committed by an individual who had previously been convicted of a capital felony. (TR 2686-2687). The court then, in summary fashion, observed that he considered the testimony of the five witnesses presented in behalf of Elledge, but observed:

> . . . It is this Court's opinion that their testimony establishes neither statutory mitigating circumstances, nor any mitigation whatsoever. . . .
>
> . . . It being the opinion of this Court that four aggravating circumstances exist to justify the sentence of death, and this Court, being of the additional opinion that NO statutory or non-statutory mitigating circumstances exist, . . .

(TR 2688).

While the State is not unmindful that a number of the "asserted" mitigating factors might very well constitute mitigation in a given case, this record is devoid of any merit to such a contention. For example, Elledge points to his childhood as exhibiting valid mitigating evidence. Daniel Elledge and Sharon Jennings both testified that Elledge's mother was abusive towards him (TR 559-560, 681-683). Even Dr. Caddy relied on his collateral contacts to gather information that Elledge, as a child, was abused by his mother. The State, through cross examination, revealed, however, that Daniel Elledge, as well as his sister, Connie, were equally abused, however neither one of them became multiple killers. (TR 566). In fact, Daniel Elledge testified that he was a family man, had a good work record, had children and was a good provider to his family. (TR 566). Moreover, on his twenty-first birthday, he suffered greatly when

his mother told him that the man he thought was his father was not his father. (TR **568-570).** Yet, the fact remains that Daniel Elledge did not become a murderer. Even Dr. Caddy, while acknowledging that Elledge's conduct was foreseeable (TR 613), acknowledged on cross-examination that people who suffer from child abuse are also pillars of this community (TR **635-636).** Indeed, **Ds.** Caddy testified that all the information he received with regard to Elledge's child abuse and his "sexual dalliances" with his sister, Connie, and the homosexual rape at age nine resulted from a twenty to twenty-five minute conversation with Dan Elledge and a thirty minute phone conversation with Sharon Jennings. (TR **629-630).** Dr. Caddy found that Elledge had an average IQ, was not insane nor psychotic and seemed pretty stable when he interviewed him. Dr. Caddy observed that there was no psychotic disorder at the time of the murder and that Elledge suffered personality disorder traits. (TR 627-628). **As** observed in King v. **Dugger, 555** So.2d **355** (Fla. 1990)**, Scull v. State, 533** So.2d 1137 (Fla. 1988), it is within the trial court's discretion to determine whether the evidence tendered of family history and personal history establishes mitigating circumstances. No abuse occurs when that evidence does not rise to the level of mitigating circumstances. See, **Sochor** v. State, ____ So.2d ____ (Fla. 1991), 16 F.L.W. S297. Terminally, with regard to the affects of Elledge's childhood on his mental/emotional state, it should be observed that the evidence tendered was totally hearsay and uncorroborated by any credible source. For example, the "sexual" encounters between Elledge and his sister were not told

to the doctor by either Elledge or his sister. Elledge made no comments to Dr. Caddy with regard to this and Dr. Caddy never spoke to Connie, Elledge's sister, to confirm the veracity of said comments. Daniel Elledge and Sharon Jennings' accounts of what happened in Elledge's childhood were only things that somebody else told them. As observed in **Nibert, supra,** mitigating circumstances must be reasonably established by the greater weight of the evidence. Rank speculation does not rise to such a level. **See,** Sanchez-Velasco v. **State, 570** So.2d **908** (Fla. 1990), and Randolph v. **State, 562** So.2d **331** (Fla. 1990).

Elledge also asserts that he was under the influence of alcohol, marijuana and extreme mental and emotional disturbance at the time of the murder, and therefore he could not conform his conduct to the requirements of law. As such, because he was under the influence of intoxicants, the trial court should have found said evidence as mitigating. The record reflects that just prior to the murder, Janet Pocis was working the day shift from 11:00 a.m. to 6:00 p.m., on August 24, **1974,** at the McGowans Lounge (TR **356-357).** At approximately 3:00 p.m., that day, Elledge entered the bar to have a few drinks. Sometime thereafter, a woman came in later identified as the victim, Margaret Strack, and sat down next to Elledge at the bar. (TR **357-358).** Ms. Pocis testified that it appeared to her that both Margaret Strack and Elledge were sober. (TR **358).** Ms. Strack requested a beer and Ms. Pocis observed that Elledge and Ms. Strack started talking to one another and had a few drinks together. (TR 358). Ms. Pocis recalled that she served Margaret

Strack two Budweiser's and served Elledge three Seagrams and Seven-up or soda, with no ice. (TR 359). On cross-examination, Ms. Pocis testified that she was the only bartender that day (TR 361), and that the daytime shift was slow. (TR 362). She recalled serving Elledge three drinks and could not testify as to anything he may have drunk prior to his arriving at the bar. She observed that he did not slur his words or stagger nor did he smell of alcohol. She recalled that it was Elledge who ordered the drinks for both Ms. Strack and himself and that when they both left together, they were acting friendly. (TR 363, 366 .

During Elledge's taped statement made on August 27, 974, three days following the murder, Elledge observed that he slept until 2:00 p.m., that Saturday afternoon and then went to the beach. (TR 404). He walked into a bar near the hotel and started drinking Seagram's and Seven-up with no ice. A girl came up and started talking to him and he bought her some drinks, specifically Budweiser beer. (TR 405). Elledge recalled that he had nine to ten drinks at the bar and that Margaret Strack had four to five. (TR 406). He asked her whether she wanted to go back to his place and smoke some marijuana and she said okay. (TR 407). He had three grams which equal three cigarettes, to be smoked. (TR 407). They left the bar between 5:30 p.m. and 6:00 p.m., and drove back to his hotel in Ms. Strack's blue 1967 Camaro convertible. Elledge observed that both he and she were feeling quite high. (TR 408-409). When they got to the apartment they talked awhile, smoked the marijuana, got high, at which point she commenced to start sexually teasing him. (TR 411).

Ms. Strack was dead between 6:00 p.m. and 6:30 p.m. TR 421). Elledge decided that he had to wait until dark before he could get rid of the body and moved the body from the living room to the bathroom where he washed the blood away from Ms. Strack's face. (TR 421-423). Elledge cleaned the floor and bathtub area of blood, smoked some cigarettes and waited until dark. (TR 423-424). After dumping the body in a church parking lot (TR 426), he drove off in the Camaro. After driving around a bit, he picked up a hitchhiker with whom he went drinking. (TR 429-430). Around 12:30 a.m. or 1:00 a.m., Sunday morning, he got into a traffic accident when he lost control of the car and smashed it into a fence. (TR 431-432). He finally went back to his hotel room, got some more sleep and then on the afternoon of Sunday, August 25, 1974, took a Greyhound Bus to Jacksonville, Florida. (TR 433).

Elledge's taped statement occurred on August 27, 1974, three days after the murder. The statement was in detail and explained his whereabouts and how he murdered Margaret Strack. He specifically recalled what he was drinking, the number of drinks he had, what transpired in his hotel room and what he did after the murder. The taped statement also reflects he had the presence of mind to clean blood off Ms. Strack and clean his hotel room and bathroom.

Armed with this evidence, there was absolutely no basis upon which the trial court could conclude that Elledge's use of alcohol or marijuana or his capacity to appreciate the wrongdoing of his conduct in any way rose to the level of first, mitigation,

or in fact, constituted mitigation which could outweigh the aggravating circumstances in this case.

Dr. Caddy's contention that although Elledge had a good recollection of what transpired, but could not control his behavior once he became enraged after Ms. Strack sexually teased and aroused him, is unsupported by the record. The taped statement by Elledge reflects that he killed her after she threatened to call the police because he raped her. (TR 417-418). He strangled her for fifteen minutes until she started turning blue and her eyes rolled back into her head. Her nose started bleeding and he continued to choke her until she was dead. (TR 420-421). Albeit, Dr. Caddy disagreed with the prior diagnosis of the doctors who saw Elledge contemporaneous to the murder, his ultimate conclusion is identical to theirs, that Elledge suffers from an impulse control disorder which is a personality disorder, with sociopathic tendencies. Such evidence was rejected by the trial court on the basis that the evidence did not support the statutory mitigating factor that Elledge suffered from extreme emotional stress or disturbance. Moreover, such evidence did not rise to the level of non-statutory mitigating evidence in that said evidence was contrary to Elledge's taped statement concerning the murder. See, **Rivera** v. **State, 561** So.2d **536 (Fla.** 1990), wherein the court rejected mental health evidence tendered in support of mitigation. See also, Randolph **v. State, 562** So.2d **331** (Fla. 1990), and Sochor v. State, ___ So.2d ___ (Fla. **1991), 16** F.L.W. **S297, 299**, wherein the court observed:

Sochor argues that he court should have found as mitigating factors that he was under the influence of extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. In proof he relies on evidence of his alcohol use the night in question and on doctors' testimony that he was a dangerous and violent person when drinking. Sochor is an admitted rapist. As testified to by his ex-wife and the victim of a prior rape, when they declined to accede to Sochor's request for sex, he became violent. He himself explains that, when sexually aroused, and indescribable feeling comes over him in the form of an irresistible impulse, particularly when drinking. It is difficult to discern whether such conduct is mitigating, but the decision as to whether a particular mitigating circumstance is proven lies with the judge and jury. Reversal is not warranted simply because the appellant arrives at a different conclusion. *Stano v. State*, **460** So.2d **890** (Fla. **1984**), *cert. denied*, **471** U.S. 1111 (1985). Although several doctors testified as to Sochor's mental instability, one testified that Sochor had not been truthful during testing and another testified that Sochor had 'selective amnesia'. While the sentencing **order** mentioned that Sochor had been found competent to stand trial and did not require Baker Act hospitalization, it is clear from the record that this is not the standard the court used in sentencing Sochor. We see no reason to disturb the court's rejecting of these mitigating factors.

Sochor also argues that the trial court failed to consider an improperly excluded non-statutory mitigating evidence. The court, in its sentencing order, stated '[t]here were several members of the defendant's family who tearfully and grievously testified. However, after considering their testimony, this court finds no non-statutory 'mitigating'circumstances.' This testimony related Sochor's physical abuse by his father, he financial support of the family when his father was unable to work, his alcohol problems, and his violent temper and mental instability. The trial judge considered the evidence of family and

> personal history, but determined it was so insignificant that it had no been established as mitigating circumstances. Deciding whether such family history establishes mitigating circumstances within the trial court's discretion. *King v. Dugger,* 555 So.2d at 355 (Fla. 1990); *Scull v. State,* 533 So.2d 1137 (Fla. 1988), *cert. denied,* 490 U.S. 1037 (1989). We find no abuse of discretion in finding that the evidence did not rise to being a mitigating circumstance.

Elledge also argues that his cooperation with the police, his confession and his plea of guilty and his remorse for the crimes, together with the fact that he will spend his remaining life in prison, are valid mitigating circumstances which the trial court should have considered. Elledge did confess and he did plead guilty, and he did express remorse for the crimes, however, after he killed Margaret Strack, he did not turn himself into the police. Rather, he waited until dark, dumped the body and then took her car. He picked up a hitchhiker and went drinking with the hitchhiker. After he wrecked the car, he realized that he might be caught and therefore tried to hide. In attempting to hide, he found the Pantry Pride grocery store where he committed a second murder, to-wit: the killing of Mr. Gaffney, the security guard and clean-up man at the Pantry Pride grocery store. After killing Mr. Gaffney, he rifled through Mr. Gaffney's pocket for some pocket change and searched the grocery store for more money. Finding $1.40, he left. He returned to his hotel room, he searched Ms. Strack's purse, which was hidden in his hotel room closet, and then, after getting some sleep, he left the next day for Jacksonville, Florida. When he arrived in Jacksonville, Elledge went to the Beacon Motel on Jacksonville

Beach (TR 520), and, under the guise of renting a room, robbed the place and killed Paul Nelson. Only after he was caught by the Jacksonville Police Department, did Elledge start confessing to the murders and cooperated with the police. It is truly stretching the imagination to suggest that based on this fact scenario, Elledge's cooperation with police, his confession, his plea of guilty and his remorse for the crimes, together with the fact that he was going to spend the remainder of his life in prison based on the murders of Mr. Gaffney and Mr. Nelson constitutes any mitigating evidence of the non-statutory genre. Indeed, the authorities cited by Elledge, specifically Perri v. State, 522 So.2d 817 (Fla. 1988), and Caruthers v. State, 465 So.2d 496 (Fla. 1985), lend no support to Elledge's circumstances. In Caruthers, 465 So.2d at 498, the trial court therein found that Caruthers' confession and guilty plea were non-statutory mitigating factors. The Florida Supreme Court reasoned that based on one statutory aggravating circumstance and the mitigation that was presented, the Caruthers case was not a capital murder case. With regard to Perri v. State, 522 So.2d at 821, the Court, in this "jury override" case, observed that the jury knew that Perri was unemployed, that his wife was pregnant and that the couple was trying to find a place to live. The court observed that he cooperated with the police in another murder case and that based on his circumstances "the jury may have considered the evidence of Perri's character, his psychological stress and his relative young age of twenty-one to counterbalance the aggravating factors. Thus, it appears that

the jury had a reasonable basis for recommending life imprisonment. . . ." Such are not the circumstances sub judice.

Although Dr. Caddy testified that Elledge was remorseful for the murders, such remorse must be put in its proper perspective. First of all, Elledge has been on death row for fourteen years prior to Dr. Caddy's interview and it would seem odd that he would not express some remorse for his actions. Moreover, and more importantly, the record contemporaneous to the murders, to-wit: his statement, reflects that his actions and conduct in no way demonstrate remorse for the three homicides except the remorse of getting caught.

Terminally, Elledge points to the fact that he has been a good prisoner and not received any violent disciplinary reports during his stay on death row. He also points to the fact that Dr. Caddy observed that although still "troubled", Elledge has real friendships on death row and is not a danger to anyone in prison. In support of Elledge's good prison adjustment, the defense called George C. Kuck and Raymond Blye. Mr. Kuck testified that he has known Elledge since 1981 and thought that Elledge was a good prisoner and not a troublemaker. When questioned on cross as to whether Elledge had any disciplinary reports while on death row, Mr. Kuck had no knowledge of any. The State introduced Elledge's prison record which reflected nineteen prison disciplinary reports from the time of incarceration up to and including his last one received in 1986. Mr. Kuck testified that even if he had read the prison reports, they would not have changed his view because Elledge was okay

around him. (TR 552). Mr. Kuck admitted that he could have read about the disciplinary reports before testifying but chose not to. (TR 552). Similarly, Mr. Blye testified that he never saw Elledge in trouble or cause any problems. (TR 555-556).

Albeit, the nature of the prison disciplinary reports were never admitted into evidence, the record reflects none involved any violence. (TR 699). Clearly, contrary to the portrait attempted to be portrayed that Elledge was a good and model prisoner, the record bears out that he was susceptible to committing prison infractions and thus received nineteen prison disciplinary reports from his incarceration in 1975 until the present. With regard to his adjustment in prison, and his making of friendships with other inmates on death row, such evidence does not rise to the level of non-statutory mitigating evidence which would warrant consideration by the trial court.

In sum, the trial court was not obligated to detail a minute accounting of each tendered mitigating factor suggested by Elledge, **Gilliam** v. **State, supra.** With regard to the order admitted, pursuant to Capehart v. State, **supra; Cook v. State, supra,** and **Valle** v. **State,** ____ **So.**2d ____ **(Fla.** 1991), 16 **F.L.W.** S303, 305-306, no error occurred.

Based on the foregoing, no relief should be forthcoming as to **this issue.**

## *POINT 11*

### *WETHER THE TRIAL COURT ERRED BY ADMITTING, DURING THE CROSS-EXAMINATION OF A DEFENSE WITNESS, HEARSAY OPINIONS OF THE DOCTORS NOT TESTIFYING AND NOT QUALIFIED AS EXPERTS*

Elledge next argues that error occurred when the prosecutor cross examined Dr. Glenn Caddy (a clinical psychologist called by the defense to testify that Elledge suffered from impulse control disorder and pathological intoxication at the time of the murder). The record reflects that Dr. Caddy had available to him various psychiatric evaluations of Elledge performed by doctors more contemporaneous to the time of the murder. He asserts, "the prosecutor impeached him with various hearsay opinions contained in the records. None of the declarants testified, but the cross revealed they opined Mr. Elledge suffered from anti-social personality disorder (ASPD), manipulated his environment, and played by his own rules." (Appellant'sBrief, page 18). Elledge asserts that defense counsel objected to almost all of this evidence as improper hearsay and outside the scope of direct, but the court permitted cross examination, stating that Dr. Caddy relied on the reports in formulating his opinion. Elledge asserts that the extent and use of the prior doctors' reports to impeach Dr. Caddy was impermissible on two grounds, first, it allowed the admission of hearsay opinions of doctors not testifying and not qualified as experts, and second, it violated Elledge's right to cross examine these experts.

The record reflects, as pointed out in footnote 14 of Appellant's Brief, that Dr. Miller, Dr. Tauble, Dr. Britton and Dr. Chapfield, as well as the California Youth Authority records,

were all reviewed by Dr. Caddy prior to Caddy's interview with Elledge. (TR 586-589). As a result of these reports and other information gathered in his evaluation, Dr. Caddy was able to come forward and observe that he disagreed with previous diagnoses by the doctors. The record reflects that no other doctors' reports were admitted at the sentencing proceedings, neither by Elledge or the State. In the instant case, however, the State, in it attempt to impeach Dr. Caddy, complied with §90.705(1), Fla.Stat., which provides, in material part:

> Unless otherwise required by the court, an **expert** may testify in terms of opinion or inferences and give his reasons without prior disclosure of the underlying facts or data. On cross examination he shall be required to specify the facts or data.

In Muehleman v. State, 503 So.2d 310 (Fla. 1987), the court resolved a similar issue adversely to Elledge's complaint. Therein, the court observed:

> Muehleman next contends that the trial court erred in admitting into evidence during the penalty phase a 'Juvenile Social History Report' detailing his juvenile criminal record. We find no error. As we noted in *Welty v. State,* 402 So.2d 1159, 1162-63 (Fla. 1981), '[t]he trial court has wide discretion in areas concerning the admission of evidence, and, unless an abuse of discretion can be shown, its ruling will not be disturbed.'
>
> First, the report's status as hearsay did not itself require exclusion from the jurors consideration in the context of the penalty phase of the capital trial. §91.141(1), Fla.Stat. (1985). Second, we once again affirm the proposition that the bottom line concern in questioning involving the admission of evidence is relevant. *Ruffin v. State,* 397 So.2d 277 (Fla.), *cert. denied,* 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed.2d 198 (1981); *Ashley v. State,* 265 So.2d 685 (Fla.

> 1972). The evidence became relevant when a psychiatric expert witness for the defense stated that he had considered the report in formulating his opinion. '[I]t is proper for a party to fully inquire into the history utilized by the expert to determine whether the expert's opinion has a proper basis.' *Parker v. State*, 476 So.2d 134, **139** (Fla. **1985).**
>
> Finding no abuse of discretion, it is not the proper role of this Court upon appeal to reweigh questions of relevance and prejudice. We therefore reject this claim.

503 So.2d at **315.** See also **Parker** v. State, **476** So.2d **134** (Fla. **1985); Robinson v. Hunter,** 506 So.2d **1106 (Fla.** 4th **DCA** 1987), and Bender v. **State**, **472** So.2d **1370** (Fla. 3rd DCA 1985).

More recently in Valle v. State, ____ So.2d ____ (Fla. 1991), **16** F.L.W. S303, **304,** 306, n.8, the court observed:

> Valle's next claim is that the State improperly cross examined the defense expert witnesses as to Valle's prison behavior by questioning them about specific instances in prison for which he had not been convicted. He also claimed therein allowing the State to cross examine a defense witness about a **1976** incident where Valle allegedly attempted to run over a police officer.
>
> In ***Hildwin v. State,*** 531 So.2d **124, 127** (Fla. 1988), *affirmed,* 490 **U.S.** *638* (1989), we noted that 'there is a different standard for judging the admissibility and relevance of evidence in the penalty phase of a capital case, where the focus is substantially directed towards the defendant's character.' We stated that **§921.141(1),** Florida Statutes (1987), allowed for broader admissibility of evidence during the penalty phase. Further, we held that
>
> > During the penalty phase of a capital case, the State may rebut defense evidence of the defendant's non-violent nature by means of direct evidence of specific acts of violence committed by the defendant provided, however, that in the absence of the conviction for any such acts, the jury shall not be

told of any arrests or criminal charges arising therefrom.

*Hildwin*, 531 So.2d at **128.**

In this case, the defense presented expert opinions that the defendant would be a good prisoner. Under the rationale of *Hildwin*, it is clear that the State could introduce rebuttal evidence of specific prior acts of prison misconduct and violence. Here, however, the defense experts have formed their opinions from Valle's prison records, including reports of the incidents explored on cross examination. Valle's experts also used his criminal records as a basis for their opinions, including the transcripts from the probation revocation hearing that dealt with the incident where Valle attempted to run over the police officer. Therefore, it was proper to cross examine the experts concerning these incidents. *Parker v.* ***State*, 476 So.2d 134 (Fla. 1985)**; *see* 890.705, Florida Statutes **(1987).**

We also do not believe the trial judge erred by allowing the State to cross examine a defense witness about his opinion of Valle's future prison behavior if, hypothetically, he were eligible for parole in fifteen years. The witness had testified to his belief that 'lifers' make good prisoners because the prison will always be their home. The State could properly cross examine him as to whether his opinion would change given the possibility that Valle could be eligible for parole in fifteen years. The State was not trying to establish the possibility for parole as an aggravating factor, but was rebutting the defense's assertion of a mitigating factor. . . .

16 F.L.W. at S304.

Additionally, the court, in footnote 8 of said opinion at 16 F.L.W. S306, observed:

The defense had opened the door for this testimony by questioning their expert witness about this incident on direct examination.

The State would submit that the circumstances in **Valle, supra, as** well as **Muehleman,** supra, support the trial court's ruling that the State was able to impeach Dr. Caddy with the information he reviewed, in particular, other doctors' reports and evaluations of Elledge. Elledge's reliance on this Court's decision in **Nowitzke v. State, 572** So.2d **1346** (Fla. **1990),** is misplaced. In Nowitzke, the court reversed, finding that the method of impeachment utilized therein was improper when the State impeached an expert witness,

> . . . by eliciting from another witness what he thinks of that expert. ***See*** *Carver v.* ***Orange*** *County,* **444** So.2d **452, 454** (Fla. 5th DCA **1984).** Thus, had Dr. **Szasz** appeared in person, he would have been precluded from testifying that Dr. Tanay was a 'hired gun'. . . . the introduction of Dr. Szasz' opinion was clearly erroneous. It also violated Nowitzke's constitutional right to confront witnesses. , . ,

572 So.2d at 1352.

The court ultimately concluded that the State committed reversible error when it continued to employ strategy throughout the entire trial, discrediting the whole notion of psychiatry in general and insanity defenses specifically.

Elledge further argues that alternatively the ability to cross examine the declarant experts violates constitutional guarantees that a defendant confront witnesses against him and have a reliable death penalty proceeding. (Appellant's Brief, page 22). Such an assertion is highly suspect first because defense counsel provided the other doctors' reports to Dr. Caddy for review and assisting him in developing his report of Elledge's mental condition. Second, the objections raised by

defense counsel at (TR 652, **654, 661,** 662), come on the heels of the following. On page **652,** the State asked Dr. Caddy,

> Isn't it also true that Dr. Tauble found Mr. Elledge had an anti-social personality?
>
> MR. GIACOMA: I'm going to object. Mr. Satz is going beyond cross examining this witness and I think it's **way** too far. It's hearsay.
>
> THE COURT: Overruled.

(TR 652).

At page 654, the same objection at page **652** was raised as a result of a question asked Dr. Caddy as to whether Dr. Tauble's report stated that Elledge did not need psychiatric intervention. **At page 661, Mr.** Giacoma objected to hearsay again, as a result of the question,

> Isn't it true that **he** also drew **the** conclusion that it was anti-social personality?

(TR 661).

The "who" was Ds. Britton. On page 662, Mr. Giacoma, in response to a question of Mr. Caddy as to,

> I'm not splitting hairs, I'm asking you what his final opinion was. It was anti-social personality.

Talking about what Dr. Britton had found, the objection was **as** f01lows:

> MR. GIACOMA: Judge, I have an objection here. Not only is it hearsay, but Dr. Britton is dead so we're getting statements in here that couldn't even be reproduced but for documents that under the guise of cross examination would be improper any other way.
>
> THE COURT: That's a nice **speech,** but I've overruled your objection because this is material that he relied upon for his opinion and I think he's entitled to be cross examined by it.

Clearly, nowhere did defense counsel assert that he was being denied his ability to cross examine doctors with regard to their reports or to the circumstances leading up to these earlier reports.

Third, the record reflects that there was no restrictions on defense counsel for re-direct examination of Dr. Caddy to either introduce these doctors' reports if in fact representations of same were incorrect, or to explore with Dr. Caddy the incorrectness of the prior doctors' reports compared to his findings that Elledge suffered from impulse control disorder -- personality disorder with a number of anti-social features, in particular, alcoholism. (TR 667-679).

Elledge's reliance on Proffitt **v. Wainwright, 685** F.2d 1227 (11th Cir. 1982), **modified,** 706 F.2d 311 (1983), is misplaced. In Proffitt, Dr. Sprehe was unavailable to testify. The court found that the use of Dr. Sprehe's report without affording Proffitt an opportunity to cross examine those findings, violated Proffitt's right to confrontation and due process. Citing **California v. Green, 399 U.S.** 149 (1970), and **Gardner** v. Florida, 430 U.S. 349 (1977), the court concluded:

> . . . Since, as in this case [see note **36** in accompanying text, *supra*], information submitted by an expert witness generally consist of opinions, cross examination is necessary not only to test the witnesses knowledge and competence in the field to which his testimony relates, but also to elicit the facts on which he relied in forming his opinion.

**685 F.2d at 1254.**

Based on this record, if any error occurred, it was that defense counsel did not fully apprise the court of counsel's concerns nor did he elect to more extensively examine Dr. Caddy on redirect. Based on Steinhorst v. State, 412 So.2d 332, 337-339 (Fla. 1982), all relief should be denied.[2]

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[2] In Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987), the court, under an ineffective assistance of counsel claim, reviewed the facts and circumstances known at the time with regard to the effect of psychiatric and family testimony on the ultimate sentence. The court observed:

> Even if Elledge's counsel had produced Dr. Lewis and Elledge's family members at the sentencing phase, we agree with the district court's that Elledge was not prejudiced thereby; he nevertheless would have received the death penalty.
>
> The value of Dr. Lewis' testimony was undercut in part by the revelation that her analysis largely relied on Elledge's recitations and had not bee fully cooperated by independent follow up investigation. In addition, the two court-appointed psychiatrists who examined Elledge each gave damaging evaluations that would have diluted Dr. Lewis' impact. Moreover, much of the testimony elicited from Elledge's brother and sister could be used against him; e.g, their descriptions of his early violent temper, his sister's explanation of his alleged incestuous assault on her, his brother's description of Elledge as a "mean guy,'' and their emergence as normal citizens even though they had been subject to similar abuse and neglect. The family testimony also was cumulative to the degree since Elledge had testified to many of the particulars in question.

823 F.2d at 1447.

Clearly, defense counsel had no reason to question Dr. Caddy to closely for fear that much more would have come out than was presented to either the jury or the trial judge, this third time around,

## *POINT III*

***WHETHER INTRODUCING EVIDENCE OF A DEFENDANT'S PRIOR HOMICIDES WHICH MAKES UP A GREAT PART OF THE STATE'S EVIDENCE AND INCLUDES VICTIM IMPACT TESTIMONY AND PHOTOS OF A CORPSE OF A PRIOR HOMICIDE VICTIM, VIOLATES FLORIDA LAW AND THE FLORIDA AND FEDERAL CONSTITUTIONS***

Elledge's next attack is three-prong. He asserts (a) that the testimony of Mrs. Nelson was inappropriate and inflammatory and had no probative value; (b) photographs of the Gaffney murder were so prejudicial that it outweighed their admissibility, and (c) that the Gaffney and Nelson homicides became a feature of the sentencing proceeding and violated the double-jeopardy clause.

The record reflects that Katherine Nelson was called to the stand and testified concerning the events surrounding the death of her husband, Paul Nelson. (TR 519-539). Prior to her testifying, the trial court overruled defense counsel's objection to her testimony on Booth grounds, asserting that the other cases, to-wit: the other murders, had no bearing on the instant resentencing. (TR 519). While acknowledging that in Elledge v. State, 408 So.2d 1021, 1022 (Fla. 1982), the court held that the details of the Nelson for which Elledge had been convicted before sentencing were admissible to support the aggravating circumstance of having a previous capital or violent felony conviction, the fact that said evidence came in through the testimony of victim/victim's family, Elledge argues was too prejudicial. Citing Freeman v. State, 563 So.2d 73, 76 (Fla. 1990), Rhodea v. State, 547 So.2d 1201, 1204-5 (Fla. 1989), and Booth v. Maryland, 482 U.S. 496 (1987), Elledge now asserts that

Mrs. Nelson's testimony had strong potential to inflame the jury. Elledge's reliance on the aforenoted cases is misplaced. In **Freeman, supra,** this Court found the testimony of a victim's wife **who was not present** at the time of the murder, to be harmless error in light of the nature and straightfowardness of her testimony. In **Rhodes** v. **State, supra,** at **1204,** this Court held that the details of any prior felony conviction involving the use or threat of violence to the person may be introduced at the penalty phase of a capital trial in lieu of the bare admission of the conviction. The court observed:

> Testimony concerning the events which resulted in the conviction assist the jury in evaluating **the** character of the defendant and the circumstances of the crime so that the jury **can make** an informed recommendation as to the appropriate sentence. It was not error for the trial court to admit Captain Rolette's testimony.

What the court did find objectionable was the admission of the tape recorded statement of a Nevada victim who defense counsel had no way of confronting or cross examining. In the instant **case,** however, Mrs. Nelson was an eye witness to the murder of her husband, Paul Nelson, at their business establishment. Her testimony was relevant, germane and admissible regarding the Nelson murder in relationship to proof that Elledge had been convicted of a previous capital felony. In **Payne v. Tennessee, 49** Cr.L. **2325** (June 27, 1991), the United States Supreme Court overruled Booth **v.** Maryland, **supra, and** concluded:

> We thus hold that if the State chooses to permit the admission of victim impact evidence and psosecutorial argument on that

> subject, the Eighth Amendment erects to per se bar. A state may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decisian as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than any other relevant evidence is treated.

**49** Cr.L. at **2330.**

In the instant case, the admission of Mrs. Nelson's testimony does not run amuck of state law nor federal constitutional rights.

Elledge next argues that the photographs of Mr. Gaffney should not have been admitted at the resentencing proceeding because their value was not outweighed by the prejudice which accrued from **said** admission. The record reflects that the Gaffney photographs were used by the medical examiner to identify and explain the cause of death of Mr. Gaffney, (TR 359-361). Pursuant to **Nixon** v. State, **572** So.2d **1336, 1342-1343** (Fla. **1990),** and **Bush v.** State, **461** So.2d **936, 939** (Fla. **1984),** the photographs were admissible where they assisted the medical examiner in explaining to the jury the nature and manner in which the wounds were inflicted and assisted in the identification of the victim. See also **Gore v. State, 475 So.2d 1205, 1208 (Fla. 1985); Randolph v. State, 562** So.2d **331** (Fla. 1990), and Haliburton **v.** State, **561** So.2d **247** (Fla. 1990).

As the final subsection to this issue, Elledge argues that the evidence concerning the murders of Mr. Nelson and Mr. Gaffney became a feature of the State's case, and as such mandates reversal. Such a contention is without merit in that many times

at resentencing, the proof of prior violent felonies or other capital felonies must be shown beyond a reasonable doubt. As such, to avoid problems addressed in Johnson v. Mississippi, 486 U.S. 578 (1988), the State is obligated to move forward and prove the underlying murders that support the aggravating factor.[3]

In Valle v. State, ____ So.2d ____ (Fla. 1991), 16 F.L.W. S303, the court rejected a similar claim that presenting evidence concerning the appropriateness of the death penalty became a feature of the resentencing. The authorities cited by Elledge do not question the appropriateness of presenting evidence at resentencing and whether that evidence becomes a feature of the proceeding. Rather, the cases cited deal with Williams Rule evidence and its impact with regard to whether collateral crimes become a feature of a proceeding. Here, where the State is required to prove beyond a reasonable doubt the statutory aggravating factors and negate the mitigating factors, see Campbell v. State, **supra,** there can be no restrictions as to the State's presentation of valid and relevant evidence.

Terminally, there is no merit to Elledge's assertion that "detailing collateral offenses for which sentence has already been imposed in a capital sentencing proceeding invites punishment fox: them, a double-jeopardy violation.'' **United** States v. **Halper,** 109 S.Ct. 1892 (1989), is inapplicable to the fact

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Additionally, the State is obligated to present rebuttal to negate statutory mitigating factors that deal with the defendant's character or the nature of the crime. Certainly, prior violent felonies and other criminal endeavours **are** crucial to the sentencer in ascertaining the appropriateness of the penalty to be imposed.

scenario sub judice, and Elledge ha5 provided no authority that would even remotely suggest that the State's responsibility in proving the statutory aggravating factors beyond a reasonable doubt, violates the double-jeopardy clause of the United States Constitution.

## *POINT IV*

### *WHETHER A HEARSAY OPINION BY AN ABSENT MEDICAL EXAMINER EMPLOYEE THAT THE VICTIM'S BLOOD ALCOHOL LEVEL WAS .06 PERCENT* WAS *IMPROPERLY ADMITTED*

On page 459 and 460 of the trial record, Dr. Abdullah Fattah, a deputy medical examiner in 1974, testified that test results based on the toxicology reports reflected Margaret Strack had .06 percent blood alcohol in her body at the time of her death. Defense counsel objected believing that the medical examiner's testimony was hearsay because he did not actually make the toxicology report. In laying the predicate for the admission of said testimony, the State elicited from Dr. Fattah that the report was made at his request and done during the ordinary course of business activity of the medical examiner in 1974. The report was made a part of Dr. Fattah's autopsy report. (TR 459). Elledge asserts that it was reversible error for the medical examiner to inform the sentencing jury that Margaret Strack had .06 percent blood alcohol level at the time of her death. It is beyond the State's comprehension how this piece of evidence, even assuming for the moment wrongfully admitted, should result in a new sentencing proceeding. After coursing through all the authorities cited by Elledge as to why this evidence should not

be admitted, the one glaring omission appears to be the reason why said omission was harmful.

Dr. Fattah testified that he performed an autopsy on Ms. Strack which revealed that her death was due to strangulation. He testified without objection that all, except for two, bruises on the body occurred prior to Ms. Strack's death (R **456),** and that cotton swabs indicated that sexual intercourse had occurred about the time of death because of seminal fluids in the vagina. (TR **458).** He testified at TR **460** that her blood level was at .06 percent which would be consistent with an individual who had had two or three **beers.** He opined that the blood alcohol level would remain the same after her death unless severe decomposition had taken place. (TR 460). On cross examination, he also revealed that he found needle tracks on the woman's arm (TR 466), and that based on this same report that revealed the alcohol level, there was no indication that there was drugs in Ms. Strack's body. (TR 466-468). Dr. Fattah admitted that the testing for drugs and alcohol would not have revealed marijuana use. (TR **468).**

The record also reflects that Janet Pocis, a bartender at the McGowan Lounge, served drinks to Margaret Strack between 3:00 p.m. and 5:30 p.m. or 6:00 p.m., when she left the bar with Elledge. (TR 357, 408). Clearly, there was no doubt that Ms. Strack had been drinking and in fact used some marijuana based on Elledge's taped confession (TR 411), after they **left** the bar. The issue at resentencing was not whether Margaret Strack consented to the sexual battery or her death but rather whether she led Elledge on and then reneged when he responded to her

"sexual advances". In **Capehart** v. **State,** ____ **So.2d** ____ (Fla. 1991), 16 F.L.W. S447, 448, this Court addressed a similar issue and decided that no relief should be forthcoming. In **Capehart,** this Court observed:

> Capehart next argues that the trial court erred in permitting Dr. Joan Wood, chief medical examiner for the Sixth Judicial Circuit, to testify regarding the cause of death and the condition of the victim's body because she did not perform the autopsy, nor was the autopsy report admitted into evidence.[6] Capehart argues that under those circumstances, the State failed to lay a proper foundation for her testimony.
>
> 1390.704, Florida Statutes (1987), provides that an expert may rely on facts or data not in evidence in forming an opinion if those facts are of 'a type reasonably relied upon by experts in the subject to support the opinion expressed.' The record reveals that the State properly qualified Dr. Wood as an expert without objection, and that she formed **her** opinion based upon the autopsy report, the toxicology report, the evidence receipts, the photographs of the body, and all other paperwork filed on the case. We are satisfied that a proper predicate for her testimony was established and that the trial court did not abuse its discretion in overruling the defense's objection. ***See,*** *e.g.,* ***Sikes v. Seaboard Coastline R.*** & R. Co., 429 So.2d 1216 (Fla. 1st **DCA),** *review* ***denied,*** 440 So.2d **353** (Fla. 1983).

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[6] The medical examiner who performed the autopsy and prepared the autopsy report died prior to Capehart's trial.

16 F.L.W. at S448, 450.

It is also interesting to note the basis, or lack thereof, of harmful error of this claim in light of Issue XI where Elledge's asserts, "strangulation of an intoxicated victim who

feels little pain or fear is not HAC." (Appellant's Brief, page 52). In light of this Court's decision in **Capehart, supra,** Campbell **v. State, 571** So.2d **415,** 420 (Fla. 1990), and Johnson v. State, **497** So.2d 863 (Fla. 1986), relief is not warranted, especially where the admission of the victim's blood alcohol level was not a critical factor (since Elledge pled guilty); has not been argued that the victim's alcohol consumption in some way lessened Elledge's culpability and the .06 blood alcohol level was corroborated by another witness (the bartender).

## *POINT V*

### *WETHER EVIDENCE OF **TWO** CRIMES OF **ATTEMPTED** FIRST **DEGREE MURDER FOR WHICH** CONVICTIONS WERE NOT **OBTAINED** IMPROPERLY **PUT** NON-STATUTORY AGGRAVATING EVIDENCE **BEFORE THE** JURY*

Elledge next argues that the sentencing proceeding was impermissibly tainted because the jury could have inferred through the testimony of Mrs. Nelson that she and her grandson were also possible victims of an attempted murder when "she then said Mr. Elledge pointed the gun into the darkened bedroom and 'shot where he left me laying and where he left David laying across our beds.' (TR 531)." (Appellant's Brief, page 40). First of all, there was no objection to the testimony of Mrs. Nelson with regard to this specific statement. Albeit, a general abjection was raised with regard to limiting the testimony of Mrs. Nelson, that objection did not and cannot encompass the assertion herein made that "non-statutory aggravating evidence" was presented to the jury based on Mrs. Nelson's accounting of what transpired the night of her husband's death.'' Second, there

is nothing in this record nor anything presented to the jury or trial judge that reflects that any charges were pending against Elledge for the "attempted murder" of Mrs. Nelson and her grandson. Pursuant to Grossman v. State, 525 So.2d **833** (Fla. 1988), errors predicated on the admission of evidence must be preserved for review by appropriate objection at trial. Absent such objection, no relief should be forthcoming. See also **Capehart v. State, 16 F.L.W.** at S449.

## *POINT VI*

### *WETHER THE ADMISSION OF THE DEFENDANT'S ALIASES, WHICH **SUGGESTED** PRIOR CRIMINAL CONDUCT, WAS ERROR*

Elledge next asserts that the trial court erred in not completely redacting his sworn confession prepared August **27, 1974**, regarding Elledge's aliases, to-wit: Butch, a/k/a Billy the Kid. (TR 392). Initially, the sworn statement was redacted pursuant to defense counsel's request. Presumably, defense counsel heard that portion of the redacted tape which set forth Elledge's aliases and saw no reason to strike further language from the sworn statement pretrial. It is a little late at this juncture to suggest that the "aliases" so prejudiced the minds of the jurors that but for the aliases, they would have recommended a life sentence. This is especially true when the aliases are recited prior to a sworn confession by Elledge that he killed Margaret Strack. Note: Lamb v. **State, 354** So.2d **124, 125** (Fla. **3rd** DCA 1978).

The authorities cited by Elledge are all distinguishable from the circumstances **sub judice.** Clearly, this case does not

fall into the genre of **Castro v.** State, **547** So.2d **111** (Fla. 1989), **or Jackson v. State, 451** So.2d **458 (Fla. 1984).** In both those cases, evidence and name-calling went to propensity **as** opposed to the instant case where there was no nexus drawn between the aliases of Butch and Billy the Kid to a "thoroughbred killer." The instant argument is totally without merit.

## *POINT VII*

### *WHETHER THE TRIAL COURT COMMITTED BOOTH ERROR BY ADMITTING EVIDENCE THAT MARGARET STRACK WAS A COLLEGE STUDENT*

Pretrial, Elledge filed a motion in limine to restrict the State from presenting evidence that identified Margaret Strack as a college student. The record reflects that no emphasis was made with regard to the fact that she was a college student, but rather, that fact came out from the picture from a college identification card which the police showed Elledge in identifying the person he killed. (TR 405).

The instant claim is the very reason why **Booth** v. Maryland, **482 U.S. 496** (1987), **and South Carolina v. Gathers, 109 S.Ct. 2207 (1989),** and for that matter, Jackson v. Dugger, **547** So.2d **1197, 1199** (Fla. **1989),** are wrong. Even without the recent pronouncement in Payne **v.** Tennessee, supra, it is utterly ridiculous to suggest that the circumstances surrounding the identification of the victim by Elledge who, moments after identifying her, says this is the girl he killed, "inflamed the jury against him." (Appellant'sBrief, **page 43).** No objection was raised, nor is the underlying issue one of a fundamental nature requiring reversal absent an objection. No **relief** should be forthcoming as to this ground.

## *POINT VIII*

***WHETHER THE TRIAL COURT ERRED BY ALLOWING CROSS EXAMINATION REVEALING THAT MR. ELLEDGE HAD TWICE PREVIOUSLY BEEN SENTENCED TO DEATH***

Elledge contends that the trial court erred in allowing evidence to be presented to the jury, brought out on cross examination, "that a defendant has previously been sentenced to death". (Appellant's Brief, page 43). The record reflects that the trial court granted defense counsel's motion not to mention Elledge's prior sentencings. (TR 2417-2419). Defense counsel later sought modification of said order and requested that the parties be permitted to bring out the fact that Elledge had been on death row but "kept in place the part of the order prohibiting the mentioning how many times or when the earlier proceedings occurred." (Appellant's Brief, page 43, n.45). The trial transcript reveals, at page 645, that the prosecutor asked Dr. Caddy, on cross examination, "Alright. Have you reviewed the transcript of testimony given at a hearing in 1975?". At this point in time, defense counsel objected, arguing that:

> MR. GIACOMA: Your Honor, I brought forth a motion in limine prior to this being started at side bar earlier. It was modified that we would tell the jury that Mr. Elledge had previously been convicted but we were not to refer to how many times or when or where.
>
> Now, Mr. Satz has just referred to the second prior hearing. This jury is going to get the presumption that there has been four or five prior hearings.
>
> THE COURT: Mr. Satz?
>
> MR. SATZ: Your Honor, first, he withdrew his motion in limine.

I asked him about a hearing, I didn't say it was a trial, it was a sentencing phase. It's important because Dr. Caddy had testified about everything from when he was a young child up until now, he is now on death row.

MR. GIACOMA: Excuse me, Your Honor. I think the jury can hear Mr. Satz as well.

**THE COURT:** Overrule the objection.

Go ahead Mr. Satz. I've got the jury back in the jury room and you can ga ahead and speak openly. I am not going to take a speculation by defense counsel as to what the jury can hear. Unless you have been back in the jury room, I don't think you have any basis for that objection.

MR. SATZ: Your Honor, as I stated before, he has stated from early childhood up until the time that William Elledge is presently on death row. I'm entitled, in my opinion, to go into the things that he did and the things that he did not do and if he did not read a transcript. I worded it hearing, not a previous trial. A previous hearing where the very same witnesses testified and in fact, Mr. Elledge testified. I think that fact is appropriate impeachment, why he didn't look into that and read it.

THE COURT: I think so, too. He said hearing.

**MR. GIACOMA:** Number one, Mr. Satz misstates where he says I withdrew the motion in limine. I did not withdraw it, I modified it.

Number two, I think the reference, if he goes on -- I am not saying it happened yet, I'm saying if he goes on and talks about the prior two sentencings, the federal hearing, 1 don't know how many he's going to mention but this jury is going to wonder why there's been six or seven prior hearings. They don't know the difference, Judge, between a hearing, a sentencing phase or a trial. They are just going to know that Mr. Elledge has been, as previously stated in voir dire, tieing up the courts with appeals for years and is the exact type of case they all expressed a dislike for and prejudged.

> THE COURT: I think, first, the State has got the right to go into cross-examination to show what he did not consider as well as what he did consider so as to that, overruled.
>
> I think that anybody with basic intelligence, and I think this jury is intelligent, they know he's been on death row for fifteen years apparently.
>
> MR. GIACOMA: There's no doubt.
>
> THE COURT: Because everybody has told them that. I'm confident that anybody with a smathering of intelligence knows that you had to have some kind of hearing before you go to death row. We're not going to talk about trials or prior sentencing.
>
> MR. GIACOMA: A just renew my objection if it continues to numerous prior dates. I just don't know how many Mr. Satz is going to go into.
>
> THE COURT: Well, I don't know either. It's overruled.

(TR 645-649).

Following that colloquy, the prosecutor then asked Dr. Caddy two questions. One, whether he reviewed the transcripts of testimony at a hearing in 1975, and second, whether he reviewed the testimony at a hearing in 1977. (TR 650). No further objections were raised by defense counsel.

This issue truly questions the "credulity" of this appeal, Elledge would have this Court believe that although the jury was aware that he was on death row, the fact that he was placed on death row on more than one occasion would greatly influence their ability as well as the sentencer's ability to cull through the evidence presented and reach a just result. See Haliburton v. State, 561 So.2d 247 (Fla. 1990).

## *POINT IX*

### *WHETHER ELLEDGE'S STATEMENTS WERE ERRONEOUSLY ADMITTED*

Elledge next argues this his statements made to the police following the murders were involuntarily made in violation of **Michigan v. Mosely, 423** U.S. 96 (1979), and Oregon v. Elstad, **470** U.S. 298 (1985). What Elledge fails to mention is that the facts and circumstances surrounding his statements and the use of same had been decided adversely to him in **Elledge** v. **Graham,** 432 So.2d 35 (Fla. 1983), and in **Elledge v.** Dugger, **823** F.2d 1439, 1442-1444 (11th Cir. 1987). Albeit, this issue was addressed pursuant to a claim of ineffective assistance of counsel (this being so because Elledge pled guilty and did not reserve this point for appellate review), the facts remains that the courts, in rejecting same, observed in **Elledge v. Graham:**

> Our review of the record convinces us that the Appellant's confessions and guilty plea were properly admitted and that the allegations of ineffective assistance of counsel has not been shown.

432 So.2d at 37.

And, in Elledge v. Dugger, that court squarely reviewing the prejudice prong of the admission of said statements, held:

> . . . This circuit has held that not honoring a request to stop questioning is no different from failing to give the ***Miranda*** warning in the first place; while both are 'technical' violations of *Miranda*, neither violates the Fifth Amendment. (cite omitted). Thus, confessions obtained by such violations while inadmissible because they run afoul of *Miranda's* ***per se*** bar, are not 'involuntary' and do not taint any subsequent confessions. *Id.* Therefore, the second, taped confession was not made inadmissible even if the first

> confession resulted from technical *Miranda* violations.
>
> Furthermore, even if the first confession was both violative of ***Miranda*** and involuntary, Elledge cannot prove he was prejudiced by admission of the second confession because it was sufficiently distant from the first confession and, therefore, admissible. ***See Elstad***, 470 U.S. at 309, 105 S.Ct. at **1294**, 84 L.Ed.2d at **232-33** *(dicta)*. When an earlier confession has been coerced and, thus, was involuntary, a court seeking to determine whether a subsequent confession was tainted thereby must look to 'the time that passes between the confessions, the change in place of the interrogation, and the change in identity of the interrogators.' (cites omitted).
>
> In Elledge's case, a full day had passed between the confessions; he had slept and eaten; new interrogators were employed (although his original interrogators were present far part of the new questioning); and the interrogation occurred in entirely different and comfortable surroundings. Additionally, his inquisitors did not use the first confession as leverage to coerce the second. See ***Gresham***, 585 F.2d at 108.
>
> Consequently, if counsel had succeeded in suppressing the first confession by means of a *Mosley*-type attack, the second confession nevertheless would have been admissible. Therefore, even were we to assume that counsel failure to adopt such a strategy rendered his performance unreasonable, Elledge cannot demonstrate that any prejudice inhered as a result, Counsel's performance thus was not ineffective under ***Strickland***.

823 So.2d at **1443-1444.**

Elledge is not able to overcome a law of the case ruling simply by changing the legal premise upon which he is asserts the same facts that his statements were involuntary. His current appeal is from the reimposition of the death penalty following resentencing. Nothing has changed with regard to the facts and

circumstances from **1974,** when the voluntariness of his statements could have been challenged but were precluded based on a guilty plea. See **Sullivan v. State, 441** So.2d 609 (Fla. 1983), **Dobbert v. State, 456** So.2d **424 (Fla. 1984),** and **Quince v. State**, 477 So.2d 535 (Fla. 1985).

Based on the foregoing, Elledge is entitled to no relief **as** to this claim.

## *POINT X*

### *WHETHER THE TRIAL COURT ERRED BY RESTRICTING IMPORTANT, MITIGATING EVIDENCE*

Elledge points to **two** instances during the course of his resentencing proceeding as the basis for his contention that the trial court restricted important, relevant mitigating evidence. During the testimony of Kuck (TR 545), the State objected to an inquiry made.of him as to whether Kuck considered Elledge would ever be a danger if sent to prison for X number of years. The trial court sustained the prosecutions objections that Officer Kuck has shown no ability or qualifications to answer or give an opinion. The trial court concurred, finding that such answer **called** for **speculation.**

Elledge also argues that he should not have been restricted with regard to his examination of Daniel Elledge concerning why Daniel Elledge believed his brother turned out the way he did.

While not unmindful that the United States Supreme Court, in **Skipper** v. **South Carolina, 476 U.S. 1** (1986), permits inquiry with regard to a defendant's future good prison behavior, the record in this case clearly reflects that Officer Kuck was

totally incompetent to answer, let alone speculate, as to the future dangerousness of Elledge. A review of his testimony reveals that he did not even know Elledge had nineteen disciplinary reports filed against him while on death row. Elledge makes much to do of the fact that none of the disciplinary reports involved violence, however, that fact nor the nineteen disciplinary reports were part of the consideration by Officer Kuck. In fact, after he was apprised that Elledge had nineteen disciplinary reports, his remarks were the same, that Elledge had never been a troublemaker as far as he was concerned. **(TR 543-544, 546-548, 552).**[4]

The State would submit this Court's decision **Burch** v. State, **522** So.2d 810, 813 (Fla. **1988),** reflects that not all evidence regarding mitigation is admissible when the evidence is **not competent evidence. Offices** Kuck proved to have no working knowledge of Elledge's stay on Florida's death row. Pursuant to Muehleman v. State, 503 So.2d at **316,** it was within the trial court's discretion to determine whether Officer Kuck was competent to speculate as to Elledge's future dangerousness. Moreover, any error that may have accrued was harmless beyond a

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[4] The record reflects that the question of Elledge's dangerousness while incarcerated was not objected to when asked of Dr. Caddy. (TR **617).** In fact, the record reflects that Dr. Caddy testified that since Elledge's time on death row, he has become less pathological due to fifteen years of abstinence from alcohol and that he was able to develop relationships with other inmates on death row which reflected his changed life. (TR **614-616).** Dr. Caddy observed that he was not a danger to anyone while on death row. (TR 617).

reasonable doubt in light of the testimony of Dr. Caddy on this same point.

With regard to the testimony of Daniel Elledge as to, "You turned out not having any problem with the law, you grew up in the same environment as Bill, why him, why not you? Any idea?'' (TR 564).

It is hard to imagine how this call for an opinion rather than personal knowledge, restricted the admission of mitigating evidence in Elledge's case. Daniel Elledge was permitted to testify with regard to the abuse he and his sister and Bill suffered; he testified as to how his parents would abandon them for the weekends to go on drunken sprees; he further testified that Bill nearly died at birth because he was a blue baby and had to be fed goat milk and was a colic baby; he also testified about sexual conduct between his brother and his sister, Connie, although he admitted that no one ever discussed it; he recalled that once his brother was hit with a brick and got knocked out; and that his brother wrote letters to his father. Given all that evidence, Daniel Elledge's opinion as to why he, Daniel Elledge, turned out good and his brother turned out bad was totally incompetent and sheer speculation. Elledge cites to no authority which would support a contention that the trial court's ruling of inadmissibility based on opinion evidence and speculation was in error. No relief is warranted with regard to this point.

## *POINT XI*

***WETHER** STRIKING TESTIMONY SHOWING THE **VICTIM USED** DRUGS VIOLATED **ELLEDGE'S** RIGHT TO CONFRONT WITNESSES AND PRESENT MITIGATING EVIDENCE IN A CAPITAL PROCEEDING*

The trial scenario from which Elledge now asserts error occurred reads as follows:

> Q: What is that called, Ulnar?
>
> MR. SATZ: Your Honor, I am going to move to strike that unless Mr. Giacoma can show that that's relevant, that there was any drugs in her system.
>
> MR. GIACOMA: Judge, we are talking about the doctor's findings of the body and we are talking about the entire, all of the findings. I don't think that we can selectively go through part of that report and not all of it.
>
> MR. SATZ: That's true, Your Honor, as long as its relevant.
>
> THE COURT: I'm inclined to agree.
>
> MR. SATZ: If he can show that that's relevant.
>
> THE COURT: Any drugs in her system?
>
> THE WITNESS: The toxicology analysis did not reveal the presence of any drugs, except the presence of alcohol.
>
> THE COURT: All right. I will sustain the objection.
>
> MR. GIACOMA: May I question him on that part though, Judge, about how long before the death drugs could have been in the body?
>
> THE COURT: Sure.
>
> MR. SATZ: No objection to that.

(TR 466-467).

Elledge's claim that error occurred is totally in error. His suggestion that "the marks demonstrate intoxication from the use of drugs injected by needle and support Mr. Elledge's account. Strack smoked marijuana by showing the victim intended to use illegal substances. The victim's intoxication establishes a defense to the especially heinous, atrocious or cruel (HAC) aggravator", is totally wrong. First of all, on cross-examination of Dr. Fattah, it was revealed that the toxicology tests in 1974 would not have revealed whether the victim had smoked marijuana. (TR 468). Therefore, there was no contrary evidence to Elledge's sworn statement that he and Ms. Strack returned to his hotel room and smoked three marijuana cigarettes. (TR 411). Moreover, Elledge did not take the stand during this sentencing proceeding and therefore absent Elledge's sworn statement produced by the State, no evidence would have come in with regard to Elledge's and Ms. Strack's smoking of marijuana. Moreover, although an issue in Point IV, that it was error to allow the medical examiner to introduce the blood alcohol level of Ms. Strack, through his testimony at the sentencing proceeding, he now seizes upon the fact that any "restricted" opportunity to explore Ms. Strack's drug use impacted on his defense that the State did not prove that this crime was heinous, atrocious and cruel.

Terminally, it is quite clear from this record that the State's objection was well-founded and defense counsel did not truly take exception to said ruling. He was permitted to explore that which he sought to secure from Dr. Fattah on cross-examination, that Ms. Strack used drugs before her death.

This Court's decisions in Taylor v. State, ____ So.2d ____ (Fla. 1991), 16 F.L.W. S469; Hayes v. State, ____ So.2d ____ (Fla. 1991), 16 F.L.W. S392; Gunsby v. State, 574 So.2d 1085, 1088 (Fla. 1991), and Lucas v. State, 568 So.2d 18 (Fla. 1990), control.

## *POINT XII*

### *WHETHER THE TRIAL COURT ERRED BY NOT HOLDING A RICHARDSON INQUIRY WHEN THE STATE USED DISCIPLINARY REPORTS TO CROSS-EXAMINE CORRECTIONS OFFICER KUCK*

Elledge contends that the trial court erred in not holding a Richardson v. State, 246 So.2d 771 (Fla. 1971), hearing when it became known to defense counsel that the prosecution had Elledge's Department of Corrections disciplinary reports and used same in cross-examining Officer Kuck.

Officer Kuck testified that he had served three of his seven years with the Department of Corrections on Florida's death row. During that three year period, he was asked whether Mr. Elledge ever got any disciplinary reports, to which he responded, "Not that I can recall." He was asked whether he had checked the records prior to coming to testify and he responded he had not. As a result, the State tendered to Officer Kuck copies of the nineteen disciplinary reports Elledge had received while on death row. Defense counsel objected, arguing that he had never been shown these before:

> . . . This is information that he obviously knew he was going to introduce (Mr. Satz) and I think as part of discovery and part of what

> he should have given me a copy of before this trial, I should have a copy of this. This was unavailable to me.

(TR 548).

The trial court questioned whether in fact the State was supposed to anticipate what the defense was going to present and show the defense the rebuttal before the State had an opportunity to put it on. In response, defense counsel observed:

> Your Honor, I believe he should have, especially when it's disciplinary reports, that are more available to the State Attorney than the defense, and especially since he has known I was going to be calling people from death row when I started this case, my first witness, I presume, over a year ago.

(TR 548).

In response, the prosecution observed that the State did not know that Officer Kuck was going to be called to the stand **before** yesterday. (TR 548). In response, Mr. Giacoma said that, "Well, there were people from **the** Department of Corrections on the list but they were different names." (TR 549). The State countered, "These records are as available to Mr. Giacoma **as** they are to me. They are about his client. He probably knew more about them than I did." (TR **549).**

It is clear that the trial court, in the spirit of **Richardson** v. State, supra, conducted a sufficient inquiry into the circumstances surrounding the Department of Corrections' disciplinary reports on Elledge, to satisfy the court that no discovery infraction occurred. The trial court did not abuse its discretion in limiting its inquiry to those facts and circumstances necessary to resolve the claim. See Welty v.

State, 402 So.2d 1159 (Fla. 1981) (trial court has wide discretion in determining the admissibility of evidence); Peterson v. State, 465 So.2d 1349 (Fla. 5th DCA 1988) (scope of Richardson hearing dictated by the trial court's inquiry); Zeigler v. State, 402 So.2d 365, 372 (Fla. 1981); Banda v. State, 535 So.2d 221, 223 (Fla. 1988); Cherry v. State, 544 So.2d 184 (Fla. 1989); Duest v. State, 462 So.2d 446, 448 (Fla. 1985), and Smith v. State, 515 So.2d 182 (Fla. 1987). No relief is warranted on this claim.

## *POINT XIII*

### *WHETHER A MISTRIAL WAS REQUIRED WHEN THE PROSECUTOR INFORMED THE JURY THAT ELLEDGE'S TAPED STATEMENT HAD BEEN REDACTED PURSUANT TO A DEFENSE MOTION*

The State never informed the jury that the tapes were redacted rather, during direct examination, Detective Devin stated that, "There are the copies of the Gaffney homicide, a statement and confession from Mr. Elledge. These are the redacted versions." (TR 469). No objection was made by defense counsel with regard to Detective Devin's comment. (TR 469). Inquiry continued, at which point the prosecution asked Detective Devin to identify the voices on the tape at which point defense counsel objected:

> For the record, there will be an objection for best evidence rule. I don't know if those were made from the originals or from copies originally.

(TR 469).

The objection was overruled and at that point, the State felt compelled to put something on the record. Specifically:

> MR. SATZ: That these were played at the request of Mr. Giacoma. I mean, why is he saying it's not the best? I don't understand.

(TR **470).**

At this point, further inquiry was made of Detective Devin with regard to making copies of the original tapes, at which point the prosecutor asked:

> Q: And these are exact duplicates?
>
> A: With the proscribed or prescribed deletions.
>
> Q: Deletions?
>
> A: (Nods head affirmatively).
>
> MR. SATZ: Mr. Giacoma, any objection?
>
> MR. GIACOMA: No, sir.

**(TR 471).**

The next time anything arises with regard to the "redacted" tapes occurs just prior to cross-examination of Detective Devin when defense counsel asserts:

> We would be moving for a mistrial on the basis that Mr. Satz in response to my motion of best evidence said that he had **had** the tape edited at my request. What that does is leaves the jury to wonder what it is the defense was hiding and what he took out. There is no need to bring it **up** in front of the jury, and I think they are forever prejudiced.
>
> THE COURT: Okay. Denied.

**(TR 507 .**

There is absolutely no error sub **judice,** Elledge's reliance on Huff v. **State, 437** So.2d **1087** (Fla. 1983), **Deque** v. **State, 467** So.2d **416** (Fla. 2nd DCA 1984), and **Wheeler v.** State, **425** So.2d

109 (Fla. 1st DCA 1983), are totally inapplicable to the circumstances sub judice. As observed in Welty v. State, 402 So.2d 1159 (Fla. 1981), the trial court has wide discretion in ascertaining the admission of evidence or lack thereof. There has been no abuse of the trial court's discretion especially when no error occurred.

## *POINT XIV*

***WHETHER THE TRIAL COURT ERRED BY PRECLUDING VOIR DIRE ON THE JURORS RELIGIOUS AFFILIATIONS AND ABILITY TO CONSIDER MITIGATING CIRCUMSTANCES AND FUNDAMENTALLY ERR BY TELLING THE JURY NOT TO ANSWER EMBARRASSING QUESTIONS***

It is clear from the onset of this issue that Elledge has not adequately preserved it for appellate review. He points to three instances regarding the questioning of the voir dire and asserts that as a result of the trial court's rulings or statements, error has occurred. The first instance concerns whether the trial court precluded defense counsel from questioning jurors on their religious affiliation. The record reflects that the sum total of any suggestion that defense counsel believed he needed to inquire of prospective jurors concerning their religious affiliation occurs one pages 161-162 of the record:

> MR. GIACOMA: I am sorry, but you have to keep answering yes or no.
>
> MR. PETERSON: No.
>
> MR. GIACOMA: She can't take a head nod.
>
> MR. PETERSON: No.
>
> MR. GIACOMA: Religious denominations, sir?

MR. SATZ: Your Honor, I am going to object to that. I think that's delving too far into an individuals --

THE COURT: Religious denominations?

MR. SATZ: Yes.

THE COURT: I will sustain the objection.

MR. GIACOMA: I will make a note of that, Judge so --

THE COURT: You don't have to make notes. She is making a note of everything. I hope she is.

MR. GIACOMA: I will so I don't have to ask it again, Judge. Military experience, sir?

Even assuming for the moment defense counsel was in some fashion or form attempting to register his objection to the trial court's sustaining of the State's objection, more needs to be said to apprise the trial court with regard to why defense counsel wanted to explore the potential jurors' religious backgrounds. While he argues in some detail the reasons Elledge believed he should have been permitted to explore the potential jurors' religious denominations, he never attempted to explain to the trial court such concerns.

Elledge also complains that the trial court precluded defense counsel from questioning jurors on their ability to fairly consider mitigating circumstances. On this score, the record reflects defense counsel asked, "Do you think that change in a positive (sic) would be considered by you to be a mitigating circumstance if someone did something good with their life?" (TR 188-189). At this point an objection was raised by the State, specifically:

> . . . I didn't object with Mr. Peterson, but he's asking the jurors things that he hopes to show prior to any evidence going in and it's the State's feeling that that has nothing to do with the qualifications to be fair and impartial. Mr. Giacoma, wants to ask them, will they consider what's presented, I have no objection to that, but going into individual things, will you consider this, will consider that, I think it's inappropriate for voir dire, just inquiring whether they can be fair and impartial.
>
> MR. GIACOMA: Number one, I'm responding to Mr. Satz's inquiries whether fifteen years prevents you from giving the death penalty.
>
> And number two, there are certain mitigating circumstances and if a juror tells me they won't consider that, then I'm going to the basis of whether or not --
>
> THE COURT: I'm inclined to agree with both of you but I don't thing we ought to get into the specific mitigating circumstances on the voir dire. I think as long as they say they'll consider everything presented including that, I think that ought to be sufficient.

**(TR 189-190).**

Defense counsel continued to ask Mr. Harris questions with regard to the death penalty and statutory aggravating and mitigating factors. (TR 190-191).

Elledge also points to the opening remarks by the trial court to the potential jurors which reads as follows:

> We are not going to ask you anything that's embarrassing to you. If you ask you anything that's embarrassing, just don't answer it. Because all they can do is kick you off the jury. Okay.
>
> We are not going to ask you how old you are. We are not going to ask you how old your children are. We are just going to have school age children or grown children. And because I tell you why. Because if you have

> got a kid that's sixty years old, we don't know how old you are, so we are not going to embarrass anybody. Okay.

**(TR 85-86).**

To suggest that any of the aforementioned Circumstances in any way thwarted Elledge's ability to secure jurors for this resentencing that could fairly review his case, is totally ridiculous. In Stano v. **State, 473** So.2d 1282 (Fla. **1985),** this Court observed:

> While, 'must have an opportunity to ascertain latent or concealed prejudgments by prospective jurors,' it is the trial courts responsibility to control unreasonably repetitious and argumentative voir dire. (cites omitted). The test for determining a jurors competency is whether the jurors can lay aside any prejudice or bias and decide the case solely on the evidence presented and the instructions given. (cites omitted). The prospective juror that Stano now complains about met that test, as did all those persons who have actually served on the jury. Stano has shown no abuse of discretion and the trial courts restriction of defense counsel's voir dire.

**473** So.2d at **1285.**

Likewise, sub **judice,** counsel **is** unable to demonstrate any harm based on the "restrictions" placed on defense counsel with regard to his questioning during voir dire. See Carroll v. **Dolsworth,** 565 So.2d **346** (Fla. 1st DCA **1990),** and **United States v. Nash, 910** F.2d 749 (11th Cir. **1990).** Elledge's reliance **on** Lavado v. **State,** 492 So.2d 1322 (Fla. **1986),** is misplaced. In that case, the court held that reversible error occurred because the defense was precluded from questioning prospective jurors about their willingness and ability to accept the defense of voluntary intoxication where in fact the theory of the defense's case was

that because of his voluntary intoxication, he was unable to formulate the specific intent required to commit robbery. With regard to any restriction as to inquiries as to mitigation, the record reflects defense counsel was not barred from discussing with potential jurors mitigating circumstances, rather, he was restricted in his specific reference to mitigating circumstances and whether given jurors would or would not accept said "evidence" as mitigation. Such a result is not contrary to **Turner** v. **Murray, 476 U.S. 28 (1986). See Mu'Min v. Virginia, 111 S.Ct. 1899** (1991).

Terminally, the fact that counsel now asserts that his right to a fair jury **was** diminished because he was cut off from intelligently exercising challenges, both peremptory and for cause, was groundless. A result cannot be gleaned from the unobjected to opening remarks by the trial court that allowed jurors not to "answer embarrassing questions". No relief should be forthcoming as to this point.

## *POINT XV*

***WHETHER REFUSAL TO VOIR DIRE JURORS APART FROM ONE ANOTHER IS PREJUDICIAL ERROR WHEN THEY ARE CONSEQUENTLY EXPOSED TO REPEATED PREJUDICIAL, FACTUALLY INACCURATE INFLAMMATORY STATEMENTS FROM OTHER JURORS***

Without citing any authority except Booth and **Turner,** supra, Elledge argues that he was denied an impartial decision-maker because potential jurors were infected by other jurors' remarks. This Court has repeatedly **held** that while individual voir dire might be a better procedure in some cases, nothing requires individual voir dire in a given case. See Randolph v. **State, 562** So.2d **331, 337** (Fla. 1990), wherein the Court observed:

> Randolph next argues that the trial court erred in denying his motion for individual voir dire. The granting of individual and sequestered voir dire is within the trial court's sound discretion. *Davis v. State*, 461 So.2d 67, 69 (Fla. 1984); *Stone v. State*, 378 So.2d 765, 768 (Fla. 1979), *cert. denied*, 449 U.S. 986, 101 S.Ct. 407, 66 L.Ed.2d 250 (1980). Randolph has not shown an abuse of discretion by the trial court that warrants reversal. *Davis*, 461 So.2d at 70. *See also Cummings v. Dugger*, 862 F.2d 1504, 1508-09 (11th Cir.) (noting that the preferred approach in the face of extensive pretrial publicity is to conduct individual examination, although declining to require individual voir dire in all cases where there is substantial pretrial publicity), *cert. denied*, ____ U.S. ____, 109 S.Ct. 3169, 104 L.Ed.2d 1031 (1989); *United States v. Holman*, 680 F.2d 1340, 1347 (11th Cir. 1982) (same).

Elledge has demonstrated no basis upon which relief should be granted.

## *POINT XVI*

### *WHETHER THE TRIAL COURT ADEQUATELY DEFINES NON-STATUTORY MITIGATING CIRCUMSTANCES*

As recited in Elledge's footnote 62, defense counsel requested a plethora of jury instructions individually setting out mitigating factors. He acknowledges that this Court, in Robinson v. State, ____ So.2d ____ (Fla. 1991), 16 F.L.W. S107, 108, holds that the "catchall" non-statutory jury instructions adequately defines non-statutory mitigating circumstances, but argues that this decision should be overruled in light of Lucas v. State, 568 So.2d 18 (Fla. 1990); Campbell v. State, 571 So.2d 415 (Fla. 1990), and Parker v. Dugger, ____ U.S. ____, 111 S.Ct. 731 (1991). Elledge's suggestion that Robinson, supra, is not good law is wanting, and his reliance on Parker v. Dugger, supra,

is totally misplaced. See Nixon **v.** State, 572 So.2d 1336 (Fla. 1991) (reaffirming that the catchall mitigating instruction is adequate to "allow the jury to consider all the mitigating evidence presented.") 572 So.2d at 1344.

## *POINT XVII*

***WHETHER THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ALLOWING THE JURY TO GIVE DOUBLE CONSIDERATION TO THE SAME ASPECT OF THE OFFENSE WHEN THE PROSECUTOR PROPERLY ARGUED THAT THE HOMICIDE VICTIMS RAPE ESTABLISHES BOTH FELONY RAPE AND PRIOR VIOLENT FELONY AGGRAVATORS***

At resentencing, the trial court gave the following instruction regarding the aggravating circumstances:

> Number one: The defendant has been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person. The crime of murder in the first degree is a capital offense; the crime of rape is a felony involving the use of threat of violence to another person.
>
> Number two: The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of rape.
>
> Number three, the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
>
> Now, this purpose cannot be found by you unless strong proof clearly shows that the dominant or only motive for the murder was the elimination of the eye witness.
>
> Number four, the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel. . . .

(TR 795-796).

Initially, the jury instruction requested by defense counsel suffers the same infirmity as that found in **Mendyk** v. **State, 545** So.2d **846, 849** (Fla. **1989)** ("We find proposed instruction number six not to be an entirely correct statement of the law under **Garcia v. State** (cite omitted), and the trial court properly did not give it."). See **also Garcia v. State,** 492 So.2d **360, 366** (Fla. **1986).** Second, in Wasko v. **State, 505** So.2d **1314** (Fla. **1987), the** court observed that contemporaneous convictions prior to sentencing can qualify as previous convictions of a violent felony and may be used as an aggravating factor, however, such a result normally occurs in multiple victims in a single incident or separate instance combined in a single trial circumstance. In the instant case, while it might have been inappropriate for the trial court to mention the crime of rape as a felony involving the use of threat, the trial court also informed the jury that the crime of murder in the first degree is a capital offense. **(TR 795).** The trial court, in his written findings (TR 2686), found:

> The defendant does have a significant history of prior criminal activity. The defendant has been convicted of murder in the first degree of Edward Gaffney. The defendant has also been convicted of murder in the first degree of Paul Nelson. He has also been convicted of felonious assault in the state of Colorado. This defendant has been confined in various institutions for a great portion of his life for various other crimes.

The record further reflects that no objection was raised by **defense** counsel with regard to the jury instructions given. Albeit, the court presumed Elledge renewed his jury instruction request, he took no issue with the instructions read sub **judice.**

Absent an objection, and based on the overwhelming presence of the Nelson and Gaffney murders as previous capital felonies, any error was harmless beyond a reasonable doubt. See Holton v. **State, 573** So.2d 284, 291 (Fla. 1990) (because other prior violent felonies also found; use of contemporary felony harmless error).

Based on the foregoing, no relief may be granted **as** to this issue.

*POINT XVIII*

***WHETHER** MR. ELLEDGE'S JURY WAS **LED** TO BELIEVE THAT **THEY** HAD NO RESPONSIBILITY FOR THE DEATH SENTENCE IN THIS CASE*

First of all, defense counsel did not object to the instructions read to the jury. (TR 802). Second, there is no evidence in this record that the jury's role was diminished pursuant to **Caldwell v. Mississippi, 472 U.S. 320** (1985). This Court has rejected a similar claim in a number of cases. See **Sochor** v. **State,** ____ **So.2d** ____ (Fla. 1991), 16 F.L.W. **S297, 299; Espinosa v. State,** ____ So.2d ____ (Fla. **July** 11, 1991), 16 F.L.W. **S489,** 491, and **Grossman** v. **State, 525** So.2d **833** (Fla. 1988), to name a few.

*POINT XIX*

*WHETHER THE TRIAL JUDGE EXERCISED REASONED JUDGMENT IN FINDING MITIGATING CIRCUMSTANCES AND AS A RESULT, A LIFE SENTENCE MUST BE IMPOSED*

Elledge has now changed his argument from Point I, regarding whether the sentencing order satisfied Campbell, **supra,** to an assertion that the trial court did not exercise reasoned judgment

in finding or not finding mitigating circumstances, and as a result of this deficiency, a life sentence should be imposed. Presumably, he has taken this tactic because he cannot prevail on his Campbell issue pursuant to Gilliam v. **State,** supra, and he now argues that pursuant to **Bouie** v. **State, 559 So.2d 1113** (Fla. 1990), relief should be granted. He argues, "The court simply copies its previous sentencing order, adding a claim to have considered all of the mitigating evidence." (Appellant'sBrief, page 69). While it is true the sentencing order **sub judice** is similar to the two previous sentencing orders entered in this case, the logic and reasoning for such a result is not hard to ascertain. Elledge has presented the same facts and circumstances as previously presented and thus, the orders previously entered addressed the same issues that were raised **sub** judice. The only thing Elledge can point to that might have **been** excised from the order is found in Point XX, regarding "previous convictions for felonious assault in the state of Colorado'' and the fact that Elledge has been "confined in various institutions for a greater portion of his life for various other crimes." These factors alone do not point to a finding that the order itself was not well reasoned with regard to the applicability of mitigating circumstances.

**Elledge's** reliance on **Bouie** v. **State, supra,** is totally in error. In **Bouie,** there was no explanation of which aggravating circumstances and which mitigating circumstances "if any" were deemed applicable. The court observed:

> . . . Neither the oral or the written findings recite any facts upon which the

> trial court based Bouie's sentence. They are merely conclusory statements which fail to show the independent weighing and reasoned judgment required by the statute and caselaw and do meet our requirements. . . .

559 So.2d at 1116.

Indeed, in Elledge v. State, 408 So.2d 1021, 1023-1024, this Court found no problem with the sentencing order which is quite similar to the instant one. This Court observed:

> Appellant attacks the sentencing order because he claims the trial judge included under his initial findings, which stated that Elledge had a significant history of criminal activity, crimes which were either non-capital or non-violent. Such an argument is clearly obfuscatory as it is apparent that his initial finding concerned the lack of the mitigating circumstance under §921.141(6)(a), Florida Statutes (1977), because the findings that directly follow the initial finding also concern lack of mitigating circumstances. The trial judge properly differentiated mitigating from aggravating circumstances in negating the statutorily described mitigating circumstance.

While it is clear that the passage of time has produced cases from this Court that have addressed the need for trial judges to be more clear with regard to their sentencing findings, as observed in Rhodes v. State, 547 So.2d 1201, 1207 (Fla. 1987). However, in Rhodes, the Court observed:

> . . . Although we finding the sentencing order in this case to be sufficient, we urge trial judge's to use greater care when preparing their sentencing orders so it is clear to this Court how the trial judge arrived at the decision to impose the death sentence.

In the instant case, Elledge's concerns that the trial court did nat consider the mitigation tendered, is without merit.

## *POINT XX*

### *WHETHER THE SENTENCING ORDER CLEARLY STATES THE FINDINGS IN AGGRAVATION AND MITIGATION*

In Point XX, Elledge is concerned that the trial judge, in his sentencing order, in paragraph one, included the fact that Elledge:

> . . . has also been convicted of felonious assault in the state of Colorado. This defendant has **been** confined in various institutions for a greater portion of his life for various other crimes.

The trial court clearly believed he had information before him that reflected the above-noted statement. Whether the record bears that out is of no moment in that there were two previous capital murders, to-wit: the murder of Mr. Gaffney and the murder of Mr. Nelson, that qualified as the statutory aggravating factor that Elledge had prior violent felonies and negated any suggestion that the statutory mitigating factor existed that Elledge had no significant criminal history.[5]

This very issue was decided adversely to Elledge in **Muehleman** v. State, 503 So.2d at **315-316**. Therein, the Court distinguished an earlier decision in Maggard v. State, 399 So.2d 973 (Fla. 1981), finding as follows:

> *Parker* made clear that the mere existence of a strategical waiver by the defense of a mitigating factor does not end the analysis.

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[5] Undersigned counsel is aware of the fact that Elledge waived this statutory mitigating circumstance and the State below concurred with said waiver. However, Dr. Caddy testified that Elledge's incarceration for the last fifteen years changed his personality and therefore **he** would not be a threat to anyone if placed in general population with a life sentence.

> In order to evaluate the alleged error, we must consider the evidence admitted, any prejudice accruing to the defendant therefrom, and the purpose for its admission. (cite omitted), In light of the reliance of this evidence in rebutting specific evidence presented by the defense, we find no abuse of discretion in this case.

*See* **Parker v. State, 476** So.2d 134 (Fla. 1985), and **Wasko v.** State, 505 So.2d at 1317, wherein the court further noted:

> Before addressing the jury override, however, we will consider the aggravating circumstance of previous conviction of violent felony in light of the mitigating circumstance of no significant history or prior criminal activity. These two circumstances are mutually exclusive. It would be illogical to find no significant prior history when there has been a prior conviction of another capital felony or a felony involving the use, or threat, of violence to a person. Such a conviction, by the nature of the crime, would be significant. In this case, however, we find that the trial court improperly found the aggravating, rather than the mitigating, circumstance.

In the instant case, based on the foregoing, it was not error for the trial court to put the two together. Clearly, beyond peradventure, Elledge had two prior capital murders. To suggest that he had no significant prior history requires this Court to wear blinders as to the reality of the case. No relief should be forthcoming.

## *POINT XXI*

***WHETHER THE TRIAL COURTS RELIANCE ON PSYCHIATRIC REPORTS NOT IN THE RECORD TO REJECT MITIGATING CIRCUMSTANCES, VIOLATED ELLEDGE'S DUE PROCESS AND CONFRONTATION RIGHTS AND CONSTITUTED CRUEL AND UNUSUAL PUNISHMENT***

Assuming for the moment this Court discerns that Elledge is entitled to no relief with regard to a similar claim raised in Point 11, he is equally without redress with regard to this claim.

The sentencing order reflects that:

> The defendant did not commit the murder while under the influence of extreme mental or emotional disturbance. The defendant was examined by two psychiatrists and both stated that at the time of the crime the defendant understood and could appreciate the nature and consequences of his acts. Neither doctor found nor reported that the defendant was acting under the influence of extreme mental or emotional disturbance at the time of the crime. There was no indication of insanity.

(TR 2687).

Ds. Caddy was called to stand on behalf of Elledge and testified that he had reviewed the medical and psychological background of Dr. Lewis, Dr. Miller, Dr. Tauble, Elledge's medical records, the California Youth Authority records, and records from the Colorado State Hospital. (TR 586). In discussing his conclusions with regard to Elledge's mental status, he concluded that Elledge knew the difference between right and wrong and was in fact legally sane. He observed that although Elledge knew the difference between right and wrong, he was unable to stop his actions once undertaken. In essence, he had no personal control. The doctor observed that he suffered

from pathological intoxication and that one could see this coming based on his history. (TR 607-609, **613**). **He** further observed on direct examination that based on his fifteen years incarcerated, Elledge was profoundly less pathological. He observed that Elledge had made friendships with others on death row and that Elledge was not a danger to anyone while he was incarcerated. (TR **614-617**). On cross examination, he readily admitted that Elledge had an average IQ, was not insane nor psychotic. He also concluded Elledge suffered from no psychotic disorder at the time of the murder but rather he suffered from a personality disorder. (TR 625). He acknowledged that he had read the reports of Dr. Miller and Dr. Tauble who interviewed Elledge in **1974** and 1975. **In** fact, Dr. Caddy published in the record the results of both Dr. Miller and Dr. Tauble's report, specifically, that Dr. Miller thought that Elledge suffered from a anti-social personality disorder and that he lacked regard for human beings and Dr. Tauble found that Elledge had an anti-social personality disorder. (TR 650-652). He also revealed that he reviewed the reports of Dr. Eichart, who indicated that Elledge did not need further psychiatric intervention; and Dr. Britton, who found that Elledge suffered from an anti-social personality disorder. (TR 653-663). In reviewing the information Dr. Caddy had reviewed in preparation for his testimony, Dr. Caddy said that the California Youth Authority information revealed that Elledge was quick to rationalize and excuse his decisions and that said conduct was consistent with an anti-social personality disorder. (TR **664**). Ultimately on re-direct, Dr. Caddy testified that Elledge

suffered from impulse control disorder with a personality disorder with a number of anti-social features. In addition, Elledge's history of alcoholism exacerbated said condition. (TR 678-679).

As the trier of fact, the trial court was in the best position to credit or not credit the mitigating circumstances tendered. In that vein, he was also permitted to review the evidence utilized by the witnesses in reaching their results, specifically, the information made available to Dr. Caddy and Dr. Caddy's views of what these reports stated. Pursuant to Valle v. **State, supra; Sochor v. State, supra; King v. Dugger, 555** So.2d 355 (Fla. **1990);** Scull v. **State, 533** So.2d **1137** (Fla. 1988); **Carter** v. **State, 576** So.2d 1291 (Fla. **1989);** Bruno **v. State, 574** So.2d **76** (Fla. **1991); Sanchez-Velasco** v. **State, 570** So.2d **908** (Fla. **1990);** Rivera v. **State, 561** So.2d **536** (Fla. 1990), and **Randolph v. State, 562** So.2d **331** (Fla. 1990), relief should be denied.

## *POINT XXII*

### *WHETHER THE EVIDENCE WAS SUFFICIENT TO PROVE ELLEDGE COMMITTED THE MURDER FOR THE PURPOSE OF AVOIDING OR PREVENTING AN ARREST*

**In Elledge v. State, 408** So.2d **1021,** 1023 (Fla. 1982), this Court affirmed the trial court's finding that the murder was committed for the purpose of avoiding arrest. Specifically, the court observed:

> . . . This argument is unfounded for a close examination of the record reveals that Elledge's taped confession and a transcript of that confession were admitted into evidence. During this confession, Elledge

> detailed the victim's threats to call the police when he initiated the rape. Such evidence is sufficient to support the conclusion that Elledge killed the rape victim in order to prevent her carrying out her threat.

It would appear that nothing different was presented in the instant resentencing that would make this particular aggravating factor less compelling. In fact, the identical evidence was presented, to-wit: Elledge's confession detailing the threats Margaret Strack made to Elledge about calling the police when he initiated the rape. (TR **417-418**). See **Caruthers v. State, 465** So.2d **496** (Fla. 1985), and **Hitchcock** v. **State, 578** So.2d **685, 693** (Fla. **1990**), wherein the court observed:

> Hitchcock has likewise demonstrated no error in the court's finding the murder to have been committed to prevent or avoid arrest. Hitchcock admitted that he killed the victim to keep her from telling her mother. Had she done so, this would undoubtedly have led to his arrest. Contrary to his current contention, we have never held that '[a]ctual, subjective awareness by the accused of an impending arrest must be proven beyond a reasonable doubt' before this aggravator can be found.

Elledge is not entitled to relief as to this claim.

## *POINT XXIII*

***WHETHER THE TRIAL** COURT **IMPROPERLY** FOUND **THE** MURDER **WAS** HEINOUS, **ATROCIOUS OR CRUEL***

The trial court found:

> This murder was especially heinous, atrocious and cruel. The defendant choked the victim until she was beating on the wall and gasping for air. He then threw her from the bed onto the floor and again choked her for

> approximately fifteen to twenty minutes. During this period of time, the defendant was raping the victim.

(TR 2687).

In Elledge v. **State, 408** So.2d 1021, the correctness of the heinous, atrocious and cruel finding was not in serious contention in that it did not even merit discussion by the court. In Elledge **v.** State, 346 So.2d **998** (Fla. 1977), no concern was raised with regard to said finding. Nor, in Elledge v. **Dugger,** 823 F.2d 1439 (11th Cir. 1987), did the federal courts have any problems with the applicability of this aggravating factor. Moreover, this Court has consistently held that in similar circumstances, the aggravating factor of heinous, atrocious or cruel applies. **See Capehart v. State,** ____ **So.**2d ____ (Fla. 1991), **16** F.L.W. at S449; **Sochor** v. **State,** ____ **So.**2d ____ (Fla. 1991), **16** F.L.W. at S299; **Holton** v. **State, 573** So.2d at 292 (Fla. **1990); Sanchez-Velasco v. State, supra,** and **Duckett v. State, 568** So.2d **891** (Fla. **1990).** In **Hitchcock v. State, 578** So.2d **at 692-693,** the court, in a very similar circumstance, observed:

> That Hitchcock might not have meant the killing to be unnecessarily torturous does not mean that it actually was not unnecessarily torturous and, therefore, not heinous, atrocious, or cruel. This aggravator pertains more to the victim's perception of the circumstance than to the perpetrators. (cite omitted). Hitchcock stated that he kept 'chokin'and chokin'' the victim, and hitting her, both inside and outside the house, until she finally lost consciousness. Fear and emotional strain can contribute to the heinousness of a killing. (cite omitted). As Hitchcock concedes in his brief, '[s]trangulations are nearly per se heinous.' *See Doyle v. State,* 460 So.2d 353 (Fla. **1984);** *Adams; Alvord v. State,* 322 So.2d 533 **(Fla. 1975),** *cert. denied,* **428 U.S. 923, 96**

S.Ct. 3234, 49 L.Ed.2d 1226 (1976). The court did not err in finding this murder to have been heinous, atrocious, or cruel.

Likewise, in the instant case, Elledge's own confession reveals that he choked Ms. Strack for fifteen minutes until her face turned purple and her rolled back into her head. He choked her until she was dead, her nose was bleeding and he did so in an effort to choke her screams completely. When she started fighting, and hitting her arms against the wall, he threw her down on the floor and continued to choke her. (TR 416-420). He denied putting any cigarette burn marks on her body or smashing her face. (TR 424, 427). However, the medical examiner testified that there were numerous bruises about the head and extremities and all the bruises except for two were caused prior to the victim's death. (TR 456). Death was caused by asphyxiation by strangulation, evidenced by the fracturing of the hyoid bone and hemorrhaging of the eyelids as well as the surface of the heart, lungs and larynx. (TR 455-456).

Based on this record, the aggravating factor or heinous, atrocious and cruel was properly found. A brief word is necessary with regard to the extraneous language used by the trial court concerning how the body was disposed. The trial court did not rely on his recital of what happened after Ms. Strack was killed to support this aggravating factor, rather, he merely recited that which was presented to the jury in the redacted confession as to what occurred after the murder. Any error regarding the courts' conclusions are harmless.

## *POINT XXIV*

***WHETHER THE TRIAL COURT ERRED IN FINDING THE FELONY (SEXUAL BATTERY) AGGRAVATOR W E N FINDING ONLY A FELONY MURDER BASED ON THE RAPE IN TAKING THE PLEA***

The record reflects, as Elledge points out, that he pled guilty to first-degree murder and rape, however, the trial court, after determining that there was a factual basis for the plea, determined that it existed for felony murder. (TR 2000-2006). In Lowenfield v. Phelps, **484** U.S. 231 (1988), the United States Supreme Court addressed a similar issue as that raised herein. This Court, in Bertolotti v. State, **534** So.2d 386, 387, n.3 (Fla. 1988), and Parker v. Dugger, 537 So.2d 969 (Fla. 1988), concluded that similar claims were without merit.

## *POINT XXV*

***WETHER CUMULATIVE ERROR AT ELLEDGE'S RESENTENCING REQUIRE A NEW RESENTENCING***

Elledge next argues that "although an error may not merit reversal by itself, that several errors in combination, require reversal." (Appellant's Brief, at 78). Pointing to the jury's recommendation of death by the "narrow margin of 8-4", Elledge makes the collective argument that all that came before when combined require a new resentencing. The State would rely on the authorities cited in the individual points set out in its pleadings in response to this particular issue.

## *POINT XXVI*

### *WHETHER FLORIDA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL*

As in **Mendyk** v. **State, 545** So.2d **846, 850 (Fla.** 1989), Elledge asserts **a** plethora of constitutional errors regarding Florida's death penalty statute as well as the manner in which it is applied as a basis for relief. None of the claims merit relief, however, a cursory review of each follows. See also **Stano v. State, 460** So.2d **890** (Fla. 1984), and a number of other cases wherein similar challenges were raised and rejected.

Each of the below cited claims were raised in some fashion or form in the thirty-plus pretrial motions filed by Elledge. The State responded to each and the trial court denied, in a cursory fashion, most constitutional challenges. The trial court's denial of said motions should be affirmed.

(A) Heinous, Atrocious and Cruel
Maynard v. **Cartwright, 108** S.Ct. **1853 (1988)**

In **Smalley** v. **State, 546** So.2d 720 (Fla. 1989), this Court, in reviewing a **Maynard** v. **Cartwright** claim, concluded that based on a number of grounds, Florida's aggravating factor was Constitutional and did not run afoul of Maynard **v. Cartmight, 108** S.Ct. **1853 (1988). See also Lewis v. Jeffers, 497 U.S. ____, 111** L.Ed.2d **606,** 110 S.Ct. **____ (1990);** Walton **v. Arizona, 497** U.S. **____, 111** L.Ed.2d **511, 110** S.Ct. **3047 (1990).** Elledge's suggestion that the decision in **Shell** v. Mississippi, **____** U.S. **____,** 111 S.Ct. **313** (1990), has any impact regarding the constitutional manner in which "HAC" is applied is totally misplaced.

Moreover, as will be noted in the proportionality argument made in Point XXIX, this Court has consistently applied heinous, atrocious or cruel aggravator to death by strangulation.

**(B)** Failure to Limit Avoid Arrest Aggravating Factor

Citing to **Hitchcock v. State, 578** So.2d **685** (Fla. 1991), Elledge argues that the aggravating factor that the crime was committed for the purpose of avoiding an arrest does not sufficiently narrow the **class** of death eligible individuals. Such a contention is without merit. **See Green** v. **State,** ____ So.2d ____ (Fla. 1991), 16 **F.L.W. S437, 439.**

**(C)** Failure to Define or Provide Specific Instructions With Regard to Each Aggravating Factor, For Example, Defining the Underlying Felonies

Pursuant to Teffeteller **v. State, 439** So.2d **840, 844 (Fla.** 1983), it is clear this Court routinely reviews the adequacy of the instruction on any underlying felony. Any error in the instruction may be harmless error pursuant to **Knight** v. **State, 394 So.2d 997** (Fla. 1981), **Frazier** v. **State, 107** So.2d **16** (Fla. 1958). **Note** also: **Vasil v. State, 374** So.2d **465** (Fla. **1979); Lightbourne** v. **State, 438** So.2d **380** (Fla. **1983)** (sexual battery), **and Duckett** v. **State, 568** So.2d **891** (Fla. **1990).**

(D) Fair Majority of Jury Recommendation Violates Cruel and Unusual Punishment

The United States Supreme Court this past term, in a similar circumstance, concluded such an error neither violates due process nor the prohibition against cruel and unusual punishment. See **Schad** v. **Arizona,** 500 U.S. ____, (Cited June 21, 1991), Case No. **90-5551, 49** Cr.L. **2279.**

(E) Supreme Court Intractable Ambiguities Prevent Even-Handed Application of Appellate Review

Citing **Parker** v. Dugger, 111 S.Ct. 731 (1991), Elledge claims that he will not get fair appellate review. Such a contention is without merit and certainly the United States Supreme Court, in Parker, did not conclude that the Florida Supreme Court did not or could not carry out its appellate function.

(F) Disparate Treatment of Capital Cases By Continuing to Apply Procedural Bar

Elledge argues that there is disparate treatment in the processing of capital **cases** in Florida because this Court continues to **adhere** to a procedural bar for those claims not properly preserved at trial for appeal. Such a contention is groundless. ***See*** **Wainwright v. Sykes, 433** U.S. 72 (1977); **Francis** v. Henderson, **425** U.S. 536 (1976); Engle **v.** Isaac, 456 U.S. 107 (1982), and **Dugger** V. Adams, **489** U.S. 401 (1989). Certainly the United States Supreme Court has a full appreciation for the need to honor and continue to adhere to procedural bars.

(G) Burden of Proof of Mitigation

In Walton v. **Arizona, ____ U.S. ____,** 110 S.Ct. 3047 (1990), and **Lewis** v. **Jeffera, 497 U.S. ____,** 111 L.Ed.2d 2606, 110 S.Ct. ____ (1990), the United States Supreme Court found no impermissible burden shifting with regard to the development of mitigating circumstances.

(H) Inability to Consider Sympathy

Elledge cites to page 794 of the record where the trial court instructed the jury "this case must not be decided for against anyone because you feel sorry for anyone, or are angry at anyone." First of all, at the close of all the instructions, no objection was made by defense counsel on this point, specifically, that the jury was precluded from considering sympathy, presumably empathy for the defendant. Second, defense caunsel never sought a jury instruction asking for sympathy towards the defendant, rather special instruction No. 27, which was denied, provided "you are always free to grant mercy to William Elledge and sentence him to life imprisonment. You may grant mercy to William Elledge regardless of the existence of aggravating circumstances or the lack of mitigating circumstances." (TR 2655). Terminally, Elledge points to no state authority which requires a conclusion that the instruction given sub judice is constitutionally infirmed. A catch-all instruction was given which this Court has held sufficient to address any and all other evidence of mitigation submitted to the jury. **Note: Nixon v. State, 572 So.2d 1336 (Fla. 1990).**

(I) Circuit Judges Selected by a System Designed to Exclude Blacks from Participating as Judges

First of all, it is interesting to note that in support of this contention, Elledge points to an article in the Florida Bar News dated May 1, 1990, titled "Single Member Judicial Districts, Fair or Foul", which was published long after any sentencing proceeding occurred in this case. He cites to no authority which

supports his contention that in this case the trial judge who heard this case in August 1989, and was the trial judge who heard this case in 1975, when Elledge pled guilty, in any way may have imposed death based on such a contention. At no point prior to this occasion did Elledge assert the current challenge. As such, he is procedurally barred from raising it at this juncture since his argument does not go to the specifics of the judge who sat but rather assails the validity of a system which, if proven, could taint every criminal prosecution that has ever been heard in Broward County, Florida. Moreover, Elledge has made no showing that "the selection of sentencers is racially discriminatory and leads to condemning men and women to die on racial factors," since there has been no showing that the trial court sub judice in any way interjected racial bias in discerning that the appropriate sentence to be imposed was death.

(J) Because the Sentencer is Selected by a Vote of the Electorates at Large and is Paid a Salary said Factfinder is not Free from Pernicious Influences

First of all, it is interesting that evil motives can be assigned to an elected judge but not assigned to an elected "public defender" or the "staff" that he employs as a result thereof. Counsel for Elledge, on appeal, is an assistant public defender and albeit the fact that he is able to cash a state warrant on payday, that influence alone nor the fact that hi5 boss, Mr. Richard Jorandby, is an elected state official, has not skewed his ability to represent Mr. Elledge to the fullest (to be exact, thirty points on appeal from a resentencing).

The fact that a sentencing judge may be popularly elected does not diminish the integrity of the sentencing process. It cannot be presumed that elected judges will pander, as Elledge suggests, to their constituency in sentencing defendant to death. *See* Harris **v. Rivera, 454 U.S. 339 (1981).** Moreover, the United States Supreme Court has recognized the validity of trial judges power to impose the death sentence, even to override a jury's recommendation of life. Spaziano **v.** Florida, **468 U.S. 447 (1984). 8921.141,** Florida Statutes, **is** not unconstitutional for allowing the trial judge to sentence the defendant to death. Provenzano **v. State, 497** So.2d **1177** (Fla. **1986).** Elledge's reliance on Ford **v. Wainwright, 477 U.S. 399, 416** (1986), **is** equally unpersuasive. Ford dealt with the executive process in determining whether an individual should be executed based on their competency. The court found the deficiency in not involving a second branch of government in the determination once raised, as to an individual's competency to be executed. Ironically in Ford, the United States Supreme Court pointed to the need to involve the courts to hold in check the executive regarding the procedures activated pursuant to **s922.07,** Florida Statutes.

Elledge's constitutional challenges to Florida's death penalty statute and to the circumstances surrounding his case are all meritless.

## *POINT XXVII*

*WETHER THE TRIAL COURT DENIED ELLEDGE EFFECTIVE ASSISTANCE OF COUNSEL BY REFUSING TO APPOINT CO-COUNSEL*

Elledge argues "denying co-counsel with complex legal issues and a lengthy procedural history risks erroneous deprivation of life, especially where the sole appointed counsel has no capital sentencing experience." (Appellant's Brief, at 89). At resentencing, Elledge's trial counsel moved for appointment of co-counsel based on the following:

> . . . Basically, Judge, to summarize this, we have two brief reasons, one being the standard appointment of performance of counsel. As the Court is aware, I am a sole practitioner. I don't have an attorney working for me or with me. I am by myself. Not that I was overworked when I took this case, but I had a lot to do. This is not a small trafficking case where I get thirty pages of police reports and tapes.
>
> To begin with, this is fifty-seven hundred pages that I don't really know what it contains, what was actually done in the very beginning; and I know the Court and Mr. Satz both would like to see me ready on January 9th.
>
> However, I would have had to literally close my office down to go through this and give a proper defense to Mr. Elledge. At this stage, I'm between the devil and the deep blue sea. Do I stop my work and work on Mr. Elledge or do I not do Mr. Elledge thoroughly enough.
>
> I think the second counsel would be good due to the severity and due to the fact that I am sure other people have been with Mr. Satz on this case. Due to the complexity, the volume, the history and it's not even a number, if a case that deals with the history, as a matter of fact, fourteen years of literally thousands of pages, I don't know if any one attorney can handle this by himself. . . .

> As the motion points out, this would be my first time on a penalty phase on Murder I. We are not here to determine guilt or innocence, just the penalty phase on the prior two occasions. I'm sure it has, as I know the Court's aware, fourteen years of buildup of documentation.
>
> I would like to point out at this time, if I may, that I didn't even have a place to go to tell me what all transpired. I finally got a list regarding the State's records, federal records, and I'm not saying that I'm incompetent by any stretch of the imagination, but I'm saying with this volume and history, two attorneys would assure Mr. Elledge a proper defense.

(TR 37-39).

In response, the State observed that there is no mandated requirement that two lawyers be appointed in capital cases, but more importantly where two are appointed, said appointments entail trial and penalty phase. The state argues that Mr. Giacoma has the advantage of having all the trial transcripts and thus the two previous 'hearings before this Court provides a backdrop from which Mr. Giacoma could work and more importantly, this is a penalty phase resentencing, not a trial. (TR 40). Following further argument, the court concluded:

> THE COURT: I'm inclined not to grant it. In fact, I'm not going to grant it, but I'm concerned here, Are you telling me, Mr. Giacoma, that you are not going to be able to handle this case? If you are telling me that, I'll remove you from it.
>
> MR. GIACOMA: I would never take a case that I felt I was not competent to handle.

> THE COURT: I would never assign you or ask you to take a case if I didn't think you weren't one of the best lawyers in town, and that you are competent.

**(TR 41-42).**

The record reflects just preceding this colloquy, the trial court granted trial counsel the assistance of an investigator (TR 37), premised, in material part, on Mr. Giacoma's same arguments with regard to the nature of his practice and the size of the case. The court **also** granted Mr. Giacoma's motion for continuance until March. (TR 46). The record reveals that on April 4, 1989, Dr. Caddy was appointed to interview Elledge at the request of Mr. Giacoma (TR 49), and after a plethora of motions to find the statute unconstitutional and various other presentencing motions, jury selection actually commenced in August 1989, some nineteen months after trial counsel's original request for appointment of co-counsel.

Without pointing to specific omissions by trial counsel, Elledge's appellate counsel merely provides that because the trial court did not appoint ca-counsel, Elledge's resentencing was fundamentally unfair. Such a contention is not borne out by the record and even in the abstract, na state authority has been cited that would even remotely suggest the trial court abused its discretion in denying said motion.

## *POINT XXVIII*

### *WHETHER THE TRIAL COURT ERRED IN REFUSING TO ALLOW ELLEDGE TO WITHDRAW HIS GUILTY PLEA*

On March 17, 1975, Elledge, flanked by defense counsel, entered a plea of guilty to first-degree murder and rape, following an extensive inquiry by the trial court of Elledge. (TR **1991-2008**). Elledge admits that the trial court, in **1989**, prior to resentencing, denied **relief** in material part based on Elledge v. **Graham**, 432 **So.2d 35** (Fla. 1983), wherein this Court affirmed the denial of Elledge's guilty plea. Interestingly, in Elledge v. **Graham**, Elledge asserted that he was entitled to habeas corpus relief as to the trial court's denial of his motion to suppress his confession because "he would not have pled guilty had the confession been suppressed." The court, in rejecting same, noted:

> . . . So far as we are aware, the petitioner has not previously sought to withdraw his guilty plea nor did he raise the issue on the direct appeal of his death sentence. We accorded the petitioner automatic review as we do in all death cases, and affirmed his conviction and sentence of death. *Elledge II*, §921.141(4), Florida Statutes (1975). Petitioner since has raised the issue of the voluntariness of his guilty plea before the trial court by means of a Rule 3.850 motion, which we address below. We know of na other right of review to which the petitioner is entitled.

432 So.2d at **36**.

Elledge alsa filed a petition for writ of error coram nobis wherein he asserted that newly available evidence with regard to psychiatric evaluations had come to light through the examination of Dr. Lewis. The court observed:

> . . . The 'facts' on which Dr. Lewis and counsel rely are not new: they were either available or could have been obtained at the time of sentencing. We note that Elledge was examined by two psychiatrists prior to trial and both stated that at the time of the rape/murder he understood and could appreciate the nature and consequences of his acts. Petitioner has presented no new information -- merely a psychiatrist who draws different conclusions. (cite omitted).

432 So.2d at 37.

The court ultimately concluded:

> . . . The record convinces us that the Appellant's confessions and guilty plea were properly admitted and that the allegations of ineffective assistance of counsel has not been shown. . . .

**432 So.2d *at* 37.**

Elledge contends that because he was back before the trial court for resentencing following remand by the Eleventh Circuit Court of Appeals in Elledge v. Dugger, supra (premised on the fact that Elledge was shackled at his last resentencing), he asserts, pursuant to **Elias V. State**, 531 So.2d 418, 419 (Fla. 4th DCA 1988), that the law favors liberal withdrawal of guilty pleas. Citing six reasons for showing good cause for the withdrawal of his guilty plea, he argues that Rule 3.170(f), Rules of Criminal Procedure mandate same. Specifically, he argues that (1) he was not informed of valid defenses; (2) he was not informed that his guilt plea waived his *right* to appeal; (3) that the guilty plea resulted from ineffective assistance of counsel; (4) that he received inadequate psychiatric evaluations; (5) that the plea colloquy was inadequate, and *(6)* that he was incompetent to plead guilty.

In Porter v. State, 564 So.2d 1060, 1063 (Fla. 1990), this Court, in a similar case wherein the defendant attempted to withdraw his guilty pleas, held:

> . . . Likewise, we find no error in the trial judge's denial of Porter's motion to withdraw his pleas. In *Lopez*, the court said:
>
> > Allowing the withdrawal of a guilty plea is within a trial judge's discretion; it is not a matter of right. *Adams v. State*, 83 So.2d 273 (Fla. 1955); *Adler v. State*, 382 So.2d 1298 (Fla. 3d DCA 1980). The burden of proving a trial court abused its discretion in refusing to allow withdrawal of a guilty plea is on the defendant. *Mikenas; Adams.* Aftex imposition of sentence, that burden means that a defendant must show manifest injustice. *Adler.*
>
> *Lopez*, 536 So.2d at 229.
>
> Although Porter asserts that he was coerced, he refused to give the names of the officers who allegedly made the threat, and he provided no other evidence to prove his claim. Under these circumstances, we do not find that the trial court erred in rejecting his claim as unfounded.

564 So.2d at 1063.

In the instant case, the State would contend that the test in determining whether the trial court erred in disallowing the withdrawal of Elledge's guilty plea is that the defendant must show manifest injustice. Elledge does not sit in the same position as a defendant who pleads guilty but prior to sentencing decides to change his mind. In Elledge's case, fourteen years passed before Elledge finally moved to withdraw his guilty plea. He cannot show good cause based on the six reasons tendered and he should not be permitted to present naked allegations that do not support even remotely, withdrawal of his pleas.

The record reflects that at the plea colloquy in 1975, the trial court asked Elledge whether he was informed of valid defenses to which he responded yes. (TR **1996**). Elledge was asked whether he was satisfied with **his** lawyer and whether he and his lawyer had discussed the case to which Elledge answered yes. (TR **1996-2000**). The trial court discussed with Elledge and his counsel the fact that he had been given psychiatric evaluations prior to pleading guilty, at which point Elledge noted that he had never been found **insane** but at one point a doctor had suggested he be hospitalized. A review of the plea colloquy reflects that the trial court, with great care, explored all avenues regarding the voluntariness of Elledge's plea pursuant to **Boykin** v. Alabama, **395 U.S. 238** (1969), and **Lamadine v.** State, **303 So.2d 17 (1974)**. Lastly, in Elledge v. Graham, 432 So.2d 37, this Court resolved the issue of whether Dr. Lewis' evaluation of Elledge in some way brought into question the two previous psychiatrists' examinations of Elledge pre-guilty plea. The court rejected said contention, observing:

> . Petitioner has presented no new information -- merely a psychiatrist who draws different conclusions.

Even assuming for the moment that the standard to be utilized is not manifest injustice but rather, whether the trial court abused its discretion in denial of the motion for withdrawal, no relief should be forthcoming. Just as Elledge has not shown that manifest injustice would have supported any of his

"reasons", none of the foregoing reasons provide support to conclude the trial court abused its discretion.[6]

## *POINT XXIX*

### *WHETHER THE SENTENCE OF DEATH IS PROPORTIONATE*

Elledge asserts that one must look to the aggravating and mitigating circumstances in determining whether the death penalty is proportionate. (Appellant's Brief, at 95). Proportionality review does not rest solely on "the mix of the aggravating and mitigating circumstances" but rather, on whether similar facts and circumstances in other capital cases have resulted in the same punishment. Contrary to Elledge's assertion that this case is like **Smalley v. State, 546** So.2d **720** (Fla. 19__); **Fitzpatrick v. State, 527** So.2d **809** (Fla. 1988); **Livingston v. State, 565** So.2d **1288** (Fla. 1990), **et** al., the State would submit that this case is similar to **Sochor** v. **State,** ____ **So.**2d ____ (Fla. 1991), 16 F.L.W. **S297,** not only in fact pattern but also with regard to the aggravating and mitigating circumstances found and alleged:

> Turning to the actual sentence, Sochos claims that the evidence did not support three of the four aggravating factors found by **the**

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[6] With regard to Elledge's contention that he **was** not informed that his plea waived his right to appeal, that contention was rejected in **Elledge** v. **Graham, 432** So.2d at **36**, wherein the court noted:

> . . . We accorded the Petitioner automatic review as we do in all death cases, and affirmed his conviction and sentence of death. *Elledge II*, §921.141(4), Florida Statutes **(1975). . . .**

**See also Elledge v. State, 346** So.2d **998** (Fla. **1977).**

trial court. He does not contest the finding of a previous conviction of a violent felony, we find as aggravator supported by the record. Sochor does contest the finding that the murder was committed during a felony. We have already found sufficient evidence of both kidnapping and attempted sexual battery. Thus, the evidence supports this aggravating factor.

The evidence also supports the finding that the murder was especially heinous, atrocious, or cruel. Fear and emotional strain can contribute to the heinousness of the murder. *Adams*, 412 So.2d at 857. Gary testified that the victim screamed for help after she was dragged from the truck and scratches on Sochor's face indicate that a struggle took place. The evidence supports the conclusion of horror and contemplation of serious injury or death by the victim. Moreover, Sochor confessed that he choked the victim to death. It can be inferred that 'strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one of which the factor of heinousness is applicable.' (cites omitted). . . .

16 F.L.W. at S299.

With regard to mitigation, the court observed:

Sochor argues that the court should have found as mitigating factors that he was under the influence of extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. In proof he relies an evidence of his alcohol use the night in question and on doctors' testimony that he was a dangerous and violent person when drinking. Sochor is an admitted rapist. As testified to by his ex-wife and victim of a prior rape, when they declined to accede to Sochor's requests for sex he became violent. He himself explains that, when sexually aroused, and indescribable feeling comes over him in the form of an irresistible impulse, particularly when drinking. It is difficult to discern whether such conduct is mitigating, but the decision as to whether a particular mitigating circumstance is proven

> lies with the judge and jury. Reversal is not warranted simply because the Appellant arrives at a different conclusion. (cite omitted). Although several doctors testified as to Sochor's mental instability, one testified that Sochor had not been truthful during testing and another testified that Sochor had 'selective amnesia.' While the sentencing order mentioned that Sochor had been found competent to stand trial and did not require Baker Act hospitalization, it is clear from the record that this is not the standard the court used in sentencing Sochor. We see no reason to disturb the court's rejection of these mitigating factors.
>
> Sochor also argues that the trial court failed to consider an improperly excluded non-statutory mitigating evidence. The court, in its sentencing order, stated, '[t]here were several members of the defendant's family who tearfully and grievously testified. However, after considering their testimony, this court finds no statutory 'mitigating' circumstances.' This testimony related Sochor's physical abuse by his father, his financial support of the family when his father was unable to work, his alcohol problems, and his violent temper and mental instability. The trial judge considered the evidence of family and personal history, but determined that it was so insignificant that it had not been established as a mitigating circumstance. Deciding whether such family history establishes mitigating circumstances is within the trial court's discretion. (cites omitted). . . .

16 F.L.W. at S299.

**See also Hitchcock v.** State, **578** So.2d 685 (Fla. 1990), citing **Adams v. State, 412** So.2d **850** (Fla. 1982) (strangulation nearly per se heinous); Alvord v. **State, 322 So.2d 533** (Fla. 1975); and the fact that **Hitchcock** asserted that his victim consented to intercourse however the trial court rejected same finding that the murder was committed to prevent or avoid arrest, as evidenced by Hitchcock's admission that he killed the victim

to prevent her from telling her mother. See also Holton v. State, 573 So.2d 284, 292 (Fla. 1990); Sanchez-Velasco v. State, 570 So.2d 908 (Fla. 1990); Duckett v. State, 568 So.2d 891 (Fla. 1990) (rape, strangulation, drowning of an eleven-year-old girl); Rivera v. State, 561 So.2d 536 (Fla. 1990) (rape/strangulation murder; the court upheld rejection of mental health testimony regarding mitigation); Tompkins v. State, 502 So.2d 415, 421 (Fla. 1986), and Doyle v. State, 460 So.2d 353 (Fla. 1984).

Terminally, any contention by Elledge that he was incapable of conforming his conduct to the requirements of law is neither supported by the record, to-wit: his confession; his plea colloquy, nor the evidence in mitigation tendered through the testimony of Dr. Caddy at his latest resentencing proceeding. Death is the appropriate sentence for the first degree murder of Margaret Strack.

## *POINT XXX*

***WETHER** ELLEDGE WAS DENIED DUE PROCESS, EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL AND MEANINGFUL APPELLATE REVIEW BY THIS COURT'S REFUSAL **TO** CONSIDER ELLEDGE'S FIRST INITIAL BRIEF*

Terminally, Elledge asserts that this Court denied him his constitutional rights by refusing to accept his Initial Brief of 171 pages raising 29 points on appeal. First of all, this Court has already rejected this claim. Second, one is hard-pressed to understand the tenacity with which appellate counsel has pursued this point (a review of the brief that was accepted by the court reflects that 30 issues were raised and a comparison of the type set from the first brief to the second reflects that much of

counsel's work product was transferred to the latter brief through the magic of changing the type set from Pica to Elite). Lastly, to suggest that he in some fashion has been required to omit valid state claims, is totally groundless. American Bar Association Standards for Criminal Justice, Chapter 4, Part VIII, in particular, Standard IV-8.3(b), reads as follows:

> Appellate counsel should give a client his or her best professional evaluation of the questions that might be presented on appeal. Counsel, when inquiring into the **case**, should consider all issues that might effect the validity of the judgment of conviction and sentence, including any that might require initial presentation in a post-conviction proceeding. Counsel should advise on the probable outcome of a challenge to the conviction or sentence. **Counsel should endeavaur to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance.**

49 Cr.L. 2020.

**CONCLUSION**

Based on the foregoing, it is respectfully submitted all claims should be denied.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROLYN M. **SNURKOWSKI**
Assistant Attorney General
Florida Bar No. 158541

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) **488-0600**

COUNSEL FOR RESPONDENT

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Eric M. Cumfer, Assistant Public Defender, 15th Judicial Circuit, 301 N. Olive Avenue, 9th Floor, West Palm Beach, Florida 33401, this 19th day of August, 1991.

CAROLYN M. SNURKOWSKI
Assistant Attorney General