IN THE

SUPREME COURT OF FLORIDA

WILLIAM DUANE ELLEDGE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 74,789

AMENDED INITIAL BRIEF OF APPELLANT

(On Appeal from the Seventeenth Judicial Circuit
In and For Broward County, Florida)

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
301 N. Olive Avenue/9th Floor
West Palm Beach, Florida 33401
(407) 355-2150

ERIC M. CUMFER
Assistant Public Defender
Florida Bar No. 764663

RICHARD B. GREENE
Assistant public Defender
Florida Bar No. 265446

Counsel for Appellant

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PRELIMINARY STATEMENT

William Duane Elledge was the Defendant and the State of Florida the plaintiff in the Circuit Court of the Seventeenth Judicial Circuit of Florida. The following symbols will be used:

"R"	Record on Appeal
"MS"	Transcript of Motion to Suppress, contained in Appellant's Motion to Supplement With Attached Documents.
"HC"	Transcript of hearing in Federal district court in support of Appellant's petition for habeas corpus, contained in Appellant's Motion to Supplement With Attached Documents.

STATEMENT OF THE CASE

Mr. Elledge was charged by indictment in the Nineteenth Judicial Circuit Court with first degree murder and rape of Margaret Strack on Auguat 24, 1974. R 827A. On March 17, 1975, he pled guilty to the charges; the trial court took his testimony to establish a factual basis for the murder plea and accepted it after finding felony murder was established. R 2000–2006. Mr. Elledge was sentenced to death; that sentence was vacated on direct appeal. Elledge v. State, 346 So.2d 998 (Fla. 1977). After the Fourth District Court of Appeal denied a writ of prohibition on August 2, 1977, Elledge v. State, 349 So.2d 1240 (Fla. 4th DCA 1977)(memo), Mr. Elledge was resentenced to death; this Court affirmed. Elledae v. State, 408 So.2d 1021 (Fla. 1982). The Supreme Court denied a petition for writ of certiorari. Elledge v. Florida, 459 U.S. 981 (1982). Judge Futch denied a motion to vacate judgment and sentence on March 10, 1983. This Court affirmed this denial and denied write of habeas corpus, quo warranto and/or habeas corpus, and error coram nobis, Elledge v. Graham, 432 So.2d 35 (Fla. 1983); petition for certiorari wae denied. Elledge v. Florida, 464 U.S. 986 (1983). Mr. Elledge filed for a petition for habeas corpus with the United States District Court, Southern District of Florida; relief was denied. The Eleventh Circuit Court of Appeals reversed this denial in part, ordering Mr. Elledge be resentenced. Elledge v. Dugger, 823 F.2d 1439 (11th Cir.), modified 833 F.2d 250 (1987). The Supreme court denied a state petition for certiorari. Dugger v. Elledae, 485 U.S. 1014 (1988).

Mr. Elledge was brought up for resentencing on August 7, 1989 after the court heard various pretrial motions on December 16, 1988 and April 13, 1989. A jury was selected and evidence presented; the jury recommended death by a vote of 8 - 4 on August 10. The trial court denied a motion for a new hearing, a pro Be motion for a new hearing, and imposed a death sentence on Auguat 28, 1989. R 825–6. A written sentencing order was filed at that time. R 2685–2689.

STATEMENT OF THE FACTS

Mr. Elledge suffered physical, emotional, and sexual abuse as a young

child. Daniel Elledge, his younger brother by six years, teetified their mother, Geneva, severely beat himself and William when they were children. R 558-560. Their close cousin, Sharon Jenninge, confirmed this abuse. R 679-685. Geneva would beat the children almost daily, often using implements such as a strap, bat, or skillet. R 559, 681. She did not beat in response to bad behavior, but rather whenever she felt like it, striking them in the head and body in a frenzy. R 559, 683. Geneva would beat them for long periods, kicking the children in the face and body as they lay curled up on the floor. She would sometime8 be stopped by their father; otherwise she often continued until she tired. R 560, 686. William Elledge was left bruised and bloodied by these assaults. R 560, 683. Sharon Jenninge' mother - Geneva's sister - considered taking William into their household becauee of the beatings, but did not, in fear of her sister's temper. R 687. The abuee had apparent affects on Mr. Elledge: at age 6, he was a meek, quiet, and shy child. R 686-7.

Geneva never showed William any affection. R 681-2. She once told William without apparent reason her husband was not William's real father. R 569. William was sickly as a baby; hie crying once caused Geneva to try to throw the infant out the window of a moving car, only to be stopped by William's father. R 685. The father, more affectionate, tried to keep the familytogether. R 566.

Both parente were alcoholics. R 560-1, 685. They would go to weekend drinking parties, leaving Connie, William's older sister and then about thirteen, in charge. R 561, 685. Connie regularly had sexual intercouree with William before she left the house at age seventeen to marry. R 563.

Dr. Glenn Caddy, a clinical psychologist holding a doctorate in psychology and author of numerous articles on the subject, was qualified as an expert. R 582, 587. He testified about the affects of Mr. Elledge's childhood and other problems on his mental/emotional state in 1974. Dr. Caddy conducted a review of voluminous material, including Mr. Elledge's psychiatric, medical, military, and California Youth Authority records and a transcript of his confession. R 586. He spoke exteneively with Mr. Elledge and two family members. R 586-9.

Dr. Caddy opined that Mr. Elledge suffered from pathological intoxication and impulse control disorder as a reeult of his severely abused childhood. His early life predestined him €or trouble. R 597. Hie mother's abuse devastated him; the environment was chaotic. R 593-4. The beatings victimized Mr. Elledge who was helpless to resist. R 595-6. The incest with his sister, a relationship which often tunred violent, caused a sense of inadequacy and lifetime problems with sexual issuee. R 598-9.

William's chaotic, abused homelife caused problem0 in controlling impulses beginning at age 3. R 600. He attempted to run away from home at the age of 9. He was picked up by a man who raped him and threw him over a bridge, leaving him with a feeling of hopelesenees. R 601. William's impulse control problems became full blown in his teen years. When he was about 12, he hit hie sister with a guitar; this level of violence was very unusual for a child of that age. His experience left him unable to distinguish between fear and rage and without limits on altercatione. R 604. He would be completely overcome with rags. R 604.

Dr. Caddy also opined that Mr. Elledge was a life-long alcoholic, first beginning drinking at age 9, after he was raped. "It seems that right from the outset Bill Elledge drank as an alcoholic drinks." R 601. William Elledge used alcohol daily in large quantities; he also ueed marijuana and occasionally other drugs in an effort to calm himself. R *602.* He suffered from pathological intoxication, causing dramatical emotional escalations when intoxicated. R 602.

The state preeented four witneeses who testified about evente surrounding Strack's death, but primarily relied an Mr. Elledge's taped confession of August 27, 1974. R 392-533. Mr. Elledge cooperated with the police fully in this case. R 513. Mr. Elledge told the police he came to Florida a week before the homicide with his girlfriend, Paula Fein. R 397. The day before Strack's death, around noon, he and Paula had an argument and split up. R 399. Mr. Elledge went to various bare, and drank all that day and night until they closed, once returning to the room he shared with Paula, finding it empty. R 400. He checked into Room 3 of the Normandy Motel in Hollywood around 6 am, sleeping until 2 pm. R 402, 404. After waking, William went to a bar and began

to drink again. Margaret Strack sat next to him, and he bought her drinks. He had 9-10 hard liquor drinks, she 4-5 beers.[1] Strack wanted to smoke marijuana, so they drove her car to his room and did so; they were both intoxicated.[2] R 408-11. Strack then began to sexually tease him by rubbing his genitals and rubbing her breasts against him. She came out of the bathroom with her panties partially pulled off. R 411-2. When William Elledge began to respond, she refused to have sex. R 413-4. He grabbed her by her throat and wrist. Strack dug her fingernails into his wrist, making him angry. R 414-6. He began to choke her until she agreed to submit. R 416. When he took off his trousers to have sex, she said she would call the police and began to scream. R 417-8. William Elledge became enraged and choked off her scream: "I was totally out of control." R 419. He remembers her thrashing about, clawing for air, and putting hie penis in her. R 418 He also threw her to the floor. R 419. However, hie mind was largely disconnected at this point: "I was totally blank." R 419. He could not remember all that happened; he next noticed she was dead.[3] R 420. Mr. Elledge triad to clean up; he waited until night to dispose of the body, taking it to a parking lot in Strack's car.[4] R 421-6. He

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[1] Janet Pocis, the bartender, testified Stack sat by William Elledge after he arrived, R 358; Pocis served Strack 2 drinks and William Elledge 3. R 358-9. The pair left around 3 pm, and were friendly with each other; they appeared sober. R 359, 366.

[2] Dr. Abdullah Fatteh, who performed Strack's autopsy, testified a report showed Strack's blood alcohol level was .06%, equal to 2 to 3 beers or one Ounce hard liquor drinks. R 460. The reading would be coneiatent with Strack drinking more shortly before her death. R 465-6. This blood test showed no other drugs; none would not appear if taken more than 24 hours before and marijuana was not detectable at all in 1974. R 467-8. The court struck, on the state's motion, his testimony the body had 15 needle marks on the elbow and two on the hand. R 466.

[3] Dr. Abdullah Fatteh testified he performed an autopsy on Margaret Strack. R 454. She died of strangulation. R 455. He testified that various bruises on the body occurred before death, but that some on the right forearm and left knee occurred after death. Sperm was found in Strack's vagina. R 458.

[4] Officer Perone of the Dania Police testified he was called to a parking lot the next: day around 7:30 pm and found Strack's body. Her blouse was pulled up, and her underwear down; her legs were tied with an electrical cord. R 350-1. He identified five photoa of the corpse at the scene and autopsy which were admitted. R 352.

tried to hide Strack's possessions in the room.[5]

Dr. Caddy testified about Mr. Elledge's mental etate at the time of this offense. Mr. Elledge was incapable of controlling his actions, acting under extreme duress and extreme mental/emotional disturbance. R 607, 613. Mr. Elledge was intoxicated from alcohol and marijuana; his pathological intoxication contributed to the offense. R 606-8. He had just broken up with his girlfriend and faced very provocative sexual teasing followed by a refusal to have sex. These circumstances caused him to completely lose control, as he told the police. R 605. Hie feelings of sexual inadequacy, arising from hia early experiences as a victim of abuse, rape, and incest, came to the fore. R 611-2. His impulse control dieorder, a result of his helpless victimization as a young child, made him become enraged and try to overcontrol the situation. R 612-3.

The state preaented no witnesses with opinions contrary to Dr. Caddy. Dr. Caddy admitted to not interviewing Katherine Nelson, the widow of another homicide victim, and not calling several others who knew Mr. Elledge then. R 637, 641, 644, 667. The state brought out hearsay opinions of various mental health professionals appearing in documents Dr. caddy reviewed that Mr. Elledge had anti-social personality disorder. R 651, 652, 654, 661, 663. Dr. Caddy explained in response to the state's questions what this disorder is. R 657, 661, 663. Dr. Caddy disagreed with these diagnosee and questioned their reliability. R 659-660. Although Mr. Elledge remembered some details of the incident after he became enraged, that wae coneistent with Caddy's diagnosis: he suffered from lack of control, not amnesia. R 635.

The state also introduced evidence of other crimes committed by Mr. Elledge, playing another confession. R 472-505. Later the evening of August 24, 1974, Mr. Elledge was drinking at a bar with another; he became drunk and wrecked the car. R 476. He entered a Pantry Pride, thinking it empty, through a vent in the building. R 478. He ran into and subdued Edward Gaffney who had tried to hit him with a mop. However, he then shot Gaffney twice, killing him,

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[5] Officer Devin of the Hollywood Police testified he found some belongings of Margaret Strack in this room on August 26, 1974. R 369.

when Gaffney raised up and Mr. Elledge feared an attack. R 479-80. Mr. E ledge rummaged the store, looking for money. R 479-98. Officer Devin testified the store had been damaged, Gaffney's pockets were empty, and a coin box was broken open. R 373-4. He also identified photographe of Gaffney's corpse at the store and autopsy. R 378. Dr. Fatteh testified he performed an autopsy on Gaffney. Fatteh confirmed he had been killed by two shots to the chest and described the damage these rounds did to Gaffney's internal organs. The state entered two photos of Gaffney's eorpee at autopsy during his testimony. R 462-3. Mr. Elledge left the Pantry Pride, returned to the Normandy and then took a bus to Jacksonville. R 499-500. His judgment and life sentence €or the murder of Gaffney were put in evidence. R 540.

The etate presented evidence of the murder of Paul Nelson in Jacksonville Beach. Mre. Nelson testified Mr. Elledge came to the motel she kept with her husband in the late evening hours one night in August, 1974. R 523. He threatened them with a gun and tied them up, demanding money. R 523. He then discovered their grandson, David McBride trying to load a rifle, disarmed him, and tied him up. R 528, 535. As Mr. Elledge searched for money in the office, Paul Nelson freed himself and went into the hall from their bedroom with an unloaded gun in his hand. R 530. Mr. Elledge ehot him to death and then ehot twice into the darkened bedroom. R 530. The court denied a motion for a mistrial baaed on Mrs. Nelson's display of emotion. R 550. The state introduced a judgment and life eentence for the murder of Paul Nelson only. R 540.

Mr. Elledge introduced evidence of his adjustment to prison. Two prison officers, Kuck and Blye, testified. Officer Kuck, in charge of a wing at Florida State Prison, has been employed there for over 7 years; previously he was an Army drill instructor. R 543. Hie experience gives him insight into who will cause trouble. R 544. He haa known Mr. Elledge well for the last few years. He has been a good prieoner who neither caueed difficulties nor been any danger to guarda or inmates. R 544-5. When shown documents, alleged disciplinary records, he stated they did not change his opinion; they are often given far minor infractions. R 551-2. The parties later stipulated Mr. Elledge had 17

disciplinary reports, none involving violence, and all but 3 written before 1983. R 699. Officer Blye, a vetern corrections officer of 13 years, had known Mr. Elledge for 10. R 554. Mr. Elledge had never threatened anyone, been involved in fights, or been trouble to the officer. R 556.

Dr. Caddy testified Mr. Elledge's pathology had decreased profoundly in prison. R 614-5. He had recently given him psychological tests and spoken extensively with him. R 625-6. His abstention from alcohol, mental treatment in prison, and reflection has changed hie behaviors. R 614-5. He has developed real friendships on death row and functioned well in prison. R 615-8. In Dr. Caddy's opinion, Mr. Elledge's actions in confessing to and cooperating with the police and his statements then and later show he is sincerely remorseful for his crime. R 618-9. The state eetablished that no remorse was shown by Mr. Elledge until after his arrest. R 620, 639-640.

SUMMARY OF THE ARGUMENT

The fairnese of the proceedings below were marred by a variety of serious evidentiary errors. Even so, Mr. Elledge presented uncontradicted evidence of numerous mitigating factors. In brief, a reaeonable quantum of evidence, uncontradicted by any competent evidence, established that Mr. Elledge faced severe, prolonged physical abuse by his mother as a child. Both parents were alcoholics and sometimes left the children for weekends while they went drinking. Mr. Elledge suffered severe, acute emotional traumas as well. He was raped at age 9 by an older man as he tried to run from home. He and his older sister engaged in regular sexual intercourse at a young age. Mr. Elledge began drinking at age 9 and is a life-long alcoholic. The crime occurred because Mr. Elledge faced provocative sexual behavior the day after he split up with his girlfriend and was intoxicated. He had been victimized by physical and sexual abuse as a child. At the time, he suffered from pathological intoxication and impulse control disorder. These factors established he acted under extreme mental or emotional disturbance, duress, and without the capacity to conform his conduct to the law's requirements. He cooperated with police, confessed, and pled guilty. He has since adjusted well to prison and recently shown personal

growth. All of these mitigating factors must be found as a matter of law.

The trial court improperly admitted a variety of evidence. First, the court allowed the state to bring out the hearsay opinions about Mr. Elledge's mental/emotional state of several doctors during the cross exam of a defense witness. None of these declarants testified; the state presented no live witness to contradict defense testimony about Mr. Elledge's state of mind when he killed Margaret Strack. Using these hearsay opinions violated Florida law and several constitutional protections, especially the right to confront adveree witnesses.

Next, the court allowed the prosecutor to use voluminous, irrelevant, and inflamatory evidence, supposedly to establish prior violent felonies by Mr. Elledge. The emotional testimony of the widow of a collateral crime victim who constantly referred to her familial relation with the deceaeed and photos of the corpse of another collateral crime victim put irrelevant, inflamatory evidence before the jury. Alternately, Mr. Elledge had confessed and pled guilty to these crimes; the volume of evidence made them a feature of the trial. Also, use of these details of the prior violent felonies violated double jeopardy.

A hearsay opinion about the deceaeed's blood alcohol level was introduced, denying Mr. Elledge the opportunity to cross examine the test-giver and opinion-maker. Evidence suggesting & Elledge attempted two murders were put before the jury; no convictions were obtained for theee crimes making such evidence non-statutory aggravation, The court allowed the jury to hear Mr. Elledge used an alias, Billy the Kid, suggesting he identified with outlaws and regularly engaged in crime. The jury heard evidence that Margaret Strack was a college student; such victim impact evidence was not relevant and served to inflame the jury. The court allowed the prosecutor to bring out evidence Mr. Elledge had two prior sentencing hearings, both oecuring many years before. This evidence also inflamed the jury against Mr. Elledge. Finally, Mr. Elledge's confessions were used against him although they were obtained against his will and contrary to Miranda's requirements.

The court excluded evidence improperly. A prison officer was not allowed to testify Mr. Elledge would do well in the future in prison, directly contrary

to controlling Supreme Court precedent. A jury member expressed concern on this issue. The court did not allow Mr. Elledge's brother to explain *why* he wae able to adjust socially despite suffering similar child abuse. This prevented Mr. Elledge from presenting his side of the case, in light of the state's evidence and argument the child abuse inflicted on Mr. Elledge did not affect hie later behavior. The court struck evidence the victim ueed hard drugs, judicially declaring she had no drugs in her system, so the evidence was not relevant. This harmed Mr. Elledge's defense to the heinous, atrocious, or cruel aggravator. It violated his right to cross the state witness who said no sign of drugs appeared in the victim's blood stream, knowing she had needle marks on her body.

The court committed per se reversible error by not holding a Richardson inquiry when defense objected to the use of an unrevealed stack of 40 pages during the cross of a prison officer, allegedly containing prieon disciplinary reports of Mr. Elledge. The trial court wrongly decided the state had no duty to anticipate use of this rebuttal evidence. Also, the prosecutor informed the jury that the taped etatement of Mr. Elledge to the police contained edits made at defense counsel's request. The jury must have realized the references were to other crimee; this comment requires a mistrial.

The court did not allow the defense to voir dire in a meaningful way. Defense was prevented from inquiry on the jurors' religious affiliation0 and ability to apply the law on mitigating cirucmatances. Religious beliefs play a major role in how jurors view the death penalty. Refusing to allow questions prevents intelligent cause and peremptory challenges, needed to insure the jury is impartial. Refusing to ask jurors if they can apply the law on mitigators directly prevents intelligent challenges. Also, amazingly, the court directly instructed the jurors not to answer counsels' questions; no truth was spoken in this voir dire after this instruction. This error was fundamental. The court refused to sequester the jurors from one another in voir dire. Many prejudicial comments were made, including an emotional statement eupporting the families of homicide victims and several comments decrying the lengthy appeals

in death cases. The refusal to protect the jury from such prejudicial comments requires this Court reverse.

The jury instructions contained error. The court refused to tell the jurors, as requeeted, what nonstatutory mitigation they must consider, if proven. The prosecutor explicitly invited them to apply their own opiniona, not the law, on what constitutes mitigation. The refusal to instruct on non-etatutory mitigators was error. The jurors were told by the court and proeeeutor Margaret Strack's rape could establish both the felony (rape) and prior violent felony aggravators. The refusal of the defense's requested anti-doubling instruction was error. The jurors were repeatedly told, contrary to the Eighth Amendment, they had little responsibility €or sentence, an incorrect role description.

The sentencing order contains numerous serious errors. The trial court copied an old order and never explicitly rejected a large number of proposed mitigating circumstances. This amounts to a failure to exercise reasoned judgment in factual findings, requiring a life sentence be imposed. At the least, a resentencing is required. The order confuses as to what mitigates and aggravates. A judicial resentencing at the least is required. The court reliee on nonrecord information or prior proceeding8 in parts of the order, contrary to Mr. Elledge's right to confront witnesses. Insufficient evidence backs the court's finding the crime was committed with the purpoae to avoid arrest. Mr. Elledge clearly was motivated to make Strack submit to a rape and angered by her resistance, not motivated to prevent an arreet in the killing. The court explicitly considered the disposal of Strack's body in finding the crime heinous, atrocious, or cruel (HAC), contrary to well-settled law. Also, HAC requires a perpetrator cooly meaning for the victim to suffer extraordinary pain. Mr. Elledge's enraged reaction, a result of hie extreme mental/ emotional disturbances does not qualify. Finally, the court erred in aggravating a felony murder by the felony aggravator. Such a reading of the etatute does not constitutionally narrow the class of death-eligible or guide the sentancer. The death penalty statute is unconstitutional for this reason and a variety of

others.

The trial court erred by refusing cocounsel upon request, especially when defense counsel had never tried a capital case before. The court erred by denying Mr. Elledge's motion to withdraw his plea, based on ineffective counsel, inadequate plea colloquy, and failure to investigate an insanity defense resulting from inadequate mental health evaluations.

Death is disproportionate for Mr. Elledge's crime which resulted from extreme mental/emotional disturbance. This disturbance took control because of Mr. Elledge's severely abused childhood, life-long alcoholism, intoxication and circumstances surrounding the offense. He acted without substantial capacity to conform his conduct to the law's requirements. After the crime, he cooperated with police, confessed, pled guilty, and has adjusted to prison. Comparison with other cases reduced to life show they have similar mental mitigation and more aggravation, yet they received Life. Mr. Elledge deserves the same.

ARGUMENT

POINT I

THE TRIAL JUDGE FAILED TO FIND PROPOSED MITIGATING CIRCUMSTANCES WHICH MUST BE FOUND AS A MATTER OF LAW SINCE A REASONABLE QUANTUM OF EVIDENCE, UNCONTRADICTED BY ANY COMPETENT EVIDENCE, SUPPORTS THEM.

Defense submitted two sentencing memoranda setting out 14 valid mitigating circumstances.[6] R 2685-9, 2719-28. Of these, the court's sentencing order was silent but for one, although noting the court "considered" teetimony of five defense witnesses, stating they established no mitigation. R 2688. The

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[6] Counsel argued the court should find Mr. Elledge: (1) was the victim of prolonged and extreme child abuse, primarily inflicted by his alcoholic mother, R 2693, 2722; (2) was a Life-long alcoholic, first beginning drinking when he was but 9 years old, R 2722, 2693; (3) was homosexually raped at age 9 while trying to run from home, R 2725, 2695; (4) had sex with his older sister at a young age, R 2695, 2725; (5) commited the crime while under the influence of alcohol, R 2693, 2722; (6) committed it while under the influence of marijuana, R 2693, 2723; *(7)* committed it while under an extreme mental or emotional disturbance, R 2719, 2691; (8) acted under extreme duress in committing it, R 2721, 2692; (9) was unable to conform his conduct to the requirements of the law in committing the crime, R 2721, 2692; (10) cooperated with the authorities in this case; (11) admitted his guilt to the homicides; (12) is remorseful for his crimes, R 2726, 2695; (13) will spend the rest of his life in prison, R 2725, 2695; (14) and, has adjusted to life in prison, with no violence in the fourteen years since being incarcerated. R 2694, 2724.

mitigators should have been found as a matter of law: this Court must ind all 14 for purposes of appeal and remand for resentencing.

Findings of fact in support of mitigation will nat be respected if not supported by sufficient, competent evidence. See Brown v. Wainwriaht, 392 So.2d 1327, 1331 (Fla. 1981); Campbell v. State, 571 So.2d 415, 420 (Fla.1990); Nibert v. state, 574 So.2d 1059, 1062 (Fla.1990). The rule is:

> [W]hen a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find the mitigating circumstance has been proved. A trial court may reject a defendant's claim that a mitigating circumstance has been proved, however, provided that the record contains 'competent, substantial evidence to support the trial court's rejection of these circumstances.'

Nibert, 574 So.2d at 1062, quoting Kight v. State, 512 So.2d 922, 923 (Fla. 1987); flee Campbell, 571 So.2d at 419-20; Huckaby v. State, 343 So.2d 29 (Fla. 1977); see also Brannan v. State, 94 Fla. 656, 114 So. 429, 430–1 (1927)(legal effect of Uncontradicted evidence generally); Hardwick v. State, 521 So.2d 1071, 1076 (Fla. 1988)(citing Brannan in capital sentencing proceeding). This Court will find mitigators on appeal if eufficient, uncontradicted evidence exists. See Huckaby, supra; Campbell, supra; Nibert, supra. Such independent review of the record must be made to provide meaningful appellate review. See Parker v. Dugger, 111 S.Ct. 731 (1991)(Eighth Amendment requires it).

Mr. Elledge's childhood validly mitigates his sentence. An abused or deprived childhood is a well–recognized mitigator. See Campbell, 571 So.2d at 419 n.4; Eddings v. Oklahoma, 455 U.S. 104, 115 (1982); Holsworth v. State, 522 So.2d 348, 354 (Fla. 1988) (citing cases). Abuse linked to an emotional disturbance manifested in the commission of the homicide mitigates strongly. Eddings, supra; Holaworth, supra. In Campbell, this Court reduced the sentence because Campbell had been subject to such severe beatings as a child, that he waa declared a dependent. Acute, severe, childhood traumas mitigate a capital sentence. See Rogers v. State, 511 So.2d 526, 535 (Fla. 1987). Lifelong alcohol abuse, particularly when linked to inability to control behavior and drinking during the offense, mitigates strongly. See Nibert, 574 So.2d at 1063; Songer v. State, 544 So.2d 1010, 1011 (Fla. 1989).

Uncontradicted evidence shows child abuse, life-long alcoholism, and other childhood traumas ruined Mr. Elledge. He regularly suffered severe, prolonged, unprovoked beatings by his alcoholic mother. Both parents were alcoholics who eometimes left the children for weekend drinking parties. They left Connie, William's older sister, then 13, in charge. She and William regularly had sex while in their teens. Mr. Elledge's mother never showed him affection, and once tried to throw him, then an infant, from the window of a moving car.[7]

Dr. Glenn Caddy, a clinical psychologist, testified his childhood devastated Mr. Elledge's mental/emotional state. Caddy confirmed that Geneva Elledge was an abusive alcoholic and the father a passive alcoholic. R 593-4. Mr. Elledge's early life predestined him for later trouble. The mother's abuse devastated him. Hie sexual relationship with hie older sister left him with a sense of sexual inadequacy and a misdeveloped sense of sexually appropriate behavior. R 599. This relationship also often flared into violence. R 599. William had difficulties controlling his behavior from the age of 3. R 600. When 9, William tried to run away from home. *An* alder man picked him up, raped him, and threw him over a bridge. R 601. As a result, William turned to alcohol and began at age 9 his life-long abuse of that substance. R 601. He also abused other aubstancee, trying to calm himself. R 601. When 12 or 13, he hit Connie with a guitar, an unusual level of violence for that age. R 600. The rage reaction came to full force in his teen years; William would react with rage in situations usually evoking fear. He tried to overcontrol situations, a reac-tion to his helpless victimization as a younger child. R 603-4.

The state offered no competent evidence contradicting the testimony of Daniel Elledge, Sharon Jennings, and Glenn Caddy about Mr. Elledge's childhood.[8] The proeecutor pointed out Caddy had not spoken with all of Mr. Elledge's family and the witnesses to his crime. The state neither introduced any rebuttal evidence nor questioned Daniel Elledge's direct testimony that Connie and

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[7] The Statement of the Facts details the evidence with record citations €or the facts outlined in thie Point.

[8] Dr. Caddy's conclusions on the effect of the childhood on Mr. Elledge's mental/emotional state are discussed below.

William had a sexual relationship.[9] The prosecutor did bring out that William was still affectionate to his father who tried to keep the family together. R 566. The uncontradicted evidence compele this Court find as a matter of law that Mr. Elledge suffered severe child abuse, homosexual rape by a stranger, a sexual relationship with his older sister, and life-long alcoholism.

The circumstances of being under the influence of alcohol, marijuana, and extreme mental or emotional disturbance, acting under extreme duress, and not having the ability to conform one's conduct to the law's requirements all mitigate a capital felony. Being under the influence of intoxicants mitigates a capital sentence. See Smith v. State, 492 So.2d 1063, 1067 (Fla. 1986) (defendant under influence of marijuana); Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985)(defendant alcoholic and evidence ehowed he wae drinking on night of murder); Maaterson v. State, 516 So.2d *256*, 258 (Fla. 1987)(defendant took substantial amounts of drugs and alcohol). statute establishes the mental/-emotional mitigatore. §§921.141(6)(b, d, f), Fla.Stat. (1989).

A reasonable quantum of evidence establishes these mitigators. Primarily, both parties relied upon Mr. Elledge's confession to the police to establish the circumstances of Strack's death. R 392-433. In short, Mr. Elledge said he had broken up with his girlfriend the day before meeting Margaret Strack in a bar. After he and Strack had some drinks, Strack suggested they smoke marijuana; they drove to his room and did so. Both were intoxicated. Strack eexually teased Mr. Elledge and then refused to have sex. The confeseion shows Mr. Elledge lost control of his actions when he became enraged: "I really can't say whether I did or didn't becauee I was totally out of control," R 419; "I can't recall if I was or not. I was totally blank and it was hard for me (inaudible) choking her," R 419; "Q. Is it possible you struck her and not remembered? A. It's very possible." R 420. Mr. Elledge is clear on the details until he started choking Strack and remembers throwing her to the floor, but the next

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[9] The prosecutor did claim Dr. Caddy had stated at deposition that Mr. Elledge did not have sex with hie sister. Since Caddy reaponded he either had not said so or misunderstood at the deposition, R 630, and the state never introduced the statement, no competent evidence contradicts this testimony either.

thing he noticed as he choked her was that she was dead." R 420.

The murder resulted from Mr. Elledge's mental disorders. Dr. Caddy testified Mr. Elledge's life-long abuse of alcohol left him prone to dramatic escalations when drinking, a condition called pathological intoxication. R 602, 608. Mr. Elledge's traumatic childhood left him with impulse control disorder beginning at age 3. R 600. As a result of his child abuse and trauma, he was unable to distinguish between fear and rage and would attempt to overcontrol every situation. R 603-4. Rage would take control of his actions. R 604. Dr. Caddy opined Mr. Elledge was unable to control himself when he killed Margaret Strack. He was disasso-ciated from his actions, induced partly by the extreme stress of the situation, partly by use of alcohol. and marijuana. R 605-7. Mr. Elledge's marriage had failed, and he had just broken up with his girlfriend. Strack's sexual teasing and refusal to have sex along with these fresh emotional wounds triggered the feelings of inadequacy and rejection that Mr. Elledge harbored from his horrid childhood sexual experiences of rape and inceet. R 611-2. Almost immediately, his pathological intoxication and impulse control disorder took control. R 612. He acted under extreme mental disturbance, R 613, incapable of conforming hie conduct to the law's requirements. R 607.

The state attempted to refute these facts, but introduced no competent evidence legally sufficient to reject these mitigators. The state suggested Mr. Elledge overstated the number *of* drinks he had, but never contradicted evidence he drank alcohol and used marijuana."[11] The opinion Mr. Elledge was a life-long alcoholic was undieputed: his confessions showed he drank constantly. R 400-6, 476. The prosecutor attempted to impeach Dr. Caddy's testimony that Mr. Elledge euffered from impulse control and pathological intoxication, pointing to parts of the confession which showed memory of details. Dr. Caddy explained Mr.

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[10] In accepting his plea of guilt to this crime, the court took Mr. Elledge's testimony to the same effect and found only a factual basis for felony murder, not premeditation. R 2003-5.

[11] Janet Pocis served Mr. Elledge and Strack and teatified she had 2 beers and he 3 mixed drinks. Both appeared sober to her. R 359-60. Fatteh testified Strack's blood alcohol level was .06%; although the blood screen ehowed no other drugs, R 460, marijuana could not be detected in 1974. R 468.

Elledge's haziness arose from his inability to control his acts and his distancing from them, not from an amnesic incident. R 635. The proeecutor questioned Caddy's choices of whom to interview. R 642. Primarily, however, the prosecutor used cross to bring out numerous hearsay opinions by psychiatrists whose records Dr. Caddy had examined that, in essence, Mr. Elledge had Anti-Social-Personality-Disorder. R 650-664. As explained in Point If, this hearsay was inadmissible. Even if admissible, it would not be competent proof of the matters asserted: the purported experts were neither qualified nor subject to cross-exam. See Bryan v. John Bean Division of FMC Corp., 566 F.2d 541, 546-7 (5th Cir. 1978); United States v. Affleck, 776 F.2d 1451, 1457 (10th Cir. 1985)(hearsay admissible, but not as substantive evidence). The etate introduced no live witness, expert or otherwise to contradict Dr. Caddy's opinions the statutory mental mitigators applied. This Court must find, a0 a matter of law, that Mr. Elledge was under the influence of alcohol and marijuana and met the statutory mental mitigating criteria.[12]

Mr. Elledge's cooperation with the police, confession and plea of guilt, and remorse for his crimes, together with the fact he will spend his remaining life in prison to which he has made a good adjustment all mitigate a capital sentence. Remorse and good adjustment to prieon are well-recognized mitigating circumatancee. See Campbell, 574 So.2d at 1063 n.4; Valle v. State, *502* So.2d 1225, 1226 (Fla. 1987). Cooperation with police, confessing, and pleading guilty also mitigate a capital sentence. See Perry v. State, 522 So.2d 817, 821 (Fla. 1988)(cooperation with police); Caruthers V. State, 465 So.2d 496, 498 (Fla. 1985)(defendant confessed and pled guilty helped mitigate sentence); Bell v. Ohio, 438 U.S. 637, 641 (1978) (companion case to Lockett in which mitigating evidence included cooperation with police).

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[12] The trial court: relied either on the inadmissible hearsay of absent expert opinions brought out during the cross of Dr. Caddy, on non-record reports, or on the vacated prior proceedings in rejecting the extreme mental/emotional disturbance circumstance. R *2687.* Relying on the hearsay oK non-record reports would be incorrect as explained in Points II and XXI. A trial court may not rely on evidence from prior vacated proceedings in a capital resentencing. See Huff v. State, 495 So.2d 145, 152 (Fla. 1986). No competent evidence supports this finding and no findings at all were made for the other mental/emotional mitigators.

Two Florida State Prison (FSP) correctional officers, George Kuck and Raymond Blye, testified to Mr. Elledge's adjustment to prison. Kuck testified he had been a FSP officer €or seven years and known Mr. Elledge since arriving. R 543, 547. Mr. Elledge is a good prisoner and caueed no problems to the officer's knowledge. R 543. He asks for no favors. R 545. Officer Blye confirmed Mr. Elledge had not bean a problem prisoner. R 555-6. Dr. caddy testified Mr. Elledge'a fifteen year abstinence from alcohol, mental treatment in prison, and reflection has nubetantially reduced hie pathology. R 615. Although still troubled, he now hae real friendships and is not a danger in prison. R 618. Dr. Caddy aleo opined Mr. Elledge was remorseful for his crimes: hie confessions, cooperation with the police, and guilty plea show his sincere desire for help. R 618-9.

The evidence of Mr. Elledge's confessions, cooperation with police, and a plea of guilt are beyond cavil. Alan Devin, then a Hollywood policeman present for most of Mr. Elledge's confessions, testified Mr. Elledge was always cooperative and his confession was "100 percent, 95, 98 percent accurate. There were a few incon-sistencies." R 513. Mr. Elledge will spend hie life in prison; the state proved he has two other consecutive life sentences.

No competent,, substantial evidence contradicts the defense evidence of these post-crime mitigators. The parties stipulated Mr. Elledge hae had 19 prison disciplinary reports: 2 in 1976, 7 in 1978, 2 in 1979, 1 in 1980, 1 in 1981, 3 in 1982, 1 in 1983, 1 in 1984, and 1 in 1986. These reports do not contradict the officers' testimony that Mr. Elledge, in 1989, had adjusted to prison life. None involve any violence. R 699. Officer Kuck stated they did not change his opinion, noting reporte are often given for minor infractions. R 552. Only 2 have been issued in the last 5 years, and most occurred in the first 5 yeara Mr. Elledge waa imprisoned. Also, Dr. Caddy's opinions on Mr. Elledge's remorse were closely questioned, but all the State established was that Mr. Elledge's remorse did not appear until after his arrest and break in his behavior. R 620-1, 639-40. His opinion on remorse was not based on a judgment of Mr. Elledge's sincerity, but rather on the circumstances of the

confession, the ple of guilt, and cooperation with police, all unrefuted.

As in Huckaby, Campbell, and Nibert, this Court must find as a matter of law all 14 mitigators for purposes of appeal, and at least order resentencing.

POINT II

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

On direct exam, Dr. Glen Caddy, a clinical psychologist called by the defense, testified Mr. Elledge suffered from impulse control disorder and pathological intoxication when he killed Strack. R 608-9, 614. He admitted to having "looked at" various psychiatric evaluations of Mr. Elledge, R 586, and to examining contact notes of psychiatrists "who did not do comprehensive examinations," R 588, but never discussed the nubstance of these reports.[13] The prosecutor impeached him with various hearsay opinions contained in the records. None of these declarante 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.[14] Defense objected to almost all of this evidence as improper hearsay and outside the scope of direct, but the court admitted it, stating Caddy relied on them for his opinion. R 652, 654, 661, 662. Dr. Caddy explicitly disagreed with the diagnoses and never tied any report to any factual data he used.[15] The prosecutor treated the hearsay as competent proof of the matters aeserted.[16]

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[13] He did say Mr. Elledge received no real mental treatment until prison, R 615, and an irrelevant report auggeeted minimal brain dysfunction. R 628.

[14] The prosecutor pointed out, via the cross: a Dr. Miller, appointed by the court in 1974 diagnosed Mr. Elledge as ASPD, R 651; a Dr. Tauble, also court appointed, said the same, R 652; a Dr. Eiehert concluded Mr. Elledge had no need for psychiatric intervention, R 654; Dr. Britton, a Florida State Prison psychiatrist, diagnosed ASPD, R 661; a Dr. Chapfield stated Mr. Elledge lived by his own rules, R 663; and the "California Youth Authority records" declared Mr. Elledge was manipulative. R 664.

[15] Dr. Caddy had spoken extensively with Mr. Elledge, consulted a wide variety of reports, read the confeseions, and spoken with two of Mr. Elledge's family members in making his opinions about Mr. Elledge's life history and mental problems. R 586-9.

[16] In summation and the sentencing memo to the court, the prosecutor argued these hearsay reports as proving what they asserted. R 754-5, 761, 766, 2681-2. The trial court's sentencing order relied on two doctors who did not teetify,

The trial court misinterpreted §§90.704 and 90.705, Florida Statutes, to admit the evidence.[17] Introducing opinione of non-testifying experte via the cross of an expert witness violates Florida law on hearsay and opinions and the confrontation righta of defendants. See Nowitzke v. State, 572 So.2d 1346, 1352 (Fla.1990); Schwab v. Tolley, 345 So.2d 747, 754 (Fla. 4th DCA 1977); see also Everett v. State, 97 So.2d 241, 244 (Fla. 1957)(permitting restriction of defense cross of two doctors on what non-testifying doctor would say about sanity); Wilson v. State, 542 So.2d 433, 434 (Fla. 4th DCA 1989)(hearsay opinion on sanity improperly admitted). In Nowitzke, the state crose-examined a defense psychiatrist, asking if an absent psychiatrist had said the witness was a 'hired gn This Court found error, in part, because this hearsay expert opinion "violated Nowitzke's consti-tutional right to confront witnesses. Art. I, S16 (a), Fla. Const.; U.S. Const. amend. VI." Nowitzke, 572 So.2d at 1352. In Schwab, a plaintiff's expert, Guttman, testified the defendant operated haetily. The Fourth District held Guttman's deposition testimony that a defense expert witness would advocate early surgery in that case was improper impeachment, being heareay opinion: "What Guttman thought Becker would think is irrelevant: and inadmissible . . . The proper method for impeaching Guttman's opinion was by the introduction of contrary opinion based on the same facts. . . ." Schwab, 345 So.2d at 754.

These cases correctly hold hearsay expert opinion introduced through the cross of an opposing expert is improper impeachment of the witneee. It is not only hearsay, but also improper opinion evidence since the out-of-court

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either relying on thie hearsay as subetantive proof, on evidence from prior vacated proceedings, or on non-record evidence. R 2687. See Point XXI.

[17] The rulings below were not predicated on S921.141, allowing use of fairly rebuttable hearsay. Fair rebuttability cannot be de-termined now since there was no hearing below to determine surprise and alternatives to attack the evidence. Also, this kind of hearsay can never be rebutted; expert opinions require cross exam to reveal their methods and reasoning. Cf. Dragovich v. State, 492 So.2d 350, 355 (Fla. 1986)(reputation evidence not fairly rebut-table since based on hearsay opinions, not specific acts of Conduct). More important, as argued below, this hearsay cannot be admitted because it violated Mr. Elledge's constitutional right to cross the declarant. See §921.141(1), Fla.Stat. (1989)(section does not allow evidence contrary to Florida and U.S. Constitutiona.

declarant is never qualified as an expert. See Bryan v. John Bean Division of FMC Corw., 566 F.2d 541, 546-7 (5th Cir. 1978); McMunn v. Tatum, 379 S.E.2d 908, 912 (Va. 1989)("No litigant in our judicial system is required to contend with the opinions of absent "experts" whose qualifications have not been established to the satisfaction of the court, whose demeanor cannot be observed by the trier of fact, and whose pronouncements are immune from cross-examination.")

Although $90.705 allows cross which brings out Pacts and data underlying an opinion, a document's contents cannot underlie an opinion unless the expert bases the opinion on the contents. Like rules elsewhere prevent cross on hearsay opinions not relied upon by the expert. See Bryan, 566 F.2d at 546-7; Box v. Swindle, 306 F.2d 882 (5th Cir. 1962); Washington Irrigation and Development Company v. Sherman, 106 Wash.2d 685, 724 P.2d 997, 999 (1986); Barrar v. Clark, 136 Ill.App.3d 715, 483 N.E.2d 630, 633 (1985); Fergusson v. Cessna Aircraft Co., 132 Ariz. 47, 643 P.2d 1017, 1019 (Ariz.Ct.App. 1982). In Bryan, the former Fifth Circuit Court of Appeale held hearsay expert opinion in the cross of an opponent's expert wae error, not admissible under Federal Rule of Evidence 705.[18] The issue in Bryan is nearly identical to this one:

> Moreover, to admit the hearsay opinion of an expert not subject to cross-examination goes against the natural reticence of courts to permit expert opinion unless the expert has been qualified before the jury to render an opinion. [cite omitted) The Lambert and Wiseman opiniona were brought before the jury without qualifying the experts who rendered them. The jury had no way of determining whether the opinions were credible or worthy of belief . . .
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> [U]nder guise of impeachment, plaintiff's counsel was permitted to argue substantively evidence that did not impeach the testifying expert. In Box v. Swindle, supra, this circuit held that reports of others examined by a testifying expert and conflicting with the testimony of the expert could not be admitted even as impeachment evidence unless the testifying expert baaed his opinion on the opinion in the examined report or testified directly from the report. In this case, Walters did not admit he relied on the conclusions reached by Lambert and Wiseman nor was Walters

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[18] Rule 705, Federal Rules of Evidence, the counterpart to S90.705, Fla.Stat. etates:

> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Bryan, 566 F.2d at 545 n.4.

> testifying solely from the Lam-bert an(Wiseman reports. Rather, Walters admitted he used statistical evidence on yield strength and other empirical data contained in the reports and employed these figures to reach hie own conclusions. The statistics and Walter's reliance on them were properly brought out under Rule 705. The concluaione reached by the other experts did not impeach Walter's use of the statistics, The fact that other experts reached a different conclu-sion goes to the weight of Walter's conclusions. Since Walter's testimony could only be undercut by arguing the substantive correctness of the other experts' conclu-sions, this evidence should have been brought out, if at all, on direct examination of the reporting experts. As it occurred at trial, however, the nonimpeaching evidence was argued substantively, violating the hearsay rule, without permitting cross-examination to the defendants.

Bryan, 566 F.2d at 546-7. This Court normally construes state rules of evidence baaed on federal counterparts like federal court interpretations. See Moore v. State, 452 So.2d 559 (Fla.1984). The Brvan opinion deftly outlines the concerns of allowing hearsay opinions into evidence as impeachment. Nowtizke, Schwab, and Everett apply here: using hearsay opinions during the cross-exam of Dr. Caddy when he saw, but did not rely on them, was error.

Mr. Elledge anticipates the state will argue Muehleman v. State, 503 So.2d 310 (Fla. 1987) allows anything seen by an expert to be used on crosa-exam, but it doee not. Muehleman approved use of a report including adjudications for delinquency made relevant "when a peychiatrie expert witness for the defense stated that he had considered the report in formulating his opinion," citing Parker v. State, 476 So.2d 134, 139 (Fla. 1985). Mushleman, 503 So.2d at 315. Muehleman's words are simply unartfully drafted. In Parker, a defense witness inaccurately described and explicitly relied on the defendant's juvenile delinquency record which opened the door to the accurate record; so, too, must have the witness in Muehleman, unlike Dr. Caddy. 'Consideration' without 'reliance' is not enough. Also, opinions, unlike the facts at issue in Huehleman, cannot be relied upon by an expert if he disagrees with them. Ruling this kind of evidence admissible in the cross of opposing experts, allows a party simply to tell opposing experts strings of inadmissible opinionn, and then introduce them as 'impeachment.' The expert's cross would become not just a conduit, but a veritable Mississippi River of inadmissible information.

Moreover, hearsay introduced as underlying an expert opinion cannot be

argued as substantive proof of the matters asserted, but rather goes only to show the reliability of the opinion. See Bryan, supra; United States v. Affleck, 776 F.2d 1451, 1457 (10th Cir. 1985)(expert 'summarizing' hearsay only goes to show basis of the opinion, not truth of the assertions). However, the prosecutor below argued the substance of the hearsay opinions were correct.

Alternately, the inability to cross-examine the declarant experts violates constitutional guarantees that a defendant confront witnesses against him and have a reliable death penalty proceeding.[19] This Court recognizes confrontation rights require at least cross-exam in capital sentencing proceedings. Rule 3.780, Fla.R.Crim.P; see Rhodes v. State, 547 So.2d 1201 (Fla. 1989); Walton v. State, 481 So.2d 1197, 1200 (Fla. 1986); Gardner v. State, 480 So.2d 91, 94 (Fla. 1985); see also Specht v. Patterson, 386 U.S. 605 (1967)(confrontation applies to witnesses at habitual offender proceeding). Hearsay expert opinion evidence violates the confrontation clauses. See Nowitzke, supra; Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), modified, 706 F.2d 311 (1983). The judge in Proffitt weighed a psychiatric report to rule whether to find mitigation. Failing to give Proffitt an opportunity to cross-examine the psychiatrist violated his confrontation rights, which apply to capital eentencings, based on the Eighth Amendment heightened reliability requirement. Id. at 1252-4. Cross-exam is the "greatest legal engine ever invented for the discovery of the truth." Id. at 1254, quoting California v. Green, 399 U.S. 149, 158 (1970), quoting 5 J. Wigmore, Evidence §1367 (3d Ed. 1940).

> Where expert witnesses are employed, cross-examination is even more crucial to ensuring accurate fact-finding. Since, as in this case, . . . information submitted by the expert witness generally consists of opinions, cross-examination is neceeeary not only to teet the witness's 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.

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[19] Due process, guaranteed by the Fifth and Fourteenth Amendments to the Federal Constitution and Article I, section 9 of the Florida Constitution, require a reliable proceeding. See Ake v. Oklahoma, 470 U.S. 68, 77-83, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985)(procedures which substantially increase reliability in criminal cases required by due process). The heightened reliability required in death sentencings by the Eighth Amendment to the Federal Constitution and Article I, section 17 of the Florida Constitution also require confrontation, as explained below.

Id. The use o the psychiatric opinions below similarly violated Mr. Elledge's right to confront witnesses. It left him in a position of attacking the shadowa of the state's absent experts while exposing hie own to the real blows of cross.

POINT III

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*

Mr. Elledge has been sentenced to die not by a reasonable decision based on his record and crime against Margaret Strack, but rather from an emotional reaction to inflammatory, inadmissible evidence of other crimes. Testimony by Mrs. Nelson and photographs of Gaffney's corpse inflamed the jury's passions contrary to Florida law, due process and the heightened reliability required in death penalty proceedings.[20] Alternately, it became a feature of the trial and violated double jeopardy.

Earlier decisions approve generally the use of the prior homicides' details. Elledge, 346 So.2d at 1001-1002; Elledge II, 408 So.2d at 1022; see Kina v. State, 514 So.2d 354, 358 (Fla. 1987)(citing cases). However, this Court recently stated:

> Although this Court has approved the introduction of testimony concerning the details of prior felony convictions involving violence during the penalty phase of a capital trial, . . . the line must be drawn when that testimony is not relevant, gives rise to a violation of a defendant's confrontation rights, or the prejudicial value outweighs the probative value.

Rhodes v. State, 547 So.2d 1201, 1204-5 (Fla. 1989); see Freeman v. State, 563 So.2d 73, 76 (Fla. 1990): see also Trawick v. State, 473 So.2d 1235, 1240 (Fla. 1985)(error to allow details of collateral crime victim's suffering). That line was crossed below.

Admitting unessential testimony by a relative of the victim of a prior

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[20] This error contravened the reliability requirements of due process as guaranteed by the Federal Constitution's Fifth, Sixth, and Fourteenth Amendments and Florida's Article I, §§9, 17, and 22, as well as cruel punishment prohibition of the Federal Constitution's Eighth Amendment, and Florida's Article I, §17.

violent felony in a capital case is error.[21] In Freeman, the state calle the widow of a prior homicide committed by the defendant to testify. This Court held the evidence should not have been admitted since not needed to establish the details. However, the testimony was "brief, straightforward, and very general," and so the error was harmless. Freeman, 563 So.2d at 76. In Rhodes, the State introduced a taped statement from the victim of a prior crime committed by the defendant. Admitting it was prejudicial error, in part because:

> (W)e see no reason why introduction of the tape recording was necessary to support aggravation in thie case. The State had introduced a certified copy of the Nevada judgment . . . There was testimony from Captain Rolette regarding his investigation of the incident. *This* evidence wae more than sufficient to establish the aggravating circumstance . . . and to establish the circumstances of the crime.

Rhodes, 547 So.2d at 1205 n.6.

This jury heard a detailed account of the murder of Paul Nelson from his emotionally diatraught widow. Mrs. Nelson inflamed the jury's passions by constantly referring to the deceased's family and the effects the crime had on them. She testified to lengthy residence where the homicide occured, R *520*, then:

> *Q* Okay. And who was living at that, in the living quarters, with you back on August 26, 19741
> A My husband, Paul Nelson, and my grandson, David Johnson McBride.

R 521. Mrs. Nelson repeated the deceased was hex "husband" twenty-three times during direct and repeatedly called David her "grand-son," who was only 16. R 527, 528, 529, 531. The jury heard their son and daughter-in-law lived close by and rushed to the scene shortly after the robbery murder, R 532; and other grand-children played regularly at the motel. R 533. Her testimony suggested the family was of moderate means. R 524-5. Mrs. Nelson said she prayed during the affair. R 526. she related her husband's words:

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[21] Testimony of a deceased's family member has the strong potential to inflame a jury. See Booth, 482 U.S. at 508 (victim impact evidence violates Eighth Amendment); Jones v. State, 569 So.2d 1234, 1239 (Fla.1990)(sentencing error occurred: "the law insulates jurors from the emotional distraction which might result in a verdict based on sympathy and not on the evidence presented. Here, none of the relatives' testimony was necaasary to establish the identity of the victims."); see also Welty v. state, 402 So.2d 1159, 1162 (Fla. 1981); Melbourne v. State, 40 So. 189 (1906).

A And I said, "Oh, he is in, he is in the boy'e room, honey." And he -- . . .
A And he brought him, he brought him on in the room where we was at and knocked him around and my, I said, "Please don't --"
My husband said, "Please don't hurt him."
He says, "He is just a child. That's my grandson."

R 528. And the jury heard David's reaction to the affair:

A And I run back and see what I could do for my husband. And my grandson hollered, "Ma, untie me, untie me, ma."
I said, "Your papa was shot."
He said, "Oh, my God."

R 531-2. Mrs. Nelson showed the strain of the offenae on her by displaying her emotions before the jury.[22] She also alleged Mr. Elledge shot the gun into the darkened bedroom where he left her and David laying across the beds. R 531. No convictions were obtained for crimes against either survivor.[23]

Nelson's testimony was unessential to outlining the circumstances of the murder of her husband: the lead detective could have told the jury what happened.[24] This testimony and the judgment and sentence for Nelson's murder would make Mrs. Nelson's testimony cumulative and unnecessary, just as the victim testimony in Freeman and Rhodes wae unnecessary. Similar to the Rhodes testimony and unlike that in Freeman, Mrs. Nelson's account was extremely prejudicial. It brought out familial relations of the deceased, told of some of the reactions of those relations to the crime, introduced evidence of uncharged crimes, and put the witnees'e own anguish on display. Given its enormous prejudice, Mrs. Nelson's testimony violated due process, the heightened

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[22] Defense moved for a mistrial baaed on Mra. Nelson's emotional display. R 550. The trial court denied the motion, but specifically found her testimony emotional. R 550. The court's own words show the aympathy which this victim, underatandably but impermissibly, engendered.

[23] Mr. Elledge argues elsewhere that introduction of these violent felonies without convictions is error; they aleo Contribute to the prejudice of allowing thie witness to teetify.

[24] Defense counsel moved to require a neutral witness testify to the details of Nelson's death instead of Mre. Neleon, baaed in part on Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). R 2096, 2475. Defense told the court it muet weigh the prejudice of having the family member testify against the probative value of that testimony, given that the state could present the details of the homicide via the testimony of the lead detective who was available, but the court denied the motion. R 62. The court denied the renewed objection before Nelson testified, R 519, and, later, a motion for a new hearing. R 2711, 2697, 2704-5, 824.

reliability required in death sentencings, and Florida's law of evidence.

Pictures of Gaffney's corpse also inflamed the jury.[25] The jury heard Mr. Elledge's taped confession to the Gaffney homicide: it fully described what happened. The state introduced copies of the indictment and judgment and sentence for the first degree murder of Gaffney. State exhibit 20, R 541. Even though the jury heard the full account of what occurred, the prosecutor showed them three photos of Gaffney'a corpee during the testimony of Dr. Fatteh, the medical examiner. State exhibits 6, 14, 15, R 379, 462. The prosecutor then had Dr. Fatteh describe in detail the damage to Gaffney's internal organa caused by the two bullets which struck him. R 463-4. The medical examiner ueed the photos only to point out the bullets' external point of entry, Gaffney's cheat. R 463. Nothing in the doctor's testimony or the photos in any way contradicted or added to Mr. Elledge's account in hie confession.

This evidence was highly prejudicial and not essential, indeed irrelevant, to proving any material issue.

> Photographs of the type involved here should be received with great caution and should not be permitted unless they prove or tend to prove some material issue in the trial of the cause.

Brooks v. State, 117 So.2d 482, 485 (Fla. 1960); see Czubak v. State, 570 So.2d 925 (Fla.1990); Reddish v. State, 167 So.2d 858, 863 (Fla. 1964). The prosecutor claimed the photos ware relevant to show the deceased's identity, his cause of death, and location of the gunshot wounde. R 461. However, Mr. Elledge was not on trial for Gaffney's death. Only details of the prior violent felonies going to the defendant's character are material. See Elledge, 346 So.2d at 1001 (purpose is to engage in character analysis). Absent some connection with the defendant's actione which throw light an his character, identity of the victim and cause of death are not material issues in proving a prior violent felony aggravating circumstance. Nothing about Gaffney'e identity or the cause of hie death show anything about Mr. Elledge's actione at the time, except that he shot Gaffney twice. This undisputed fact, contained in Mr.

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[25] The court overruled an objection to the autopsy photos of Gaffney'e corpee as cumulative, prejudicial, a violation of Booth and "Elledge II." R 461. The photos had not been admitted in the previoue sentencing hearinge.

Elledge's confession, simply could have been confirmed by the medical examiner without reference to the photos: they were not relevant to a material issue.[26]

The photos also do not pass the test of 590.403 which excludes evidence whose prejudicial effect outweighs its probative value. Mr. Elledge explicitly stated he shot Gaffney twice. R 480, 491. The state never showed Gaffney's wounds conflicted with this account; the autopsy photos' prejudicial effect outweighed their probative value. See Henrv v. State, 16 F.L.W. S54 (Fla. January 3, 1991); Rhodee, 547 So.2d at 1205; Trawick, 473 So.2d at 1240(error to introduce collateral crime victim suffering); see also Hawkins v. State, 206 So.2d 5, 8 (Fla. 1968)(no error to permit photos of dead victims of other crimes introduced to prove fixed pattern in method of killing, but "Ordinarily we would not approve the introduction of the dead victims of the other crimes."). In Henry, the defendant was charged with killing his estranged wife; the State introduced details of Henry's killing of her son nine hours later, including a medical examiner photo of the corpse. This Court held the prejudicial effect outweighed the probative value of the collateral evidence, emphasizing the use of the corpse photo ae singularly prejudicial and unnecessary. Since Mr. Elledge's confession fully established what happened in the Pantry Pride, the prejudice from the photoa of Gaffney's corpse similarly outweighs their probative value. Its use violates Florida law, due process, and the heightened reliability required in death sentencings. See Rhodes, supra.

Alternately, the evidence erroneously became a 'feature' of the state's case. The evidence of the Nelson and Gaffney crimes, €or which Mr. Elledge had been separately punished, was voluminoue. The prosecutor described them at

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[26] Identity and cause of death are material had the state been trying or sentencing Mr. Elledge for the murder of Gaffney; even then, these photos may not be admissible since his confession and the doctor'e testimony established Gaffney's identity and cause of death. Compare Bush v. State, 461 So.2d 936, 939-40 (Fla. 1984); with Reddish, 167 So.2d at 863 (photos of body at morgue inadmissible when cause of death established and no facts at issue); Hoffert v. State, 559 So.2d 1246, 1249 (Fla. 4th DCA 1990)(photo of interior of corpse's skull to show damage from blow cumulative to other evidence of injuries and adding nothing to testimony of doctor); Beagles v. State, 273 So.2d 796, 799 (Fla. 1st DCA 1973)(no fact in issue when defendant admitted how death occurred).

length in opening statements.[27] The direct testimony of state witnesses an tapes of Mr. Elledge's confessions cover a total of 129 pages of transcript; *62* of them concern crimes other than the Strack homicide, 48% of the speaking evidence presented by the state. The prosecutor called 5 witnesses: 2 testified about the Strack homicide, 2 about both the Strack and Gaffney homicides, and 1 about the Neleon homicide and other Uncharged crimes.[28]

Becoming a feature of the case violates an independent restriction on use of otherwise relevant collateral crime evidence. See Williams v. State, 117 So.2d 473 (Fla. 1960); Brvan v. State, 533 So.2d 744, 746 (Fla. 1988); Snowden v. State, 537 So.2d 1383, 1385 (Fla. 3d DCA 1989)(citing cases)(feature limit on collateral crimes evidence a particularized prejudice versus probative value test).[29] The State charged Williams with fatally shooting the owner of the H & K market in St. Petereburg. The state introduced details of a robbery of the Blue Grass Market in that city about a month later in which the defendant shot and wounded an employee with the same gun ueed to kill the H & K owner. This Court found the evidence relevant, citing Williams v. State, 110 So.2d 654 (1959)(an unrelated case). However, the Court then held the State went too far into the details of the collateral robbery "and made the later offense a feature

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[27] Defense counsel unsuccessfully objected to this detailed account of the prior violent felonies by the prosecutor. R 335.

[28] Counsel has counted only those pages of direct testimony of state witnesses and taped confessions in which the jury actually heard evidence directly concerning a particular crime. Charles Perrone and Janet Pocie testified concerning the Strack homicide, R 350-367. Alan Devin and Abdullah Patteh testified about Strack and Gaffney. R 367-518. Katherine Nelson testified about her hus-band's death and other uncharged crimes by Mr. Elledge. R 520-538. Countedtranscript pages concerning the Strack homicide are: R 350-353(Perone); 356-361(Pocis); 367-371(Devin); 391-433(Elledge confession); 453-460(Fatteh). Counted transcript pages concerning the Gaffney homicide are: R 372-378; 379-380(Devin); 461-464 (Fatteh); 469-470(Devin); 470-505(Elledge confession). counted transcript pages concerning the Nelson homicide are: R 520-534 (Nelson). Portions not relating directly to either homicide have not been counted: R 370-387; 437-439; 450-452.

[29] Some reversals under the feature rule show the evidence often borders on irrelevancy and so does not meet a prejudice versus probative value test. See State v. Davis, *290* So.2d 30, 35 (Fla. 1974); Jenkins v. State, 533 So.2d 297, 300 (Fla. 1st DCA 1988); Denson v. State, 264 So.2d 442, 442-3 (Fla. 1st DCA 1972). As argued above, much of this collateral crime evidence had little probative value and was extremely prejudicial. As in Davis, Jenkins, and Denson, this Court should hold feature rule was violated for this reason as well.

instead of an incident." Williams, 117 So.2d at 475. The Court explicitly based its concern on the effect on the jury's penalty decision. Williams, 117 So.2d at 476; see Whiteman v. State, 343 So.2d 1340, 1342 (Fla.2d DCA 1977).

Feature rule reversals often focus on the sheer volume of evidence. See Mattera v. State, 409 So.2d 257, 259 (Fla. 4th DCA 1982)(collateral crime established by 4 of 8 prosecution witnesses with many dissimilarities to crime charged became feature of case); Matthews v. State, 366 So.2d 170, 171 (Fla. 3d DCA 1979)(extensive evidence about offense to which defendant had pled nolo contendere made that offense a feature); see also Stano v. State, 473 So.2d 1282, 1289 (Fla.1985)(upheld death sentence where defendant had 8 prior first degree murder convictions, but evidence on the line of impropriety); Wilson v. State, 330 So.2d 457, 458 (Fla.1976)(prejudice nearly outweighed probative value when 600 transcript pages taken for evidence of other crimes, but proved pattern of conduct and so properly admitted). The proportion of collateral crimes evidence here - nearly half of the state's case concerned the other offenses - ehows they became a feature. As in Mattera, half the evidence concerned other crimes. As in Matthews, extensive evidence concerning its details becomes less necessary and makes the ease a feature since Mr. Elledge has pled to the offenee. Much of the extensive evidence was unnecessarily preju-dicial, unlike Wilson and Stano. Mr. Elledge wae punished more for the crimes against Neleon and Gaffney than againat Strack, crimes for which he had already received two consecutive life sentences.

Even if the evidence were properly admitted, detailing collateral offenses for which sentence has already been imposed in a capital sentencing proceeding invites punishment for them, a double jeopardy violation.[30] Cf. united States v. Halper, 109 S.Ct. 1892 (1989)(although sanction denominated 'civil,' when it could only be punishment for offense already punished, sanction violated double

[30] Double jeopardy is prohibited by the Fifth and Fourteenth Amendments to the Federal Constitution and Article I, section 9 of the Florida Constitution. Although this court has ruled previously that some details of offenses for prior violent felonies may be introduced in a capital sentencing hearing, Bee e.g. Elledge, 346 So.2d at 1001-2, it must reconsider in light of the serious constitutional error in twice punishing a person for a crime.

jeopardy; use of details invites jury to punish prior offense); Graham v. West Virainia, 224 U.S. 616, 32 S.Ct. 583, 586 (1912)(approving a habitualization statute, but noting it limited evidence to facts of prior offenae and offender's identity, not reopening questions of guilt, unlike introducing details).

POINT IV

A HEARSAY OPINION BY AN ABSENT MEDICAL EXAMINER EMPLOYEE THAT THE DECEDENT'S BLOOD ALCOHOL LEVEL WAS .06% WAS IMPROPERLY ADMITTED.

Dr. Abdullah Fatteh, a deputy medical examiner in 1974, testified testing showed the blood in Strack's body had an alcohol. level (BAL) of .06%, and found no other drugs. R 460. The predicate for admitting this hearsay[31] was:

> Q Was the toxicology done at your request?
> A Yes, Sir.
> Q Was it done in the ordinary course of business activities of the Medical Examiner back in 1974?
> A Yes.
> Q And did he report it to you?
> A Yes.
> Q And did you make it part of your autopsy report?
> A Yes, sir.
> MR. SATZ: Okay, Your Honor, I think there's sufficient predicate.

R 459. The state never put the report in evidence.[32] No information about its anonymous author can be gleaned from the record.

A. AN OPINION ABOUT A DECEDENT'S BLOOD ALCOHOL LEVEL OF AN EMPLOYEE OF THE MEDICAL EXAMINER'S OFFICE, ABOUT WHICH OPINION NOTHING ELSE IS KNOWN, IS INADMISSIBLE HEARSAY IN A CAPITAL SENTENCING PROCEEDING.

The prosecution's theory how this report was admissible is not clear, but

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[31] This testimony was admitted over a timely hearsay objectian; the prosecutor made no claim the evidence was admissible under §921.141(1). The failure of the state to raise this ground below means no record on whether the defense was surprised by or had other means to rebut the report wae made. It would violate due process to now hold unrebuttability was not shown without giving couneel notice and an opportunity to be heard. Moreover, hearsay expert opinion evidence is neither fairly rebuttable, cf, Dragovich v. State, 492 So.2d 350, 355 (Fla. 1986)(reputation evidence not fairly rebuttable), nor admissible under the confrontation clause, as explained below, and so inadmissible under §921.141.

[32] Although 590.705, Florida Statutes, allows experts to base opinions on facts not in evidence, Flarida courts uniformly hold experts cannot be mere conduits for inadmissible evidence. See Riaains v. Mariner Boat Works. Inc, 545 So.2d 430, 431 (Fla. 2d DCA 1989)(citing cases)(improper for toxicologist to give opinion on decedent's BAL baaed on inadmissible lab report); Kurvnka v. Tamarac Hospital Corp., 542 So.2d 412, 413 (Fla. 4th DCA 1989) (error to admit opinion on decedent's cocaine usage baaed on inadmissible lab report); Bunvak v. Clyde J. Yancev and Sons Dairv, Inc., 438 So.2d 891, 893 (Fla. 2d DCA 2983). Fatteh could not testify to the report's contents unless the report was admissible.

no exception to the hearsay rule allows admission of an unknown medical examiner employee's hearsay opinion to be used against a criminal defendant. This Court must Btrongly condemn this misuse of hearsay opinion. Many criminal charges, e.g. drunk driving and drug crimes, depend on similar testimony. Permitting use of the BAL report below will invite the police to insulate their experts from cross-examination by rigging procedures to record and transmit opinions to juries via a mere clerk/witness.

The BAL report was inadmissible under §90.803(6), Florida Statutee, the business records exception, for several. reaeone. Florida courts hold testimony based on a business record cannot be admitted until the record itself has been introduced. See Brown v. State, 537 So.2d 180, 181 (Fla. 3d DCA 1989); Adams v. State, 521 So.2d 337, 338 (Fla.4th DCA 1988). Absent the document, testimony on its contents is hearsay. The testimony was inadmissible since no records were introduced.

The prosecutor did not lay a sufficient predicate for the exception. Evidence must strictly comply with the requirements of a hearsay exception to be admitted thereunder. See Juste v. Department of Health and Rehabilitative Services, 520 So.2d 69, 71 (Fla. 1st DCA 1988). The predicate for buainess records includes identifying the record and explaining its mods of preparation. See sandearen v. State ex rel. Sarasota county Public Hospital Board, 397 So.2d 657, 660 (Bla. 1981); National Car Rental System, Inc. v. Holland, 269 So.2d 407, 413 (Fla. 4th DCA 1972)(doctor's certificate in employer's records inadmissible in part due to absence of evidence of mode of preparation). It is abuse of discretion to admit a business record with no showing how it was prepared. See Dutilly v. Department of Health and Rehabilitative Services, 450 So.2d 1195, 1197 (Fla. 5th DCA 1984)(blood test improperly admitted without, ~~inter alia~~, showing compiler with knowledge of thing recorded); Holt v. Grimes, 261 So.2d 528 (Fla. 3d DCA 1972). If the record includes opinions, the proponent must establish their admissibility under §§90.701-90.705 as part of the predicate. §90.803(6)(b), Fla.Stat. (1989); see Ferguson v. Williams, 566 So.2d 9, 11 (Fla.3d DCA 1990); Dutilly, supra. In Dutilly, the Fifth District Court

o Appeal reversed a grant c a summary judgment for he petitioner in a paternity action. Petitioner's counsel had certified a blood test report indicating the defendant was the child's father to a 99.983 probability; two lab officials certified the testing was done in accord with national standards. The Court found the predicate insufficient, in part because petitioners failed to show "the opinion of paternity contained in the report would be admissible under sections 90.701-90.705." Dutilly, 450 So.2d at 1197. Fatteh did not say he even knew who did the teating, much less testify the person was qualified to give an opinion admissible under §§90.701-90.705 or describe the mode of making the report. As in Dutilly, Ferguson, National Car Rental Svatem, Inc., and Holt, the record was inadmissible without this predicate.

Records do not qualify as business records unless prepared at or near the time of the thing observed. See Sandegren, supra; E.Z.E., Inc. v. Jackson, 235 So.2d 337, 339 (Fla. 4th DCA 1970)(entries made from memory 7-10 days later inadmissible); Beckerman v. Graenbaum, 439 So.2d 233, 235 (Fla. 2d DCA 1983)(-recording years after event not admissible). [redacted]he contemporaneouenese requirement establishes the hearsay's reliability. Holley v. State, 328 So.2d 224, 225 (Fla. 2d DCA 1976). Nothing showa whether the BAL report was made substantially contemporaneously with the matter observed. As in E.Z.E., Inc., Hollev, and Beckerman this failure makes the BAL record inadmissible.

Further, Fatteh was not qualified to establish a predicate for the BAL report. A witneas may qualify to lay a business record predicate by two ways. A superviser of the activity may testify to the predicate. See Alexander v. Allstate Ineurance Company, 388 So.2d 592, 593 (Fla. 5th DCA 1980); Mastan v. American Cuatom Homes, Inc, 214 So.2d 103, 110-1 (Fla. 2d DCA 1968). Also, one well enough acquainted with the activity to describe the mode of preparation of the particular record may lay it. See Alexander, supra; R & W Farm Equipment Company, Inc. v. Fiat Credit Corporation, 466 So.2d 407, 409 n.2 (Fla. 1st DCA 1985). However, a mere employee of the declarant's business who neither supervises the preparer nor personally knows how the report was prepared cannot lay a business record predicate. See Quick v. State, 450 So.2d 880, 881 (Fla.

4th DCA 1984)(auditor not qualified to lay predicate for cashiers' reports which formed basis for auditor's opinion on theft of receipts); Specialty Linings, Inc. v. B.F. Goodrich Company, 532 So.2d 1121, 1122 (Fla. 2d DCA 1988) (production department manager not qualified to lay predicate for accounting records absent supervision and personal knowledge of account); Mastan, 214 So.2d at 110-1 (Fla. 2d DCA 1968)(one of three bookkeepers not qualified to introduce books). The courts have specifically excluded testimony about lab test results when the testifying doctor has no personal knowledge of how the test was conducted. See Beasley v. Mitel of Delaware, 449 So.2d 365, 367 (Fla. 3d DCA 1984); Brown v. State, 389 So.2d 269, 270 (Fla. 1st DCA 1980)(doctor could not use state lab gonorrhea report since he was ignorant of who performed the test and how). In Beasley, at trial over worker death benefits, a deputy medical examiner testified the decedents BAL was .16%, based on a lab report of the decedent's blood drawn by a funeral director. The First District held the testimony and lab report inadmissible; the examiner could not lay a business record predicate for the lab report unless he knew the procedure used. Beasley, 449 So.2d at 366-7. Similarly, Fatteh did not testify he supervised the test of Strack's blood or personally knew how the test was done. Like the doctors in Beasley and Brown, he was not qualified to establish the BAL test as a business record. Although Fatteh was employed by the office that did the tests, he did not testify he either supervised the employee or personally knew how the tests were performed. He was not qualified to introduce the BAL report, just as the employee witnesses in Quick, Specialty Lininas, Inc., and Mastan were not.

Moreover, the BAL was prepared in anticipation of litigation. Records so prepared are inadmissible and their trustworthiness suspect. C. Ehrhardt, Florida Evidence, §803.6, 491 (2d Ed. 1984); see Depfer v. Walker, 123 Fla. 862, 125 Fla. 189, 169 So. 660, 663 (1936); Smith v. Frisch's Big Boy, Inc., 208 So.2d 310, 312 (Fla. 2d DCA 1968)(police report not a business record); Stambor v. One Hundred Seventy-Second Collins Corp., 465 So.2d 1296, 1298 (Fla. 3d DCA 1985)(citing cases). Records so prepared are neither made in 'a course of

business'[33] nor under circumstances showing they are reliable. As the Supreme Court said in discussing the predecessor to Federal Rule 803(6):[34]

> But there is nothing in the background of the law . . . which suggests for a moment that the bueineae of preparing cases for trial should be included. . . Preparation of cases for trial by virtue of being a "bueineee" or incidental thereto would obtain the benefits of this liberalized version of the early shop book rule. The probability of truetworthineee of records because they were routine reflections of the day to day operations of a busineee would be forgotten as the basis of the rule [cites omitted] Regularity of preparation would become the test rather than the character of the records and their earmarks of reliability [cite omitted] acquired from their source and origin and nature of their compilation.

Palmer v. Hoffman, 318 U.S. 109, 114 (1943)(e.a.). A medical examiner knows her reports will likely be used in litigation. Nothing about the character and internal use of a medical examiner report shows reliance or reliability unlike the businessperson who makee a record for internal use. Businesspeople may discard or not record necessary documentation to make their bueineae report admissible in court, but no unfair surprise Occurs to require full reporting when made in anticipation of litigation.[35]

The state may argue the trial court could have admitted the record as a public record hearsay and rely on smith v. Mott, 100 So.2d 173 (Fla. 1958). See §90.803(8), Fla.Stat. (1989) In Smith, thie Court approved use of a BAL report made by a public agency admitted after the witness teetified he wae familiar with the test procedure generally ueed and able to describe and eubstsntiate that procedure in detail. Smith and the public records hearsay exception do not aid the State for several reasons.

First, Smith is distinguishable. Fatteh did not testify he knew how the teat was performed or whether it wae scientifically reliable, unlike the witness in Smith. Smith, 100 So.2d at 175. This Court must require opinions in public

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[33] §90.803(6) requires the records be kept in the regular course of busineee. See Garcia v. State, 564 So.2d 124, 127 (Fla. 1990).

[34] The 1943 business record etatute was created by 49 Stat. 1561 (1936), then codified at 28 U.S.C. 5695. Palmer, 318 U.S. at 111 n.1.

[35] If the preparer forgets details of a test, the report is still admissible ae a past recollection recorded, but the report preparer must herself testify to lack of memory and allow the jury to draw conclusions on her reliability. §90.803(5), Fla.Stat. (1989). Also, the preparer will at least be open to questioning on the result's scientific basis and reasoning.

records be admissible under §§90.701-70 , just as such a predicate is required for buaineas recorde. See §90.803(6)(b), Fla.Stat. (1990). unqualified expert opinions in public recorde are as unreliable ae unqualified expert opinions in business records, as shown by the discussion in Smith itself. Id. at 175-6.

Also, Smith should not be extended to criminal cases. The public record exception excludes "matters observed by a police officer or other law enforcement personnel" from admission in criminal cases. §90.803(8), Fla.Stat. (1989). This provision excludes opinions by medical examiner employees. Federal cases show the medical examiner employee is a 'law enforcement personnel.' In United States v. Oats, 560 F.2d 45 (2d Cir. 1977), the second Circuit Court of Appeals considered whether a United States Custom's Service chemist whose report opined the substance seized from the defendant was heroin was a 'law enforcement personnel.' "We would thus construe 'other law enforcement personnel' to include, at the least, any officer or employee of a governmental agency which has law enforcement responsibilities." Id. at 68. The chemist's lab regularly tested items seized by Customs Agents, and carefully followed rules designed to allow admission of the results at trial.; in short, the chemists were part of the proeecution team, and their reports inadmissible against criminal defendant ~ ~Medical examiners similarly are part of the prosecution team and should be considered 'law enforcement personnel' within the meaning of §90.803(8). They primarily determine the causes of various deatha, the categories of which show the intent is to root out criminal causation. See $406.11, Fla.Stat. (1989). Statute requires them to report to law enforcement agencies and

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[36] Florida rules of evidence, when based on substantially similar federal counterparte, are usually interpreted the same way. See Moore, 452 So.2d 559. Federal Rule 803(8) varies slightly from §90.803(8), but its import is the same. It definea as admissible:

> Records, reports, etatements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pureuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases mattere observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Fad. Rules Evid. Rule 803(8), *28* U.S.C.A.

prosecutors. S406.1 , Fla.Stat. (1989). It requires law enforcement cooperation with medical examiners. 5406.14, Fla. Stat. (1989). Examiners frequently testify in homicide prosecutions; they are as much a part of the prosecution team as the chemist in Oats. The opinion of an anonymous employee of that office, being part of the police investigation, is inadmissible as a public record against a criminal defendant.[37]

Second, Appellant urges this Court recede from Smith and hold public records containing expert opinion evidence are inadmissible under the public records act exception. The Court in smith finds a lack of a motive to fabricate makes the records reliable. Smith, 100 So.2d at 176. Such reasoning is not apropos to assuring the qualifications of the tester and soundneee of teat methoda and reasoning, the critical. concerns in reliability of expert opinions. The chance for error is much greater in opinion testimony based on research and testing than a simple factual observation, and hence the need for cross-examination becomes greater.[38] When admitted via hearsay, opinions become unassailable because methodology and reasoning are hidden. In contrast, cross has little value for observed factual matters since what the observor saw is already recorded. This Court should recede from Smith and hold expert opinions in public

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[37] This specific exclusion in the public record section of recorde in criminal cases made by law enforcement personnel should also be read to exclude them as business records. See Oats, 560 F.2d at 78; United States v. Cain, 615 F.2d 380, 382 (5th Cir. 1980). As the Fifth Circuit put it, to rule otherwise makes the business records exception "a back door for evidence excluded by" the public recorde section. Cain, 615 F.2d at 382. Underlying this broad reading of the public record's exclusion of police records is concern for the confrontation clause.

[38] This distinction between opinions and factual observations appears in the worde of §90.803(8) as shown by comparing it with the Federal rule. Federal Rule 803(8) includes as admissible:

> (C) in civil actions and proceedings against the Government in criminal casee, factual findings resulting from an investigation made pursuant to authority granted by law. . . .

Fed. Rules Evid. Rule 803(8), 28 U.S.C.A. The United States Supreme Court holds an opinion is a factual finding under section (C) of Rule 803(8). See Beech Aircraft Corporation v. Rainey, 109 S.Ct. 439, 450 (1990)(citing cases at 446, n.7). §90.803(8), Florida Statutes, although it tracks the federal rule nearly word for word in other ways, does not include this phrase encompassing opinions based on research. Its only phrase arguably encompassing opinion evidence is, "matters observed pursuant to duty imposed by law." §90.803(8), Fla.Stat. (1989). A blood alcohol level cannot fairly be characterized a 'matter observed:' it is a conclusion based on testing and research.

records generally are inadmissible hearsay.

Third, §90.803(8) excludes records "when circumstances show their Lack of trustworthiness." §90.803(8), Fla.Stat. (1989). The unreliability infecting business records made in anticipation of litigation, discussed above, identically infects public records so made. United States v. Stone, 604 F.2d 922, 925-6 (5th Cir. 1979); see also Dykes v. Quincy Telephone Company, 539 So.2d 503, 505-6 (Fla. let DCA 1989)(hearing officer's propoaed order not a public record in part because adjudicative in nature); Beech, 109 S.Ct. 449 n.11(citing Palmer in discussion on reliability under Federal Rule 803(8)). Since the medical examiner employee prepared the BAL primarily for use in litigation, its trustworthiness is suspect and the preparer should submit to examination.

B. THE STATE *AND* FEDERAL CONSTITUTIONS DEMAND EXCLUSION OF HEARSAY EXPERT OPINIONS OF A STATE WITNESS IN FAVOR OF HER LIVE TESTIMONY.

The confrontation Clause was enacted:

> to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil caees, being used against the prisoner in lieu of a personal examination and croee-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conecience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United Statee, 156 U.S. 237, 15 S.Ct. 337, 339 (1895). Use of the BAL report violated this compelling reason for enacting the Confrontation Clause.

This Court holds the Confrontation Clauses of the Florida and Federal Constitutions[39] apply to capital sentencing proceedings.[40] See Rhodes v. State, 547 So.2d 1201, 1204-5 (Fla. 1989); Gardner v. State, 480 So.2d 91, 94 (Fla.

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[39] Contained at the Sixth and Fourteenth Amendments to the Federal Constitution and Article I, sections 16 and 22 of the Florida Constitution.

[40] Confrontation rights, since they make the result more reliable, are also required by due process, guaranteed by the Fifth and Fourteenth Amendments to the Federal Constitution and Article I, section 9 of the Florida Constitution. See Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985)(due process requires procedures in criminal cases which significantly increase reliability of the result). Also, the heightened reliability required in death sentencinqs by the Eighth Amendment and Article I, eection 17 includes the right to confront expert witnesses, at the least. See Proffitt v. Florida, *685* F.2d 1277 (11th Cir. 1982), modified 706 F.2d 311 (1983).

1985); see also Specht v. Patterson, 286 U.S. 05 (1967 (confrontation clause applies to habitual offender sentencing); Roberts v. State, *568* So.2d 1255 (Fla. 1990)(assumes appellate counsel errs by not arguing hearsay testimony inadmissible as confrontation clause violation). Hearsay contravening the confrontation clause is inadmissible in death eentencing proceedings. Rule 3.780, Fla.R. Crim.P.; see Tompkins v. State, 502 So.2d 415, 420 (Fla. 1987).

The Supreme Court holds hearsay not falling "within a firmly rooted hearsay exception" requires "a showing of particularized guarantees of trustworthiness" to be admitted. Ohio v. Roberts, 448 U.S. 56, 66 (1980). The absence of traditional predicates for a hearsay exception means it does not fall within a firmly rooted exception. See Dutton v. Evans, 400 U.S. 74 (1970)(plurality) (record examined for particularized reliability of co-Conspirator's statements admitted under state rule broader than federal co-conepirator exception); United States v. Ordonez, 722 F.2d 530 (9th Cir. 1983)(failing to lay tradition predicate for ledger as businees record meant it was not firmly rooted hearsay exception). The failure of the prosecutor below to establish the predicate for any firmly rooted hearsay exception under national standards - which are similar to Floridian - requires the government to show particularized guarantees of truetworthineee to pass ecrutiny under the confrontation clause. No such showing was made: the testimony about the BAL report violated Mr. Elledge's confrontation rights. See Stewart v. Cowan, 528 F.2d 79, 85 (6th Cir. 1976)(police testimony about ballistics test conducted by FBI violated state defendant's confrontation rights); Pickett v. Bowen, 626 F.Supp. 81 (N.D.Ala. 1985), aff'd 798 F.2d 1385 (11th Cir.1986) (state court violated confrontation clause by admitting hearsay diagnosis of doctor under state business records exception without showing unavailability); cf. California v. Trombetta, 467 U.S. 479, 490 (1984)("defendant retains the right to croes-examine" Intoxilizer test givers to insure proper teat methode followed and so due process not violated by destroying breath samples).

Even if this Court should hold that the documente are admissible as business or public records under current law, the confrontation clauses would

still be offended by their use. Admitting hearsay relating (1) expert opinions (2) prepared in anticipation of litigation against criminal defendants is not firmly rooted in American jurisprudence. Business records made in anticipation of litigation are not reliable enough for use even in civil proceedings. Palmer, 318 U.S. at 114 (based in part on the historic use of the business record exception). The Court recently cited Palmer to explain what public records are too unreliable to be admitted. Beech Aircraft Corporation, 109 S.Ct. at 449 n.11.

Admitting expert opinions contained in either public or business records is also not "firmly rooted" in the constitutional sense. The Supreme Court has held the co-conspirator hearsay exception is a firmly rooted one, see Bourjaily v. United States, 483 U.S. 171, 183-4 (1987), but a residual hearsay exception is not. See Idaho v. Wright, 110 S.Ct. 3139, 3147 (1990). In Bourjaily, the Court noted the federal co-conspirator exception was first articulated in 1827 as part of the older res seetae rule and had a long history of acceptance since. Bourjaily, 483 U.S. at 183. But not every codified hearsay exception must be Considered "firmly rooted." Wright, 110 S.Ct. at 3148. Admitting expert opinion evidence under the public recorde exception found unqualified acceptance in civil cases in the federal courts only in 1988. Beach Aircraft Corp. 109 S.Ct. at 447-450 (discussing the history of the divisions of courts and commentators on this point). Even today, the federal rules of evidence exclude use of opinion evidence contained in public records against criminal defendants. Federal Rule of Evidence 803(8)(C). The buainess records exception was initially a very limited one, allowing only statements of account; it gradually expanded by statute and judicial decisions, not even arguably including opinions contained in business records until the last half century. See C. Ehrhardt, Florida Evidence, 5803.6, 492 (2d Ed. 1984); McCormick, Evidence, 719-720 (2d Ed. 1972)(First widespread adoption of modern business records exceptions started with model acts of 1920s); see also Ch. 25111, Laws of Fla. (1949) (first adopting Florida's modern business records exception); Chapin v. Mitchell, 44 Fla. 225, 32 So. 875 (1902)(tracing early Florida law). Admitting expert opinions under either exception does not have the long history of use

like the co-conspirator exception in Bourjaily. Contra Davis v. State, 562 So.2d 431 (Fla. 1st DCA 1990)(business records qualifies as a firmly rooted hearsay exception). Rather, modern liberalization of the rules of evidence has partially allowed use of hearsay opinions, a Liberalization that does not comport with the confrontation clause's conservative purpoaa - to protect the right8 guaranteed British subjects when the clause was enacted. See Mattox, 15 S.Ct. at 339. Admitting opinions as business and public recorde hearsay exceptions is a recent sprout, Like the exception in Wright, not "firmly rooted," in the growth of the law.[41]

POINT V

EVIDENCE OF TWO CRIMES OF ATTEMPTED FIRST DEGREE MURDER FOR WHICH CONVICTIONS WERE NOT OBTAINED IMPROPERLY PUT NONSTATUTORY AGGRAVATING EVIDENCE BEFORE THE JURY.

The proceeding was impermissibly tainted by admitting evidence of two attempted first degree murders by Mr. Elledge for which no convictions were obtained. Mrs. Nelson testified about the shooting of her husband. 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." R 531. No convictions were obtained for these shootings.

When this case wae first before this Court, the State had introduced details of the Gaffney murder although Mr. Elledge had not then been convicted of it. This Court said then:

> Admittedly, the testimony by the police officer related to [the Gaffney confession] was not objected to by appellant's trial counsel, but that should not be conclusive of the special scope of review by this Court in death casee. Admission of evidence of the Gaffney murder is proscribed by our decision in Provenee, supra, because the charge had not reeulted in a conviction at the time of the trial in the instant case. It was therefore, a nonatatutory aggravating factor.

Elledge, 346 So.2d at 1002; see Provenee v. State, 337 So.2d 783, 786 (Fla.

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[41] Additionally, the State never showed that the medical examiner office employee who performed the test was unavailable. Since expert opinions in public records derive little value from the time of their making, unlike co-conspirator statements which do not require showing unavailability, see United States v. Inadi, 475 U.S. 387 (1986), the proponent must show unavailability. Indeed, absent cross, the opinions are unreliable. The State did not show unavailability below; use of the BAL result violated Mr. Elledge's right to confront the test giver.

1976); Dougan v. State, 470 So.2d 697, 701 (Fla. 1985).

Just as this Court before found introduction of Gaffney's murder without a conviction was error, it must now find error to admit the evidence of two attempted murders. Although the State may try to distinguish the above casee because the alleged attempted murders occurred in the same episode as the Nelson homicide, such would be a distinction without a difference. The rule admitting the detail8 of prior violent felonies does not open the way for unconstitutional, prejudicial and irrelevant evidence. See Rhodes v. State, 547 So.2d 1201, 1205 (Fla. 1989). A mere relation in time with a convicted offense does not elevate an unconvictsd offense to the status of a etatutory aggravating circumstance; the statute plainly requires evidence only of prior convictions. The testimony does not explain how the offense for which Mr. Elledge was convicted occurred. As gratuitous, damaging evidence, the trial court committed fundamental error by admitting it, contrary to §921.141, Florida Statutea, due process, and the heightened reliability required in death sentencinge.[42]

POINT VI

ADMISSION OF THE DEFENDANT'S ALIASES WHICH SUGGESTED PRIOR CRIMINAL CONDUCT WAS ERROR.

The trial court erred by not redacting a portion of Mr. Elledge's confession; a policeman begins the tape, saying, "This is statement of white male, William . . . Elledge . . . Aleo known as Butch, also known as Billy the kid. . . ." R 392. Mr. Elledge confirmed he used the name 'Billy the Kid' in response to the officer's question. R 393.

Introduction of an alias connotes "in the public mind some previous criminal activity." Lee v. State, 410 So.2d 182, 183 (Fla. 2d DCA 1982); see State v. Harvey, 26 N.C.App. 716, 217 S.E.2d 88 (1975). Admitting aliases at trial muet be strictly scrutinized to avoid suggesting the defendant belongs to a criminal class. Lee, supra; D'Allesandro v. United Statee, 90 F.2d 640, 641 (3d Cir. 1937). The use of an alias impugns a defendant's character generally, contrary to the rules of evidence. See United States v. Terebecki, 692 F.2d

[42] These rights are guaranteed by the Fifth, sixth, Eighth, and Fourteenth Amendments to the Federal Constitution and Article I, sections 9, 16, 17, and 22 of the Florida constitution.

1345, 1348 n.2 (11th Cir. 1982). This is especially true when the alias inherently demeans the defendant's character. Cf. Lamb v. State, 354 So.2d 124, 125 (Fla. 3d DCA 1978)(no error in allowing indictment with alias listed because defendant uaed it in proceedinge and alias not demeaning). This Court holds inadmissible evidence which goes to show only criminal propensity or bad character. See Caatro v. State, 547 So.2d 111, 114 (Fla. 1989); Jackson v. State, 451 So.2d 458 (Fla. 1984). In Jackson, the state introduced evidence the defendant, accused of shooting two men to death over drugs, pointed a gun at a witness and boasted he was a *thoroughbred killer.' This Court reversed, holding the boast went only to propensity to kill, not a relevant issue. Jackson, 451 So.2d at 461. Like the defendant'e boast in Jackson, Mr. Elledge's identification with a well-known desparado relates only to his Character and propeneity for crime. It was irrelevant and its prejudicial effect outweighed its probative value. The sentencing was unreliable, contrary to due proeeee and the prohibition against cruel and unusual punishment. U.S.Const. Amendments VIII and XIV.

Also, proof of criminal activity for which no convictions were obtained conatitutee non-statutory aggravating evidence. See Elledge, 346 So.2d at 1002; Draaovich v. State, 492 So.2d 350, 355 (Fla. 1986)(citing cases). Use of this alias waa similar to the evidence in Draaovieh that Dragovich had a reputation as an arsonist and was known as 'the Torch.' This evidence was incompetent and harmful when it improperly entered the weighing process.[43] Likewise, evidence one uses a famous outlaw's name cannot be used in deciding a capital sentence.

POINT VII

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

The jury heard a police officer ask Mr. Elledge, in his taped confession, to identify Strack from a college identification card. Mr. Elledge did so. R 405. Evidence of Strack's education was irrelevant, prejudicial victim impact

[43] The error below is even more clear cut since Mr. Elledge waived reliance on the no prior criminal history mitigating circumstance, R 1895, meaning evidence of other crimes would be taken as aggravation.

evidence, contrary to Florida law and the Federal Constitution.[44]

Evidence of the character of a homicide victim potentially inflames the jury and so violates the heightened reliability required for a capital sentencing proceeding. See Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987); South Carolina v. Gathers, 109 S.Ct. 2207 (1989); Jackson v. Dugger, 547 So.2d 1197, 1199 (Fla. 1989). In Gathers, the proaecutor introduced various religious tracts the victim was carrying which were used to inflame the jury for the homicide. As in Gathers, the proaecutor here introduced a totally irrelevant fact about the victim's associations. The education of Margaret Strack was not at issue; the introduction of evidence auggesting her college career had been cut short inflamed the jury against Mr. Elledge. It was irrelevant, and its prejudice outweighed any probative value it had. Jackson, supra. As in Gathers, its use violated the heightened reliability required for death sentencings.

POINT VIII

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

During the cross examination of Dr. Caddy, the proeecutor aeked if he reviewed the tranacripte of the 1975 and 1977 hearings in formulating his opinion. R 645, 650. These questions improperly preeented evidence Mr. Elledge had previouely been sentenced to death.[45]

Bringing out information on cross exam that a defendant has previouely been sentenced to death can only inflame a jury. See Teffeteller v. State, 495 So.2d 744, 746-7 (Fla. 1986); see also Jackson v. State, 545 So.2d 260, 263

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[44] Mr. Elledge moved to redact this portion of the confession prior to trial. R 2082, 2593, 56. He warned the trial court "given today's climate with the Bundy execution so recent, and talk about college girls, I think it's going to away the jury in this case." R 58. The trial court denied the motion. R 59. The court also recognized an objection had already been made when the tape was published. R 387.

[45] The court had granted defense counsel's motion in limine not to mention the prior sentencings. R 2417-9, 24. The court later modified the order at defense counsel's request to the extent the parties could bring out the fact: Mr. Elledge had been on death row, but kept in place that part of the order prohibitting mentioning how many times or when the earlier Proceedings occurred. R 102. Defense objected on this basis when the prosecutor asked about the 1975 and 1977 proceedings.

(Fla. 1989)(prosecutor brought out on cross that defendant had previously bean convicted in that case: intentional presentation of previous conviction required reversal). Although this Court found no reversible error in Teffeteller when information the defendant had previously been sentenced to death came out, that decision was based primarily on defense waiver. See Weber v. State, 501 So.2d 1379, 1384 (Fla. 3d DCA 1987). When the prosecutor deliberately elicits the damaging evidence, over objection by defense, the error requires reversal. See Jackson, supra. This occurred below. The jury was told Mr. Elledge already had two sentencinge. Even worse, the jury was informed thsee occured some twelve years before. Public anger at the length of capital sentencing decisions is well known. This information invited the jury to make a atatement against Mr. Elledge for rightfully demanding a fair eentencing hearing.

Such information violates due procese. In a related context, the former Fifth Circuit held "Indeed, we are hard pressed to think of anything more damning to an accused than information that a jury had previously convicted him for the crime charged." United States v. Williams, 568 F.2d 464, 471 (5th Cir. 1978). Williams is bottomed on due process. See Williams v. Griewald, 743 F.2d 1533, 1537 n.4 (11th Cir. 1984). Similarly, letting a sentencing jury know the defendant was previously sentenced to death violates due process. It also violates the prohibition against cruel and unusual punishment. The decision to impose death is awesome, difficult, and highly subjective. Knowing another sentencer hae twice imposed death before relieves jurors of their sense of responsibilityto make their own decieion. Cf. Caldwell v. Mississippi, 472 U.S. 320, (1985)(telling jurors the decision will be reviewed on appeal relieves their feeling of responsibility and renders the sentence unreliable, contrary to the Eighth Amendment). Permitting evidence Mr. Elledge had twice before been sentenced to death was error.

POINT IX

MR. ELLEDGE'S STATEMENTS, INVOLUNTARILY MADE AND OBTAINED IN VIOLATION OF THE FIFTH AMENDMENT WERE ERRONEOUSLY ADMITTED.

After his arrest in Yacksonville, Mr. Elledge was then taken to the Jacksonville Beach Police Department. At 5:00 or 5:30 a.m. on August 26, 1974,

Officer Roach first advised Mr. Elledge of his Miranda rights.[46] MS 0-9. When asked if he were willing to waive his rights and answer questions, Mr. Elledge told Officer Roach that he "had nothing to say." MS 13. He refused to identify himself, MS 32, and was "somewhat evasive . . . He indicated he didn't know what I was talking about." HC 60. Officer Roach then went to the Beacon Motel to gather more facts concerning the Nelson homicide. MS 13. Officer Roach tried a second time to interrogate Mr. Elledge at 7:30 or 8:00 a.m. After being given his Miranda rights, Mr. Elledge again "had nothing to say." MS 13. Despite Mr. Elledge's desire to remain silent, Officer Roach began talking "to establish a rapport." MS 32. He conducted a "general type of interview;" the two discuesed where Mr. Elledge had been, what he had been doing, where he worked, and if he had been drinking or taking drugs. Mr. Elledge gave conflicting responses to the last question. MS 32-33. Officer Roach again asked about the Nelson homicide. When not interviewed, Mr. Elledge was returned to his cell. MS 28.

Between the second and third interviews, Officer Roach obtained a photo lineup identification of Mr. Elledge as the perpetrator of the Nelson homicide and learned circumstantial. evidence connected him to Strack's murder, MS 16-17. Around 9:00 a.m., officer Roach tried to interview Mr. Elledge for the third the, again reading the Miranda rights. Mr. Elledge still had nothing to say. MS 25. Officer Roach confronted Mr. Elledge during this interview with the various pieces of circumstantial evidence connecting him to the Strack homicide. Though Mr. Elledge did not respond to this attempt at interrogation, he wae by now becoming frightened by Officer Roach's persistent attempts to get him to talk. "He was evasive and he continued to deny what -- any knowledge of the Nelson situation." HC 61. At the close of this interview, he was charged with the Nelson robbery and homicide, MS 36, and returned to his cell.

The fourth and final interview by Officer Roach took place at around 10:30

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[46] These facts are taken from the testimony of Officer Roach at both the hearing on the motion to suppress, held before Judge Futch on March 17, 1975 and the hearing on Mr. Elledge's petition for habeas corpus held before Judge Edward Davis, United States District Court, Southern District of Florida on July 2, 1985. As used in this point the abbreviation MS stands for the 1975 Motion to Suppress, see Motion to Supplement, Attachment C; HC refers to the transcript page of the habeas corpus hearing, Bee Motion to Supplement, Attachment D.

a.m. MS 19,27. This one also began with Miranda warnings. MS 20. "He was again evasive." HC 61. Officers Roach and Hunt were both present for virtually the entire interview. MS 25. In this interrogation, Mr. Elledge confessed to the Strack homicide. MS 23-5. He had no sleep before this confession from 2 am that morning, and nothing to eat, being very hungover. MS 66. He did not sleep until 3 pm at the Duval County Jail. MS 66. From then until the next afternoon, of August 27, he got little sleep, becauea he was in a holding cell with little ventilation, holding twenty-eight people, more than its capacity. MS 69.

At around 3 pm on August 27, Mr. Elledge was again interviewed, now by Officer Devin of the Hollywood police, Chief Willis of the Dania police, and Detective Lombard of the Holywood police. The police had Mr. Elledge execute two wavier of rights forms, after which Mr. Elledge gave the taped statements used in this resentencing. When asked what hie mental and emotional. state was during this interview, Mr. Elledge testified,

> I was still. kind of in a daze that the whole situation had taken place; and I wae so confused from the fact that three people had died in two days, you know, that I waa supposed to be involved in.
>
> I was just emotionally not able to, really ready to, even think about it, and try to sort out the facts; or anything like that, or try to figure out where I wae at.

MS 67.

Mr. Elledge invoked his right to remain silent and the police ignored and repeatedly questioned him. This was a violation of hie right to remain silent, guaranteed by the Federal Consitution's Fifth Amendment.[47]

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wiehea to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise hie Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.

Miranda v. Arizona, 304 U.S. 436, 473-474 (1966). Although Mr. Elledge stated he had "nothing to say" interrogation continued until his will was overborne.

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[47] The police violated Mr. Elledge's rights to remain silent, to counsel, to due process, and to freedom from cruel and unusual punishment, guaranteed by the Federal Constitution's Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments and Florida's Article I, 552, 9 12, 16, 17 and 23 and Rule 3.190, Florida Rules of Criminal Procedure.

In Christopher v. Florida, 824 F.2d 836 (11th Cir. 1987), the defendant said, "I got nothing else to say." 824 F.2d at 840. The Court ruled all questioning must cease, and suppressed the statements. In Spradley v. State, 442 So.2d 1039 (Fla. 2d DCA 1983) and State v. Wininger, 427 So.2d 1114 (Fla. 3d DCA 1983), the courts held a request to stop questioning "however phrased" must be honored. This Court holds statements such as "I'd rather not talk about it" and "I don't want to talk about it" are at least equivocal requests to remain silent, requiring questioning cease. Owen v. State, 560 So.2d 207, 210-11 (Fla.1990). Here, the requests were even clearer, yet questioning continued.

Repeated re-approaching a suspect and re-reading his rights is coercive. Michigan v. Mosely, 423 U.S. 96, 102 (1979). The officers below engaged in just such a tactic, until Mr. Elledge's will was overborne. The statements of August 27 also were involuntary. Mr. Elledge suffered from a mental/emotional disturbance, had little sleep and had been kept in an overcrowded and poorly ventilated cell after being forced to confess to the Jacksonville police the previoue day. All of these factors, individually and cumulatively point to the fact that Mr. Elledge's statements were involuntary and that he did not freely, knowingly, and intelligently waive his right to counsel and right to remain silent. The Florida courts consistently hold that improper, coercive tactics, especially when used in combination, renders a statement involuntary. Brewer vs. State, 386 So.2d 232 (Fla.1980); Gaspard v. State, 387 So.2d 1016 (Fla.1st DCA 1980); Hawthrone v. State, 377 So.2d 780 (Fla.1st DCA 1979); Williams v. State, 441 So.2d 653 (Fla.3rd DCA 1983); Ware v. State, 307 So.2d 255 (Fla.4th DCA 1975); Fillinger v. State, 349 So.2d 714 (Fla.2nd DCA 1971). Also, the August 27 statements to the Hollywood police were the product of the first involuntary statement, requiring they be suppressed. See Oreaon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285 (1985); Gaspard, supra. The trial court erred in admitting them.

POINT X

THE TRIAL COURT ERRED BY RESTRICTING IMPORTANT, RELEVANT MITIGATING EVIDENCE.

The trial court excluded competent, live testimony from a prison officer

that Mr. Elledge will be a good prisoner in the future." R 545. Officer George Kuck testified he had been employed as a corrections officer for seven and a half years; he currently is a sergeant in charge of a wing at Florida State Prison with 102 inmates. R 543. He had known Mr. Elledge since 1981 or 1982; he had not been a problem inmate. R 543. For 22 years before becoming a corrections officer, Kuck was an army drill. inetructor. R 544. This experience gave him good judgment on who would cause trouble. R 544. However, the court undercut this testimony and prevented him from testifying Mr. Elledge would do well in the future:

> Q If Mr. Elledge was to go back to prison for X number of years, do you think, consider that ha would ever be a danger to --
> MR. SATZ: I object to that. He has shown no ability or qualifications to give an opinion like that.
> THE COURT: I sustain the objection. I think it calls for speculation.

R 545. This error was extremely prejudicial; one juror expressly asked about Mr. Elledge's future behavior in prison. R 689.

This court holds a potential for good adjustment to priaon Life mitigates a capital sentence. See Valle v. State, 502 So.2d 1225, 1226 (Fla. 1987)(testimony of psychologist and corrections consultants concerning defendant's future good prison behavior erroneously and prejudicially excluded); Francis v. Duaaer, 514 So.2d 1097, 1098 (Fla. 1987)(probability of future good behavior in prison is valid mitigator); Fead v. State, 512 So.2d 176, 178 (Fla. 1987)(parole supervisor testified defendant "could work in farming within the prison system."); accord Skipper v. South Carolina, 476 U.S. 1, 5 (1986); Jonea v. Duaaer, 867 F.2d 1277, 1280 (11th Cir. 1989). The law ahows deference to the opinion of experienced prison officers with first hand knowledge of a prisoner's behavior.[49] See Fead, supra; Burch v. State, 522 So.2d 810, 813

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[48] Ironically, Mr. Elledge's petition for habeas corpus was granted because he had been forced to sit in chains at his previous resentencing based on untested hearsay allegations allegedly originating with a jailer that he would be a danger to court personnel. Elledge, 823 F.2d at 1451-2.

[49] The courts defer to predictions of prisoner behavior by prison officers in other contexts in respect €or their expertise. See Meachum v. Fano, 427 U.S. 215, 225, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976)(prison officials discretion on security level needed for inmates respected without judicial review unless predicated on specific acts of misconduct found without due process); Clark v.

(Fla. 1988)(court noted claim of good prison adjustment weak since county jailer opined Burch required more secure prison); Jones, supra(hearsay evidence of jailer's opinion related by defendant's relative that defendant a model prisoner established prejudice for Hitchcock error). In Texas, where statutes explicitly put future dangerousness at issue, testimony of corrections officers with first hand familiarity with the defendant about hie future dangerousness are competent opinions. See Fierro v. State, 706 S.W.2d 310, 317 (Tex.Crim.App. 1986)(en banc). First hand knowledge provides expertise in the defendant's character:

> It could be urged with equal logic that a lawyer who had been familiar with a defendant's criminal record for 25 years and had prosecuted him for the crime of rape would be in a better position to predict future conduct than a psychiatrist who based an opinion on a brief visit in a jail cell.

Esquivel v. State, 595 S.W.2d 516, 527 (Tex. Crim. App. 1980)(en banc); see also Gardner v. State, 480 So.2d 91, 93 (Fla. 1985) (officer who observed codefendant €or five hours qualified to opine on his character and personality). The Supreme Court approves future dangerousness findings by those not academically trained in psychology or psychiatry, explicitly noting prison officials make such judgments. See Barefoot v. Estelle, 463 U.S. 880, 897 (1983); Jurek v. Texae, 428 U.S. 262, 274-6 (1976)(opinion by Stewart, J.).

Officer Kuck's opinion was no more speculative than those in Valle, Jones, and Fead, and should have been coneidered by the jury as relevant mitigating evidence. The state may argue that although not 'speculative,' the officer was not qualified as an expert and so the judge wae right for the wrong reason. However, had the objection been sustained on that basis, Mr. Elledge could easily have remedied the error by aeking the officer be qualified. He had shown Kuck's expertise in corrections and first hand knowledge of Mr. Elledge's character. Together, theee sources of knowledge allow Officer Kuck to opine on Mr. Elledge's future conduct, as did the knowledge of the corrections consultants in Valle, the jailer in Jones, the policeman in Gardner, and the prison officer in Fierro. Alternatively, mitigating evidence cannot be restricted by

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State, 395 So.2d 525, 528 (Fla. 1981)(courts give wide-ranging deference to security decisions by prison officials).

mechanistic application of state rules of evidence. See Green v. Georgia, 442 U.S. 95, 97 (1979); Dutton v. Brown, 812 F.2d 593, 601 (10th Cir.), cert. denied 108 S.Ct. 116, 197 (1987)(en banc). As the Eleventh Circuit recognized in Jonee, 867 F.2d at 1280, opinions by jailers about prisoner behavior are admissible as mitigation even though the jailer was not qualified. The exclusion of Kuck's opinion cannot stand under either atate law or federal constitutional analysis.[50] The court compounded the error'a harm by stating Kuck's opinion on Mr. Elledge's future behavior was speculative. This erroneously instructed the jury it cannot reliably predict Mr. Elledge's future behavior.

The exclusion also violated due process. The state introduced evidence of Mr. Elledge's prior violent feloniee which goes to show propensity to violence, see Elledge I, 346 So.2d at 1001. Restricting evidence of future nonviolence in the face of atate evidence suggesting the same violates the due process of law by denying Mr. Elledge the opportunity to rebut state evidence. See Skipper, 476 U.S. at 5 n.1. The order for this reaentencing states:

> Only with an adversary proceee can the reliable evidence be sorted out from the unreliable. Future dangeroueness can be determined only "when the convicted felon hae the opportunity to preeent his own side of the case." Barefoot v. Estelle, 463 U.S. 880, 901. . . .

Elledge, 823 F.2d at 1452. The trial court denied Mr. Elledge that opportunity below, contrary to due process.

Restricting William's brother, Daniel Elledge, from explaining Daniel's successful social adjustment following an abused childhood violated the Lockett rule and due process.[51] Daniel Elledge testified about the severe emotional and physical child abuse heaped upon the Elledge brothers primarily by their mother. The Statement of the Facts details this abuse. Both children were abused, in Daniel's opinion, R 560. But, when the defense attempted to ask Daniel why he did not have the same problems as hie brother despite the abuse, the trial court

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[50] §921.141, Florida Statutes and the Federal Constitution's Eighth Amendment and Florida's Article I, section 17 which prohibit unusual punishment all require complete consideration of relevant mitigating evidence in a capital eentencing.

[51] Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

kept the evidence out. R 565. In cross, the state emphasized other family members were abused, R 565, and Daniel has a good work record. R 566. The prosecutor brought out that other victims of child abuse grow up without probleme during questioning of a defense expert who opined Mr. Elledge's upbringing caused his behaviors. R 636. The court ruled this evidence relevant. Ibid. The prosecutor urged the court reject child abuse as a mitigating circumatanee since other abused family members had not turned to crime. R 2680.

Daniel Elledge wae clearly competent to testify what influenced his own upbringing: this Court allows lay strangers to testify about a person's Character with a mere five hours observation. See Gardner, 480 So.2d at 93. The state's own questions and arguments put the character of Mr. Elledge's family at issue by suggesting the child abuse inflicted on Mr. Elledge and Daniel did not influence Mr. Elledge's mental state since Daniel wae not similarly affected. Denying a defendant an opportunity to rebut or explain damaging state evidence in a capital sentencing proceeding violates due process. See Skipper, supra; Gardner v. Florida, 430 U.S. 349, 362 (1977); see also McCrae v. State, 395 So.2d 1145, 1151 (Fla. 1981) (prosecutor may go into details of defendant's prior convictions when defense opened door by misleading jury on seriousness of prior offense). Allowing Daniel to explain why he pulled through his dismally abusive childhood would rebut the thrust of the state's evidence that William's childhood did not affect hie later behavior. It would put the full picture of the Elledge household and its effects before the jury, rather than the cribbed snapshot omitting facts damaging to the state's theory. The trial court erred in excluding this evidence.

Alternately, if this Court rules this evidence not relevant, then it must find error in allowing the prosecutor to bring out the fact that: other victims of child abuse, completely unrelated to Mr. Elledge, made appropriate social adjustments. R 636. This evidence wae so remote and collateral aa to be irrelevant; it prejudiced Mr. Elledge by suggesting the abuse he suffered as a child had nothing to do with his later behavior.

POINT XI

STRIKING TESTIMONY SHOWING THE VICTIM USED DRUGS VIOLATED MR.

ELLEDGE'S RIGHT TO CONFRONT WITNESSES AND PRESENT MITIGATING EVIDENCE IN A CAPITAL PROCEEDING.

The court erred by striking cross about the multiple needle marks on Strack's body. The medical examiner, Fatteh, testified on direct that the blood screen performed on Strack revealed only the presence of alcohol and nothing else. R 460. During cross, he testified Strack had 15 needle puncture marke on her right elbow and 2 on her left hand. The court struck this cross, declaring in the jury's presence the marks irrelevant since no evidence euggeated use of hard drugs when Strack died.[52] R 466-7.

Preventing Mr. Elledge from presenting this relevant evidence harmed his caee. In his confession, Mr. Elledge stated the victim wae intoxicated before she died.[53] R 408. The marks demonstrate in-toxication from the use of druge injected by needle and support Mr. Elledge's account Strack smoked marijuana by showing the victim tended to use illegal substances. The victim's intoxication establishes a defense to the especially heinoua, atrocious, or cruel (HAC) aggravator. Strangulation of an intoxicated victim who feels little pain or fear is not HAC. See Rhodes v. State, 547 So.2d 1201, 1208 (Fla. 1989); Hereoq v. State, 439 So.2d 1372, 1380 (Fla. 1983). In Rhodes, evidence that the victim was known to frequent bars and be a heavy drinker together with the defendant's statements on her condition made HAC inapplicable.[54] The court below refuaed to admit similar evidence showing the victim used hard druge which would have corroborated Mr. Elledge's claim she was intoxicated. The evidence of Strack's drug use also supports evidence she sexuallyteased Mr. Elledge. The connection between proetitution and drug use *is* well known: drug use suggests the victim implicitly exchanged sex play for marijuana. Mr. Elledge needed to establish the teasing to explain his violent reaction: he had broken up with his

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[52] This comment in effect instructed the jury this fact was untrue. Fatteh also said teats would likely not detect drugs in the body longer than 24 hours and marijuana was not detectable in 1974. R 468.

[53] The state disputed that Strack wae intoxicated by way of Fatteh's direct testimony and that of the bartender, Janet Pocis, who said Mr. Elledge and Strack did not appear drunk when they left the bar. R 360.

[54] Even when the victim is aware enough for HAC to apply, intoxication can lessen the weight of the aggravator.

girlfriend the previous day and reacte(in a drunken, stoned rage after the teasing. R 399.

Mr. Elledge has the right to full cross-examination of opposing witnesses under both the Sixth Amendment to the Federal Constitution and Article I, S16 of the Florida Constitution.[55] See Coxwell v. State, 361 So.2d 148, 150 (Fla. 1978); Coco v. State, 62 So.2d 892, 895 (Fla. 1953). This Court recognizes the right to confront and cross-examine witnesses applies to capital eentencing proceedings. Rule 3.780(a), Fla.R.Crim.Pro.; see Rhodes, 547 So.2d at 1204; Walton v. State, 481 So.2d 1197, 1200 (Fla. 1986).

> [A] fair and full cross-examination of a witness upon the subjects opened by the direct examination is an absolute right . . . which muet always be accorded by the person against whom the witness is called, and this is particularly true in a criminal case . . . wherein the defendant is charged with murder in the first degree. . .
>
> It is stated in 58 Am.Jur., page 350, Section 629, and we quote with approval:
>
> ". . . if a question is within the scope of direct examination it is not objectionable on cross- examination because it tends to establish a defense to the action."
>
> It is further stated . . ..
>
> "[C]ross -examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut, or make clearer the facts testified to in chief by the witness on cross-examination."

Coco, 62 So.2d at 895. It is proper to cross about physical evidence within the witness's knowledge which tends to modify, rebut, supplement, or clarify the direct testimony. Id. at 894; see Zerquera v. state, 549 So.2d 189, 192 (Fla. 1989); Knight v. State, 97 So.2d 115, 119 (Fla. 1957). In Coco, the defendant argued misidentification and attempted to establish - via the cross of an officer who testified he lifted the fingerprints - that prints taken from a murder weapon did not match his own. This Court held restricting testimony about

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[55] Because the right to confront witnesses increases the reliability of the result, it is also mandated by due process, see Ake v. Oklahoma, 470 U.S. 68, 77-83, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985)(procedures substantially increaeing reliability in criminal cases required by due procees), and the heightened reliability required in death eentencings. See Ibid; Proffitt v. Wainwriaht, 685 F.2d 1227, 1252-4 (11th Cir. 1982), modified 706 F.2d 311 (1983). Since the state introduced evidence suggesting Strackwaa not as intoxicated a0 Mr. Elledge claimed, refusing to allow him an opportunity to rebut or explain that evidence violates the due process right to present a defense. See Skipper, 476 U.S. I, 5 n.1.

the match or lack of it was error.

The court below refused to allow evidence of drug abuse by declaring what the facts were: that the deceased had no drugs in her body and so evidence suggesting she did was not relevant. This ipse dixit reasoning cannot distinguish the holdings of Coco Knight, and Zerquera. The medical examiner had knowledge of facts suggesting drugs may have been involved. Like the officer in Coco and the witnesses in Knight and Zerquera, his claim that the blood contained no drugs does not prohibit questioning him about facts which rebut or supplement that claim. The trial court erred in refusing to allow cross showing the victim used hard drugs after Fatteh testified on direct Strack's blood revealed only alcohol.

POINT XII

THE TRIAL COURT ERRED BY NOT HOLDING A RICHARDSON INQUIRY WHEN DEFENSE OBJECTED DOCUMENTS USED TO CROSS EXAMINE A DEFENSE WITNESS HAD NOT BEEN REVEALED.

Officer Kuck testified that Mr. Elledge had not been a problem prisoner. In cross, the prosecutor asked him to examine various disciplinary reports written by prison officers for alleged infractions by Mr. Elledge. At sidebar, defense objected the prosecutor had not provided him with the documents, but the trial court stated the prosecutor had no duty to anticipate rebuttal evidence.[56] R 548. The prosecutor argued the records were available to defense, and he had not gotten the name of the witness until three days before. Defenae claimed he had sent the names of prison officers a year before, although not certain this witneee wae one. R 548-9. The court overruled the objection without inquiry, not even allowing defense time to read the forty pages of documents. R 549. The prosecutor then had the witneae tell the jury the documents were many disciplinary report8 on Mr. Elledge. R 551.

The use of these documents constituted a discovery violation neceseitating an inquiry pursuant to Richardson v. State, 246 So.2d 771 (Fla. 1971) and its progeny. Rule 3.220(b)(1)(xi), Florida Rules of Criminal Procedure requires the

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[56] Both parties were proceeding under the discovery rules. The state filed a witness list in the 1977 resentencing. Motion to Supplement the Record, Attachment B. The proeecutor deposed Dr. Caddy, the defense expert witneea. R 630.

prosecutor disclose any tangible papers or items the prosecutor intends to use at trial which were not obtained from the accused. Failing to disclose these kinds of items triggers the need for a Richardson inquiry. See Ricci v. State, 550 So.2d 34, 36 (Fla.2d DCA 1989). Contrary to the statement of the trial court, Florida law requires prosecutore to reveal evidence in their poseession which they reasonably anticipate using in rebuttal. See Lucae v. State, 376 So.2d 1149, 1151 (Fla.1979); Stone v. State, 547 So.2d 657, 659 (Fla.2d DCA 1989); Witmer v. State, 394 So.2d 1096, 1097 (Fla.1st DCA 1981). In Lucae, the defendant claimed to be intoxicated at the time of the offense; the State called a police officer not listed as witness in rebuttal. This Court held the officer should have been disclosed, but denied relief beeauee defenae counsel there did not object. Lucas, 376 So.2d 1151. Lucas requires disclosure of all witnesses which the prosecutor ahould reasonably anticipate calling. Stone, supra; Witmer, supra(citing cases). This Court must also require prosecutors reveal all tangible papers and items they reasonably anticipate using. Otherwise trial by ambush occurs, contrary to the rules' purpose. See generally James v. State, 453 So.2d 786 (Fla.1984).

No Richardson inquiry was held below, which inquiry requires:

> At a minimum . . . this inquiry should cover such questions as whether the state's violation was inadvertent or willful, whether the violation was trivial or substantial, and, most importantly, whether the violation affected the defendant's ability to prepare for trial.

State v. Hall, 509 So.2d 1093, 1096 (Fla.1987)(citing cases).; see Cherry v. State, 544 So.2d 184, 186 (Fla.1989); Duest v. State, 462 So.2d 446, 448 (Fla.1985). The trial court inquired on no point, moet importantly, nat on the effect on the defendant's ability to prepare. Mr. Giacoma wae not even allowed time to read the material much Less argue he could do more investigation.[57]

The court did nothing to determine if the violation waa willful or inadvertent. No attempt was made to clarify the conflict between the prosecutor's and defense counsel's statements about the prosecutor's awareness prison

[57] The court refused counsel time to read the forty pages of material to see if some might have been dismissed. R 549.

officers would testify. Not a shred o information appears on when or how the prosecutor came into poseession of these documents. Whether or not the etate can reasonably anticipate use of evidence must also be determined at a Richardson hearing, Ratcliff v. State, 561 So.2d 1276, 1277 (Fla.2d DCA 1990), and no such inquiry was made here. Even such record as exists shows the prosecutor knew he would use these documents before the witness testified: he collected and marked them before the cross when they were revealed. The proeecutor must inform defenae of discovery material am soon as it comes into his possession, if occurring during or shortly before trial. See Thompson v. State, 565 So.2d 1311, 1316 (Fla.1990); Lee v. State, 538 So.2d 63, 64-5 (Fla.2d DCA 1989). Also, on April 4, 1989, defense counsel subpoenaed both officers Kuck and Blye and a number of other officers to the reeentencing in April. R 1970. After resentencing was continued, defense again subpoenaed Kuck and Blye on July 26, 1989. Motion to Supplement the Record, Attachment A. Thus, the prosecutor should have known this type of testimony would be presented well in advance, yet gave no notice whatsoever the disciplinary reports would be used.

Nor doea it matter whether defense had access to the reports, although the record is unclear on this point. Discovery serves to put parties on notice of the issues as well aa insuring access to information. The fact that an opposing party might be able to discover evidence independently doea not eliminate procedural unfairnesa resulting when a party uses undisclosed material. Richardson rules apply to statements of defendants, see Cumbie v. State, 345 So.2d 1061 (Fla.1977), which would not be the case if the courts were concerned only with access to information. The state's claim defense counsel mhould have found the reports goes to the procedural unfairness of violation, whether defense has investigated the area and what more it could do. It cannot be determined on the cold record. See Ricci, 550 So.2d at 36 (failure to provide jewelry catalogue used to prove value required Richardson inquiry).

The failure to hold an adequate Richardson hearing is per se reversible error. See Hall, 509 So.2d at 1096-7(citing cases). This Court: must reverse and remand because the trial court failed to conduct a Richardson inquiry.

POINT XII

A MISTRIAL IS REQUIRED WHEN A PROSECUTOR INFORMS THE JURY A TAPED STATEMENT OF THE DEFENDANT HAS BEEN REDACTED ON MOTION OF DEFENSE.

The proeecutor told the jury a taped confession of Mr. Elledge contained other statements which had been removed at defense counsel's request. When the state sought to introduce two tapes containing Mr. Elledge's confession to the Strack homicide during testimony of Detective Devin, defense objected they were made from copies, not originals, thue violating the best evidence rule. R 469. After the court overruled the objection, the prosecutor revealed to the jury that the edits were made at the defense's request. R 470. Mr. Satz then established the tapes were made from the originals; the witness noted portions had been deleted.[58] R 471.

Comments on matters outside the evidence, especially in a way suggeeting defense counsel has hidden that evidence from the jury violates Florida law and federal due process standards. See Huff v. State, 437 So.2d 1087, 1090-1 (Fla.1983); Duque v. State, 460 So.2d 416, 417 (Fla.2d DCA 1984); Wheeler v. State, 425 So.2d 109, 110-1 (Fla.1st DCA 1983). In Duque, the court had excluded testimony of a doctor €or a discovery violation by the state; during closing arguments, the prosecutor told the jury about a statement the defendant made to the doctor. The Second District held the error fundamentally tainted the proceeding, requiring a mistrial. Likewise, telling Mr. Elledge's jury Mr. Elledge made additional statements to the police which have been excluded taints these proceedings. It allowed the jury to epeculate on what else Mr. Elledge told his police interrogators who had only one purpose in questioning him: to turn up evidence of crime. Although the prosecutor did not directly tell the jury other crimes were involved, the implication is similar to that in Wheeler. There, the prosecutor told the jury the defendant charged with drug offenses, supplied drugs to their schools which would get into their homes. The

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[58] These tapea had been previously redacted upon agreement of the parties. Defenae agreed "if that tape doesn't visibly reflect to the jury that something has been taken out to let them wonder what's missing". R 60. Later, defense moved for a mistrial because the jury heard the prosecutor say the tapes were redacted at counsel's request. R 507. The court denied that motion and a motion for a new hearing on that basis. R 507, 2702, 2711, 825.

First District reversed, holding the Statement "could have led the jury to believe that the prosecutor had information outside the record that the drugs sold by the defendant were destined to the places mentioned." Wheeler, 425 So.2d at 110. Similarly, the commente below would have led the jury to believe a statement about other crimes was kept from them. Mistrial was required.

POINT XIV

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

During voir dire, the court precluded defenae counsel from questioning jurors on their religious affiliations and ability to fairly consider mitigating circumstances. R 162, 188-190. The evidence below involved religious concerns and many mitigating circumstances.[59] Without objection, the court began voir dire:

> The lawyers just get up and aak you a bunch of questions, and most of them will appear intelligent. Sometimes they kind of get of€ on a deep end. It's my job to turn them around if they get too far.
> We are not going to ask you anything that's embarrassing to you. If we ask you anything that's embarrassing, don't answer it. Because all they can do is kick you off the jury.

R 85-6(e.a.). Nothing indicates the jury was sworn as required by the rules:

> Do you solomnly swear (or affirm) that you will answer truthfully all questions asked of you as proepective jurors, so help you God?

Rule 3.300(a), Fla.R.Crim.Fro. Restricting questioning and instructing not to answer questions separately and cumulatively violate Mr. Elledge's rights.[60]

The complete prohibition of voir dire on religion and ability to consider mitigating circumstances precluded Mr. Elledge from effectively exercising his cause and peremptory challenges. Both Florida and Federal courts require a thorough voir dire to insure jurors are capable of fairly deciding the case;

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[59] The jury discovered that Strack's body was abandoned in a church parking lot. R 351, 426. Defense argued an abundance of mitigating factora, set out in full in the Statement of the Facts and Point I, including the statutory mental/emotional mitigators.

[60] It denied him due process of law, the effective assistance of counsel and his right to a fair and impartial jury as to penalty, pursuant to the Federal Constitution's Fifth, Sixth, Eighth, and Fourteenth Amendments, Florida's Article I, §§2, 9, 16, 17, 21, and 22, Rules 3.251 and 3.300, Florida Rule of Criminal Procedure, and §§913, 918 and 921.141, Florida Statutes.

subject to check on repetitive or argumentative questioning, counsel must be allowed to question jurors "'to ascertain latent or concealed prejudgments.'" Stano v. State, 473 So.2d 1282, 1285 (Fla. 1985), quoting Jones v. State, 378 So.2d 797, 797-8 (Fla. 1st DCA 1979); see Gibbs v. State, 193 So.2d 460, 462 (Fla. 2d DCA 1967)(Adkins, J.). Denial of voir dire entirely is reversible error. See Barker v. Randolph, 239 So.2d 110 (Fla. 1st DCA 1970). Refusing questions on the juror's ability to follow the law to be applied in the ease precludes intelligent peremptory and cause challengee, violating the right to an impartial jury. See Pope v. state, 84 Fla. 428, 94 So. 865 (1923)(proper for prosecutor to aek whether jury could follow law on principals in murder case); Lavado v. State, 492 So.2d 1322 (Fla. 1986); Washinuton v. State, 371 So.2d 1108 (Fla. 4th DCA 1979); Moses v. State, 535 So.2d 350 (Fla. 4th DCA 1988). The Federal sixth Amendment requires meaningful questioning about issues on which a substantial number of jurors harbor opinions. See United States v. Dellinger, 472 F.2d 340, 366-369 (7th Cir. 1972).

The error in precluding questions on mitigating circumstances is seen by comparing Lavado and Washinaton. In Lavado, this Court held refusing to allow questions on the ability to accept a voluntary intoxication defense was error, and adopted district court dissenting opinion. Lavado, 492 So.2d at 1323.

> [i]t is apodictic that a meaningful voir dire is critical to effectuating an accused's constitutionally guaranteed right to a fair and impartial jury. [cites omitted] . . . What is a meaningful voir dire which will satisfy the constitutional imperative of a fair and impartial jury depende on the issues in the case to be tried. The scope of voir dire therefore "should be so varied and elaborated as the circumstances surrounding the juror under examination in relation to the case on trial would seem to require. . ."

Lavado v. State, 469 So.2d 917, 919 (Fla. 3d DCA 1985)(Pearson, J., dissenting), quoting Pinder v. State, 8 So. 837, 838 (1891). Similarly, the Fourth District holds it error to prohibit voir dire on the insanity defense, Washinaton, 371 So.2d at 1109, and on the juror's ability to fairly decide the case knowing the defendant is a convicted felon. Moses, 535 So.2d at 351. Likewise, meaningful voir dire in a capital case entails questioning jurors on their ability to accept mitigating circumstances. The statutory mitigators - potential 'defenses' to the death penalty - of extreme emotional disturbance, duress, and

capacity to conform conduct to the law's requirements, are similar to the guilt defenses of insanity and voluntary intoxication. Many jurors would not accept them as mitigating, just ae many do not accept insanity and intoxication as guilt defenses. Counsel must be able to intelligently strike those with doubts. The potential for jurors to be incapable of fairly judging nonstatutory mitigation is greater: the Legislature's failure to include them as statutory mitigation indicates their popular disfavor. Yet, the law requires they be considered. See Hitchcock v. Dugger, 481 U.S. 393 (1987). Preventing questioning on whether the jurors can fairly do so prevents striking incompetent jurors.

The restriction also violates the Federal Constitution's Eighth Amendment which requires especially probing voir dire of capital sentencing juriee. In Turner v. Murray, 476 U.S. *28* (1986), the Court held a capital defendant charged with an interracial crime has a right to voir dire on racial prejudice. The Court relied in part on the decisions unique to a capital sentencing, explicitly baaing its decision of the subjective choices on mitigators argued in thie case. Turner 476 U.S. at 34. It is axiomatic if question0 are required on topics which indirectly influence such decisions, then the Eighth Amendment a100 requires voir dire directly on the ability to decide mitigators. Prohibitting euch questions violates that provieion and Florida's Article I, §17.

Similarly, knowledge of a person's religious background, relevant to views on the death penalty and aggravating and mitigating evidence, allows counsel to intelligently identify and strike potentially biased jurors. The right to meaningful voir dire includee the right to ask questions which will root out hidden biases and prejudices. Thue, in Dellinaer, in which the defendante were prominent anti-war activists charged in connection with those activities, the Seventh Circuit reversed because the trial court refused to ask jurors about opinions on the Vietnam War, members of the counter-culture such as hippies, and confrontations between police and demonstratora. The right to an impartial jury entails the right *to* both cause and peremptory challenges. "At a minimum, when requested by counsel, inquiry must be made into matters where the likelihood of prejudice is so great that not to inquire would risk failure in assembling an

impartial jury." Dellinger, 472 F.2d at 368. In United States v. Ible, 630 F.2d 389, 394-5 (5th Cir. 1980), a counterfeiting case where the money was used to buy alcohol, the Court, reversing on other grounds, also held the defendant had a right to ascertain jurors' "moral or religious beliefs about alcohol." Questions on their views on alcohol. alone was not enough. Just as many people base their views of alcohol on religion, many base their views of the death penalty on religion. One juror below volunteered euch a belief. R 321. The viewpoint may be the expressed position of their denomination, or more often, the subtler influences of religioue beliefs. E.g, one who believes in a retributive God will focue primarily on the nature of the offense and give very little weight to mitigating factors concerning a defendant's background and life. As in Turner, supra, couneel has a right to root out hidden prejudices to insure fair Consideration of the mitigating evidence as required by the law.

Assuming arguendo, thie Court holde defense may not voir dire on religious background in capital cases generally, a specific need €or inquiry appeare below. The prosecutor twice brought out that the deceased's body wae found in a church parking lot. R 350-351, 421-426. This fact may inflame religioue jurors as being sacrilegious, prejudicing a capital defendant. Cf. Booth v. Maryland, 482 U.S. 496 (1987). Intelligent challenges to avoid thie prejudice required knowledge of jurors' religious beliefs.

A voir dire in which counsel is not given truthful answers to questions violates hie right to a fair jury by cutting off intelligently exercised challenges, both peremptory and for cause. See Loftin v. Wilson, 67 So.2d 185, 192 (Fla. 1953); Mitchell v. State, 458 So.2d 819, 821 (Fla. 1st DCA 1984). The trial court's astounding instruction jurors not answer the questions posed them, in direct contradiction to their oaths (apparently unadministered) is fundamental error, trenching on Mr. Elledge's due process right to an impartial decision-maker. It rendered the entire voir dire unreliable; it is impossible to say what jurors were embarassed by what queetione and simply kept quiet. The court's instruction was emphasized by the prosecutor. R 105. The intereste of juetice compel correction of thie due process error even though no objection was

made below. See State v. Smith, 15 F.L.W. S659, S660-1 (Fla. December 20, 1990); Ray v. State, 403 So.2d 956, 960 (Fla. 1981). The instruction wae such that neither retraction nor rebuke would cure it. See Pait v. State, 112 So.2d 380, 385 (Fla. 1959). If the judge told the jury they should answer embarrassing questions, jurors would simply not know which instruction to believe. A shy juror would follow hie instinct and remain quiet. These errors, individually and cumulatively, denied a meaningful voir dire.

POINT XV

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

The court below refused to question the jurors in voir dire apart from one another.[61] During the questioning of the prospective jurors, they were exposed to numerous comments from their mates prejudicing Mr. Elledge. Mrs. Doyle deeired to ask why the crime occurred in 1974; defense objected and requested the question and answer be done without the other jurors, but the court overruled the objection. R 153. she asked "why are we making this judgment so many years later?" R 155. In a Like vein, other jurors expresaed impatience with delays in executions. R 209-14, 284. One juror stated the case must be an important one for the elected State Attorney personally to try it. R 197. Another juror compared anyone committing multiple murders with Ted Bundy. R 211. A juror commented a relative found guilty of murder was out of prison in ten years. R 242. Most prejudicially, Me. Jones stated her opinion that "the victim's families will alwaye suffer for their loss and it will be a void that will never be filled." R 320.

Undoubtedly, had such material been introduced as evidence or argued by the prosecutor, this Court would find reversible error occurred. Nothing magical about a voir dire transforms prejudicial information into harmless information. Refusing, in a capital case, to conduct voir dire individually and eequeetered upon request, runs the risk that just this kind of prejudicial

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[61] Defense moved for individual, sequestered voir dire before trial. R 1583, 2551. The state opposed. R 1634, 2549. The court denied this request, R 2548, and again before trial. R 102.

information will infect the jury. When, as here, the jury is infected, it denies a defendant an impartial decision-maker contrary to due proceee, guaranteed by the Federal Constitution's Fourteenth Amendment and violates the heightened reliability required in death sentencing proceedings. Cf. Booth, 402 U.S. 496(heightened reliability requires no evidence of victim impact); Turner, 476 U.S. 28(heightened reliability requires probing voir dire on racial prejudice in capital trial involving interracial killing).

POINT XVI

THE *TRIAL* COURT DID NOT ADEQUATELY DEFINE NONSTATUTORY MITIGATING CIRCUMSTANCES.

Defense counsel moved the court give the jury numerous special jury instructions defining nonstatutory mitigating circumetancer.[62] The court denied them. R 715-6.R Mr. Giacoma objected that the instructions were needed to insure the mitigators were not eomething "that defense counsel dreamed up," and that the jury would consider them. R 716-7. The trial court had rafuaed to allow voir dire on mitigators, during which the prosecutor said "Now, what may be mitigation to some, may not be mitigation to others." R 318. In hie summation, the prosecutor invited the jury to apply their own predilections on what conetituted mitigation:

> So look at each and every one of these mitigating circumetancee that you can consider.
> And one of them that you <u>might</u> Consider, I am sure Mr. Giacoma will probably bring this up . . . is child abuee . . . And I submit to you that that mitigating circumetance, <u>if you consider it a mitigating circumetance</u>, is far outweighed by the aggravating circumstances. . . .

R 764 (e.a.). Failing to instruct on well-established, specific nonstatutory mitigating circumetancee on motion of defense when a prosecutor argues the jurors may decide for themselves what is mitigating violates due proceee and the Eighth Amendment requirement all mitigating evidence be Considered in a death

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[62] Defense moved the court instruct the jury, if reasonably convinced that Elledge:

> (I) cooperated with law enforcement; (2) euffered alcohol abuee, during his life; (3) waa the victim of a homosexual rape; (4) was a victim of child abuse; (5) was affected by the use of alcohol or marijuana; (6) hae exhibited good behavior in prison during recent years; (7) ha8 had personal growth during recent years; or (8) wae ever dependent upon drugs, during his lifetime,

it should consider these facts as mitigating. 2648-2654, 2657.

sentencing proceeding.

This Court rejected a like claim in Robinaon v. State, 16 F.L.W. S107, S108 (Fla. January 15, 1991), holding the 'catch-all' nonstatutory jury instruction adequately defines nonstatutory mitigation. This Court must overrule Robinson in light of the recent decisions of Lucar v. State, 568 So.2d 18 (Fla.1990), Campbell v. State, 571 So.2d 415 (Fla.1990), and Parker v. Dugger, 111 S.Ct. 731 (1991). In Campbell, originally issued in June,[63] this Court described, in a non-exclusive list, various categories of well-defined nonetatutory mitigating circumstances, including (1) abueed childhood and (2) remorse, potential for rehabilitation, and good prison record. Campbell, 571 So.2d at 429 n.4. However, this Court does not presume the trial court ie aware of what is being proven and will not fault mitigation findings unless defenee counsel explicitly points out the categoriee of mitigation which she is attempting to prove. Lucas, 568 So.2d at 24. what this Court does not explain in Robinson, is how a lay jury can understand what is to *be* proven and what is mitigating when experienced trial judges, with the benefit of twelve years of case law on what constitutes mitigation, must be told that by defense counsel.

Parker also supports the proposition that juries must be told what the nonstatutory mitigation is upon request. In Parker, the Supreme Court found the appellate review inadequate because this Court failed to consider *the* non-statutory evidence in declaring error harmless and finding the jury override valid. The Court noted the difficulty in defining nonstatutory mitigation:

> Nonstatutory evidence, precisely because it does not fall into any predefined category, is considerably more difficult to organize into a coherent discussion; even though a more complete explanation is obviously helpful to a reviewing court, from the trial judge's perspective it is simpler merely to conclude, in those cases where it is true, that such evidence . . . does not outweigh the aggravating circumstaneea.

Parker, 112 S.Ct. at 738.

Given the lack of clarity in defining nonatatutory mitigation as recognized by this Court in Lucas and the Supreme Court in Parker, putting this issue before the jury in lump form, with no instructions on what can mitigate, invites

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[63] Campbell v. State, 15 F.L.W. S342 (Fla. June 14, 1990).

the jury to decide for itself what is mitigating. In light of argument from a prosecutor to do just that, the jury below, in reasonable probability, did not coneider the mitigating evidence presented. See Bovd v. California, 110 S.Ct. 1190, 1198-1200 (1990).[64] In Boyd, the Court approved use of a catch-all instruction, but one with a wider scope than Florida's catch-all. Also, in Bovd, the prosecutor explicitly told the jury to weigh the evidence of the defendant's background, removing any reaeonable probability that they jury did not so weigh it. Bovd, 110 S.Ct. at 1201. In contrast, the proeecutor here explicitly told the jury to weigh only those mitigators the jury felt were mitigating. Failing to instruct on and define mitigators was error.

The error is especially pronounced for not instructing on Mr. Elledge's recent personal growth and adjustment to prison mitigate. The jury below was told to coneider "any other aspect of the Defendant's character or record, and any other circumstance of the offense." R 798. This Court recognizes prison behavior "is clearly irrelevant to [a defendant's] character, prior record, or the circumstances of the crime at the time of the killing." Hitchcock v. State, 16 F.L.W. S23, S24 (Fla. December 20, 1990). However, capacity for rehabilitation, remorse, and good adjustment to prieon are relevant mitigators. See Ibid. (rehabilitation); Campbell, 571 So.2d at 419 n.4; Skipper, 476 U.S. 1. If the jury reads the catch-all instruction in a manner similar to this Court in Hitchcock, it will ignore valid mitigating evidence. The refueal to specifically instruct on these mitigatore, together with the prosecutor's arguments, resulted, in reaeonable probability, in the jury ignoring relevant mitigating evidence, contrary to the Eighth Amendment's guarantee.

POINT XVII

THE COURT COMMITS PREJUDICIAL ERROR BY ALLOWING THE JURY TO GIVE DOUBLE CONSIDERATION TO THE SAME ASPECT OF THE OFFENSE WHEN THE PROSECUTOR IMPROPERLY ARGUES THE HOMICIDE VICTIM'S RAPE ESTABLISHES BOTH FELONY (RAPE) AND PRIOR VIOLENT FELONY AGGRAVATORS.

Defense requested that the court instruct his jury:

> The State may not rely upon a single aepect of the

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[64] Reasonable probability means the chance the jury construed the instruction to exclude relevant mitigating evidence is less than more-likely-than-not, but more than a mere possibility. Bovd, 110 S.Ct. at 1198.

> offense to establish more than a single aggravating circumstance. Therefore; if you find that two or more of the aggravating circumstances are supported by a single aepect of the offense, you may only consider that as supporting a eingle aggravating circumstance.

R 2634. The court denied the instruction after the prosecutor opposed the request because the prosecutor claimed the rape of Strack could establish both a prior violent felony and the rape felony aggravating cireumstancea. R 704. The proeecutor argued to the jury that Strack's rape established both the felony (rape) and prior violent felony aggravators. R 757, 762. The court refused to instruct the jury not to rely on the same aspect of the offense to establish more than one aggravator, R 2634 and specifically instructed rape could be a prior violent felony. R 795. Strack's rape was the only rape in evidence.

The jurors' coneideration of Strack's rape ae a prior violent felony was error under state law and federal due procese and freedom from cruel and unusual punishment guarantees. See Wasko v. State, 505 So.2d 1314, 1317-8 (Fla.1987); Patterson v. State, 537 So.2d 1257, 1263 (Fla.1987). In Wasko, this Court held that contemporaneous convictions of violent felonies on the homicide victim could not be considered prior violent felonies. Although Waeko doea not cite to the doubling rule of Provence v. State, 337 So.2d 703 (Fla.1976), that rationale underlies its decision. In Provence, this Court held it error to find both the pecuniary gain and felony (robbery) aggravators established by evidence the defendant robbed the victim; otherwise, a robber would automatically start with two aggravators while one committing any other listed felony would have but one. Similarly, defining 'prior violent felony' to include crimes against the homicide victim would double the same aspect of the offense since they already are aggravated under $921.141(5)(d), the felony aggravator. Any felony murderer would automatically start with two aggravators against him; like Provenee, such a reeult is insensible. In light of argument urging the jury find two aggravators baaed on the rape, not giving the anti-doubling instruction was error.

Cases rejecting like claims are distinguishable. In Suarez v. State, 481 So.2d 1201, 1209 (Fla.1985), the Court held a mere listing of aggravating circumstances which could be given double conaideration was no error. The

defenee below, however, requested a specific doubling instruction, and the prosecutor improperly argued the same aspect should establish two aggravators. Mendyk v. State, 545 So.2d 846, 849 (Fla.1989) upheld a refusal to instruct on doubling, saying it was not a correct statement of the law. The court found Mendyk's crime aggravated in part by the cold, calculated, and premeditated, and the heinous, atrocious, or cruel aggravators. In Garcia v. State, 492 So.2d 360, 366 (Fla.1986), cited at Mendyk, 545 So.2d at 849 to show the instruction incorrectly stated the law, this Court held the same evidence could establish these two aggravators. No error would occur to doubly consider them on the same evidence. In contrast, considering the rape to establish both the felony and prior violent felony aggravators is error; the anti-doubling instruction correctly states the law and should have been given.

POINT XVIII

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

The jury was continually told their function was advisory. The judge Stated several times in hie opening remarks the jury role is advisory and the court is not required to follow it. R *86-87.* "The jury does not impose punishment. The imposition of punishment is the function of the Court rather than the function of the jury." R 87. Pour times, the court deecribed their role as merely advisory without elaboration, although once stating their recommendation was entitled to great weight. R 799, 800, 801. The prosecutor also repeatedly deecribed the jury's penalty role as merely making a recommendation. R 111, 132, 138, 146, 296.

> It is constitutionally impermissible to rest a death sentence on a determination by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.

Caldwell v. Mississippi, 472 U.S. 320, 328-9 (1985); see Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988), but see Reed v. State, 560 So.2d 203 (Fla. 1990). As in Caldwell and Mann, the jury was led to believe that responsibility €or the

death sentence rested elsewhere.[65] This constituted harmful error. Although this Court has previously denied like claims, in State v. Hamilton, 16 F.L.W. S129, S132 (Fla. January 17, 1991), it recognized the fruitlessness of refusing adoption of constitutional standards adopted by the Eleventh Circuit since collateral attack will vacate the result. It should now adopt Mann and reverse Mr. Elledge's death sentence for resentencing.

POINT XIX

THE TRIAL JUDGE DID NOT EXERCISE REASONED JUDGMENT IN FINDING MITIGATING CIRCUMSTANCES AND SO LIFE MUST BE IMPOSED.

The sentencing order states:

> In hie attempt at eetablishing 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 etatutory mitigating circumstances, nor any mitigation whatsoever.

R 2688. Aside from this one paragraph and additionally finding Gaffney's murder was a prior violent felony, the sentencing order's findings virtually copy word for word the *1977* order. Motion to Supplement *the* Record, Attachment E. The order explicitly rejects two etatutory mitigating circumstances; the sum of its conclusions on nonstatutory mitigating evidence is:

> and this Court, baing of the additional opinion that NO statutory or non-statutory mitigating circumstances exist . . . .

R *2688.* The order says nothing about 13 other proposed mitigators, listed above at footnote 1.

This Court has long held the trial court errs if it does not exercise reaeoned judgment in finding and weighing aggravating and mitigating circumstances. See Bouis v. State, 559 So.2d 1113 (Fla. 1990); Lucae v. State, 417 So.2d 250 (Fla.1982). The court "must expreeely evaluate in its written order" whether each proposed mitigating cireumetance is supported by the evidence and, when a nonetatutory mitigator, truly mitigating in nature, Campbell, 571 So.2d at 419; see Bouie, supra; Lamb v. State, 532 So.2d 1051, 1054 (Fla.1988); Rogers

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[65] Mr. Elledge moved before trial to prevent denigration of the jury's role based on Caldwell and Mann, pointing out that great weight must be given a jury's penalty verdict under Tedder v. State, 322 So.2d 908 (1975). R 2043-2044. This motion waa denied.

v. State, 511 So.2d 526 (Fla.1987); see also Van Royal v. State, 497 So.2d 625, 628 (Fla.1986). The sentencing order must explicitly weigh each mitigator found, giving each some weight, although the sentencer has discretion to judge the weightinees. Campbell 571 So.2d at 419. S921.141 requires:

> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment ... .

§ 921.141(3), Fla. Stat. (1987)(e.a.). Failure to consider the sentencing evidence at all is a failure to exercise reaaoned judgment and requires this Court impose a life sentence.[66] Bouie, 559 So.2d at 1116; see Van Royal, 497 So.2d 625. In Bouie, the trial court submitted a written order substantially the same as its oral pronouncement, which stated:

> The court has considered the aggravating and mitigating circumstances presented in evidence in this cause and determines that sufficient aggravating circumstances exist, and that there are insufficient mitigating circumstancee to outweigh the aggravating circumstancee.

Bouie, 559 So.2d at 1116. This Court described the findings as totally deficient, mere conclusory statements:

> which fail to show the independent weighing and reasoned judgment required by the statute and caselaw and do not meet our requirements. Because of the abeence of requisite findings, we therefore follow the statutory mandate and reduce Bouie's sentence to life imprisonment with no possibility of parole for twenty-five years.

Id. (e.a.).

The order here also makes a conclusory statement, just a0 in Bouie, that no mitigating circumstancee exist and makes no findings at all for 13 proposed mitigators.[67] The court simply copied its previous sentencing order, adding a claim to have considered all the mitigating evidence. Rogers and Lamb, both

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[66] This reasoned judgment is also required by the guarantees of due proceaa and freedom from cruel and unusual punishment contained in the Federal Constitution's Fifth, Sixth, Eighth, and Fourteenth Amendments and Florida's Article I, §§2, 9, 16, 17, and 21. See Parker v. Dugger, 111 S.Ct. 731 (2991).

[67] Theae mitigating circumstances are detailed in the first footnote in Point I.

issued well before resentencing, show rejecting mitiga ors without discussing the evidence violates the plain meaning of the statute: lacking the requisite findings, it shows a lack of the reasoned judgment required by statute. Cf. Parker, supra. Reliance on previous proceedings does not comport with the statute either. See Huff v. State, 495 So.2d 145, 152 (Fla.1986). As in Bouie and Van Royal, a life sentence must be imposed for failure to exercise reasoned judgment. In the alternative, this court must remand for a new sentencing in which the mitigating circumstances are adequately considered by the sentencer.

POINT XX

THE SENTENCING ORDER DOES NOT CLEARLY STATE FINDINGS IN AGGRAVATION *AND* MITIGATION; NO VALID, REASONABLE INTERPRETATION OF PART OF THE ORDER EXISTS.

The sentencing order states:

> Pursuant to Law, this Court makes the following findings of fact:
>
> (1.) 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 aseault in the State of Colorado. This Defendant has been confined in various institutions for a greater portion of his life for various other crimes.

R 2686. Thie section of the order repeats nearly word for word a section of the 1977 sentencing order, except the court finds two murders instead of one. Elledae, 408 So.2d at 1023 n.3.

Several errors appear. First, whatever aggravator or mitigator the trial court meant to be finding, its conclusions that Mr. Elledge waa convicted of felonious assault and spent long periods incarcerated are invalid. ***Not*** a shred of evidence in this record ehowa Mr. Elledge waa convicted of felonious assault in Colorado or spent his moat of hi8 life incarcerated. These specific findings must be reversed for insufficiency of evidence. Further, both the prior violent felony aggravator and the no significant criminal history mitigator are concerned with criminal conduct, not the resulting sentences; thoee sentences have no relevance to any aggravating or mitigating factor.

Second, if the court was relying on prior proceedings to make theae findings, it waa error. See Huff v. State, 495 So.2d 145, 152 (Fla.1986); see

also King v. Dugger, 555 So.2d 355 (Fla. 1990)(resentencing is completely new proceeding). If the court relied on extra-record information, Mr. Elledge was denied an opportunity to confront the witnesses and rebut or explain the evidence. See Gardner v. Florida, 430 U.S. 349, 361-2 (1977). This Court must at least remand to give him such an opportunity.

Third, this Court has previously rejected characterizing the nearly identical finding in 1982 as aggravating under the prior violent felony circumstance, calling it "clearly obfuscatory." Elledge, 408 So.2d at 1023-4. Mr. Elledge validly waived the no significant criminal history mitigator in this resentencing. R 1895. The state acknowledged he waived this circumstance. R 1620. This waiver prevents both the court and proeecutor from using otherwise inadmissible evidence of prior crimes. See Maggard v. State, 399 So.2d 973, 978 (Fla.1981); Fitzpatrick v. State, 490 So.2d 938 (Fla.1986). The court's use of the evidence to rebut a validly waived mitigating circumstance is error.

Fourth, assuming, arguendo, this Court reshapes the order to find the trial court was attempting to establish the aggravating circumstance of prior violent felonies, consideration of non-violent, non-capital offenses was improper by the plain words of the statute. §921.141(5)(b), Fla.Stat. (1989); see Spaziano v. State, 393 So.2d 1119, 1123 (Fla.1981). Although other facts might support the prior violent felony aggravator, this untested, unknown information about other: offenses affected the weight the trial court gave the aggravator and requires a resentencing.

Fifth, the confusion in what the court meant to find and what evidence it relied on at least requires remand for a new order.[68] See Mann v. State, 420 So.2d 578, 581 (Fla.1982); Lucas v. State, 568 So.2d 18 (Fla.1990); cf. Parker, 111 S.Ct. 731 (1991). In Lucas, this Court remanded for reconsideration by the judge of findings becauee they were not made with the clarity needed for meaningful review. This order suffers from the same flaw.

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[68] Mr. Elledge argues elsewhere that the trial court failed to exercise reasoned judgment in imposing sentence, requiring a life sentence be imposed; this argument assumes without conceding this Court will adversely decide that issue.

POINT XXI

THE TRIAL COURT'S RELIANCE ON PSYCHIATRIC REPORTS NOT IN THE RECORD TO REJECT MITIGATING CIRCUMSTANCES VIOLATED MR. ELLEDGE'S DUE PROCESS AND CONFRONTATION RIGHTS AND CONSTITUTED CRUEL AND UNUSUAL PUNISHMENT.

The sentencing order rejects the extreme mental/emotional dieturbance mitigator, but relies on two psychiatric reports which do not appear in the record.[69] R 2687. The trial court's use of these reports when their authors never submitted to cross examination violated Mr. Elledge's right to freedom from cruel and unusual punishment, confront witnesses and rebut evidence. See Proffitt v. Wainwright, 685 F.2d 1227, 1251-5 (11th Cir. 1982), modified 706 F.2d 311, cert. denied 464 U.S. 1002 (1983); Rhodes v. State, 547 So.2d 1201, 1204 (Fla. 1989); see also Gardner v. Florida, 430 U.S. 349, 358-9 (1977)(due process violated when judge sentenced defendant baaed in part on undisclosed preeentence investigation). In Proffitt, the trial court coneidered a written report by a psychiatriet between the jury recommendation and pronouncement of eentence. The Eleventh Circuit held use of this report violated Proffitt's rights to confront the witness and rebut state evidence, based on the Eighth Amendment need for heightened reliability in death eentencings. Proffitt, 685 F.2d at 1254-5. In Rhodes, a taped statement by a victim of the defendant's prior violent felony was introduced; the inability of the defendant to cross this victim violated his con-frontation righta. Uee of nonrecord psychiatric reports, without providing Mr. Elledge an opportunity to croes-examine its authors, violates hie confrontation and due proceae rights.

POINT XXII

THE EVIDENCE WAS NOT SUFFICIENT TO PROVE MR. ELLEDGE COMMITTED THE MURDER FOR THE PURPOSE OF AVOIDING OR PREVENTING AN ARREST.

The trial court states Mr. Elledge killed Margaret Strack with the purpose of avoiding a lawful arrest, finding he killed her after she had told him she would call the police. See §921.141 (5)(e), Fla.Stat. (1989). R 2687. In his confession, Mr. Elledge states Strack sexually teased him. He grabbed her by the throat and wrist when she refused to have sex; she scratched his wrist, making

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[69] The court may be relying an the hearsay opinions of peychiatrists brought out in the cross examination of Dr Caddy; such evidence would not be competent, as explained in Point 11.

him angry. He choked her. She agreed to have intercourse, but when he started to have sex, she said she would call the police and began to scream. Mr. Elledge choked her with both hands, raping and killing her, R 414–7, but hie confession shows anything but a calculation about trouble with the police. "I can't really say whether I did or I didn't because I was totally out of control." R 419. "I can't recall if I was or not. I was totally blank , . ." Ibid. Nowhere did he say he killed Strack to prevent her from calling the police.[70]

To show a defendant kills with the purpose to avoid an arrest, the state must show "that the dominant or only motive for the murder was the elimination of the witness." Menendez v. State, 368 So.2d 1278, 1282 (Fla.1979)(e.a.); see Scull v. State, 533 So.2d 1137, 1142 (Fla.1988). Aggravators must be proven beyond a reasonable doubt; they are not if the record shows a reasonable, uncontradicted hypothesis of innocence. See Eutzy v. State, 458 So.2d 755, 757-8 (Fla.1984). "Not even 'logical inferences' drawn by the trial court will suffice to support a finding of a particular aggravating circumstance when the state's burden has not bean met." Clark v. State, 443 So.2d 973, 976 (Fla. 1984). Absent "clear proof beyond a reasonable doubt that the killing's dominant or only motive" was eliminating a witness, the aggravator cannot be found. Rogers v. State, 511 So.2d 526, 533 (Fla.1987); see Garron v. State, 528 So.2d 353, 360 (Fla. 1988); Cook v. State, 542 So.2d 964, 970 (Fla.1989).

The reasonable hypothesis that Mr. Elledge killed Strack in a rage to her resistance to sex is uncontradicted. Comparison with Garron, Rogers, and Cook show proof of motive was insufficient. In Garron, the aggravator was struck although the defendant shot the victim:

> while she was talking on the telephone with the operator asking for the police. . . Here, there is no proof as to the true motive for the shooting . . . Indeed, the motive appears unclear. The fact

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[70] The trial court, in accepting Mr. Elledge's plea to murder, found his testimony to the same effect established only felony murder, not premeditated murder. R 2005–6. Dr. Caddy testified Mr. Elledge suffered from pathological intoxication and impulse control disorder. R 600, 602. This episode was triggered because Mr. Elledge had split with his girlfriend the day before; he waa pathologically intoxicated; he faced sexually provocative behavior followed by a refusal to have sex; and his childhood traumas of physical and sexual abuse resulting in impulse control disorder rendered him incapable of controlling hie actions. R 605-7, 612-3.

that Tina was on the telephone at the time of the shooting hardly infers any motive on the appellant's part.

Garron, 528 So.2d at 360. In Rogers, the defendant thrice ahot a grocery employee during a robbery attempt. He told his cadefendant he did so after the man slipped out of the back of the store because the victim had been "playing hero." This Court held the evidence failed to establish the dominant motive for the murder was to avoid arrest. Rogers, 511 So.2d at 533. In Garron, the witness was actually trying to call the police; a threat to call alone is not sufficient to prove motive. In Rogers, Rogers' statement shows he realized the victim was trying to get to the police, but he killed in anger over the victim's actions, not to avoid arreat. Similarly, Mr. Elledge's confession shows he was primarily motivated to have sex, and killed not to avoid arrest but in anger over the resistance - her fighting and screaming and threat to call the police. In Cook, the defendant's statement he ehot the victim " 'to keep her quiet beeauae ahe waa yelling and screaming' " was insufficient to find his motive was to avoid arreet because "Cook shot instinctively, not with a calculated plan to eliminate Mrs. Betancourt as a witness." Cook, 542 So.2d at 970(quoting Cook's statement). As in Cook, Mr. Elledge acted emotionally in reaction to his anger, not from a calculated plan. As in Cook, Rogers, and Garron, clear proof hie primary or only motive was to avoid arrest is lacking. This failure also violates the need for carefully channelled decieion-making in death cases. Cf. Mavnard v. Cartwriaht, 486 U.S. 356 (1988).

POINT XXIII

THE TRIAL COURT RELIED ON IMPROPER CONSIDERATIONS AND INSUFFICIENT EVIDENCE IN FINDING THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATOR.

The court found this crime was especially heinous, atrocious, or cruel (HAC) because Mr. Elledge choked Strack to death while raping her. §921.-141(5)(h), Fla.Stat. (1989). R 2687. The court relied on the disposal of the body to find HAC, and made no findings about Mr. Elledge's mindset. R 2687-8. Other evidence does not appear in the sentencing order. Mr. Elledge confessed that Strack was drunk and stoned. R 408, 411. A bartender testified she served Strack drinks the afternoon of her death, R 359, and the medical examiner, assuming this evidence is admissible, testified alcohol was found in her blood.

R 460. Uncontradicted evidence, detailed in the Statement of the Facts, ahows Mr. Elledge committed the crime in a drunken, stoned rage after Strack sexually teaeed him but then refused to have *sex.* He could not control his actione aa a result of intoxication, a failed marriage, a recent breakup with his girlfriend, and his own helpless victimization as a child by physical and sexual abuse.

The trial court erred in two ways. First, the evidence does not validly establish HAC. If the record shows an uncontradicted, reasonable hypothesis of innocence to an aggravator, it must be rejected as a matter of law. See Eutzy, supra; Clark, supra. In Rhodes v. State, 547 So.2d 1201 (Fla.1989), this Court held a strangulation death not HAC on facts very similar to these.

> We note, however, that in the many conflicting stories told by Rhodes, he repeatedly referred to the victim ae "knocked out" or drunk. other evidence supports Rhode's statement that the victim may have been semiconscious at the time of her death. She was known to frequent bars and to be a heavy drinker. On the night she disappeared, she was last seen drinking in a bar. In Herzog v. State, 439 So.2d 1372 (Fla.1983), we declined to apply this aggravating factor in a situation in which the victim, who was strangled, was semiconscious during the attack. Additionally, we find nothing about the commission of the capital felony "to set the crime apart from the norm of capital felonies" . . . Dixon. . . .

Rhodes, 547 So.2d at 1208. Like Rhodes, the evidence in this case raises a reasonable hypothesis that Strack was not in full possession of her faculties. She drank to excess and smoked marijuana; her body showed evidence of drug injections. The sexual teasing shows her judgment waa impaired.

Further, like Rhodes, the court pointed to nothing which set the crime apart from the norm of capital felonies, something to show the killer was 'conscienceless or pitiless.' This Court recognizes the constitution requires HAC findings be limited "to those conscienceless or pitiless crimes which are unnecessarily torturous to the victim." Smalley v. State, 546 So.2d 720, 722 (Fla.1989); see Proffitt v. Florida, 428 U.S. 242, 255 (1976) (plurality)(citing these words without others as appropriate limit on HAC). 'Conscienceless or pitiless' are mental attributes of the perpetrator; the limiting phrase connects the perpetrator's mental state to unneceeeary torture of the victim. Although this Court often approves HAC on appeal when the victim suffers extraordinary

mental or physical pain, the 'Conscienceless or pitiless' limit requires a crime in which the perpetrator coolly means for that pain to occur for HAC to apply. Porter v. State, 15 F.L.W. S353 (Fla. June 14, 1990); Cheeire v. State, 568 So.2d 908 (Fla.1990); see also Amazon v. State, 487 So.2d 8, 13 (Fla.1986)(irrational frenzy offsets HAC offense). In Porter, the Court struck HAC, relying on the 'conecienceless or pitiless' limit, holding the record was "consistent with the hypotheeis that Porter's was a crime of passion, not a crime that was meant to be deliberately and extraordinarily painful." Porter, 568 So.2d at 910. Chesire's crime was not HAC which:

> is proper only in torturoua murders - those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another . . . Since the evidence is entirely consistent with a quick murder committed in the heat of passion . . .

HAC was not proven. Cheeire, 568 So.2d at 912. The cases in which this Court approves HAC baaed on victim suffering simply means it finds evidence of that suffering sufficient to infer the 'conscienceless or pitiless' mindset of the one inflicting the pain. However, even if the victim suffers, when the circumstances of the offense show a reasonable, uncontradicted hypothesis that the perpetrator acts without this conscienceless or pitiless mindset, this Court will find HAC invalid as a matter of law. Rhodes, supra; see Teffeteller v. State, 439 So.2d 840, 846 (Fla. 1983); Mills v. State, 476 So.2d 172, 178 (Fla.1985). Teffeteller's victim "sustained massive abdominal damage due to the shotgun blaet but remained conecious and coherent for about three hours." Teffeteller, 439 So.2d at 842. This Court held:

> The fact that the victim lived for a couple of hours in undoubted pain and knew that he waa facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm of capital felonies.

Id. at 046; accord Mills, supra. Strack, drunk and stoned, suffered less; that suffering alone does not make the crime HAC. The circumstances of this crime show Mr. Elledge acted without intent: to cause pain. He reacted in a drunken, atoned rage after Strack sexually teased him but then refused to have eex. His inability to control his actions, a result of his pathological intoxication and victimization by physical and sexual abuse as a child, shows he lacked the

'conscienceless or pitiless' mental state required. Nothing conflicts with this reasonable hypothesis showing HAC inapplicable: it must be struck.

Second, the court should not have Considered eventa after Strack died or lost consciousness in establishing HAC. See e.g. Jones v. State, 569 So.2d 1234, 1238 (Fla.1990)(citing cases; improper to consider sexual abuse of corpse in finding HAC); Herzog, supra(events after victim loses consciousness do not establish HAC). Mr. Elledge's disposal of the body was not relevant to HAC. Even if this Court finds HAC validly established, consideration of these prejudicial, irrelevant facts affect the weight given HAC and require this Court to remand for a judge resentencing. Cf. Jones. supra(instructing on HAC harmful error when jury could consider treatment of the corpse). These errors also violate the need for carefully channelled decision-making. Cf. Maynard, supra.

POINT XXIV

THE TRIAL COURT ERRED IN FINDING THE FELONY (RAPE) AGGRAVATOR WHEN FINDING ONLY A FELONY MURDER EASED ON THAT RAPE IN TAKING THE PLEA.

When Mr. Elledge pled to first degree murder and rape, the court took his testimony to determine the plea's factual basis and determined a basis existed only for felony murder. R 2000-6. However, the prosecutor argued the rape aggravated this crime and the court found the rape aggravator. R 2687. This use of the felony aggravator in a felony murder case means §921.141(5)(d), Florida Statutes fails, as applied to Mr. Elledge, to narrow the class of death-eligible murderere and rationally guide the sentencer in deciding sentence.[71]

Sentencing schemes must minimize the chance of arbitrary infliction of death. If the statute uses aggravators as the means of reaching this and:

> [A]n aggravating circumetance must genuinely narrow the class of persons eligible for the death penalty and must reaeonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

Zant v. Stephens, 462 U.S. 862, 877 (1983); see Porter v. State, 15 F.L.W. 3353, 5354 (Fla. June 14, 1990)(aggravating circumstance of cold, calculated must have meaning different than premeditation element of murder to narrow class); see

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[71] Mr. Elledge argued before trial that §921.141(5)(d) violates the constitution as applied because it does not narrow the class of death eligible or guide the sentencer. R 1546-51, 1630-1, 2341-2, 2343-8. The court deniedthe motion. R 2340, 33-4.

also Lowenfield v. Phelps, 484 U.S. 231, 244 (1988)(statute may narrow in definition of crime eligible for death). Allowing death on the class of all felony murders does not rationally narrow the claes.

The felony aggravating circumstance should apply only when the defendant is a principal to a premeditated murder. Under that definition, the addition of a felony aggravator would not expand the class of death eligible to include all first degree felony murders. See State v. Cherry, 257 S.E.2d 551, 567-8 (N.C. 1979). In Cherry, the North Carolina Supreme Court considered a similar felony aggravating circumstance and held it inapplicable to felony murder cases; since the felony was an element of the murder, it could not reasonably be a basis for aggravating that murder. Cf. State v. Mischler, 488 So.2d 523, 525 (Fla.1986) (element of scored felony offense cannot be used as basis for departure eentence). Applying the felony aggravatory to a felony murder similarly fails to rationally distinguish those eligible for death from those not. Since Mr. Elledge was guilty only of felony murder, this Court must hold the felony aggravator is invalidly applied to him.

POINT XXV

CUMULATIVE ERROR REQUIRES THIS COURT GRANT MR. ELLEDGE A RESENTENC-ING.

Florida courts consistently hold that although an error may not merit reversal by itself, that several errors in combination, require reveraal. See Nowitzke v. State, 572 So.2d 1346, 1350 (Pla.1990); Varnum v. State, 188 So. 346 (Fla.1939); Douglas v. State, 135 Fla. 199, 184 So. 756 (1938); Barnes v. State, 348 So.2d 599 (Fla.4th DCA 1977); Perkins v. State, 349 So.2d 776 (Fla. 2d DCA 1977). The Courts hold unpreeerved error otherwise barred can be considered in judging the harm from errors. Gibbs v. State, 193 So.2d 460 (Fla.2d DCA 1967); Pollard v. State, 444 So.2d 561 (Fla.2d DCA 1984); Gordon v. State, 449 So.2d 1302 (Fla.4th DCA 1984). Justice Adkins wrote on this issue while sitting as an associate on the Second District Court of Appeal.

> Objections were not made in the lower court, and the making of these comments waa not such fundamental error of law as to constitute the sole cause of reveraal. However, this error may be considered with other assignments of error in determining whether the substantial rights of the defendant have been injuriously affected.

Gibbs, 193 So.2d at 463.

The errors in this case, cumulatively and separately, subatantially prejudiced Mr. Elledge's rights.[72] The jury recommended death by the narrow margin of 8 - 4. The most clearly harmful of the errors involved the admission of incompetent and prejudicial evidence. The incompetent hearsay opinions of unqualified experts was the only material contradicting the defense's expert witness who presented substantial mitigating evidence on Mr. Elledge's state of mind. The state presented victim impact testimony in proving up prior violent felonies; also, an irrelevant, immaterial photo of the corpee of a collateral crime victim was admitted. In contrast, Mr. Elledge was prevented from presenting evidence that he would do well in prison; a juror explicitly asked about this very issue. Evidence that the victim used drugs to support hie claim the crime was not especially heinous was excluded. The trial court failed to consider uncontradicted evidence establishing mitigators, and did not exercise reasoned judgment in imposing sentence. This requires a life sentence be imposed. Other errors prejudice Mr. Elledge, cumulatively and separately. This Court must remand for resentencing before a jury or impose a life sentence.

POINT XXVI

FLORIDA'S **DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.**

Florida's aggravating circumstance that the crime was especially heinous, atrocioue or cruel (HAC) provides no limits or guides to imposing a death sentence. Its words are identical to Oklahoma's aggravator held facially vague in Maynard v. Cartwriaht, 108 S.Ct. 1853 (1988); see Shell v. Mississippi, 111 S.Ct. 313 (1990). HAC in Florida has no consistently applied limits: this Court refuses to specify any findings to limit HAC. Although in Mills v. State, 476 So.2d 172 (Fla. 1985), the Court held a lingering death from a gunshot wound did not establish HAC because "The intent and method employed by the wrongdoers is what needs to be examined," Id. at 178, it has never consistently defined the kind of intent which makes a murder not HAC. Since all murders require some kind of intent and method, all murders potentially qualify for HAC. Moreover,

[72] Not holding a Richardson inquiry, Point XII, is per se reversible error.

in Pope v. State, 441 So.2d 1073 (Fla. 1984), this Court criticized a jury instruction based on the Dixon definition of HAC, approved an instruction which, in substance, repeats the statute's words, and stated "No further definitions of the terms are offered, nor is the defendant's mindset ever at issue." Id. at 1078(e.a.). Unless this Court declares Pope overruled and Mills the law, and so strikes HAC in this case, this aggravator is unconstitutional. Although cases exist in which the Court strikes HAC because the victim euffered little, the Court has not limited HAC by specifying what kind of victim suffering, if any, is required to find HAC. Compare Grossman v. State, 525 So.2d 833, 840-1 (Fla.1988)(upheld HAC because officer was beaten and knew she was struggling for her life) with Brown v. State, 526 So.2d 903, 906-7 (Fla.1988)(Officer begged Brown not to kill him after struggle, but Brown did so; HAC struck). In Jennings v. State, 453 So.2d 1109 (Fla. 1984), vacated 470 U.S. 1002, reversed on other grounds, 473 So.2d 204 (1985) this Court approved HAC although it accepted that the victim had been unconscious; in Herzog, 439 So.2d 1372, it dieapproved use of facts after unconsciousness to prove HAC. Other cases show particular facts may establish HAC, but no case explains what is necessary to find in order for HAC to be established. This refusal to specify any necessary findings by the judge and jury mirrors the flaw in the Oklahoma construction of HAC. Refusal to specify what needs be found and resort to a totality of the circumstances teat creates unconetitutional vagueness.

> The discretion of a sentencer who can rely upon all the circumstances of a murder is as complete and as unbridled as the discretion afforded the jury in Furman. No objective standards limit that discretion.

Cartwright, 822 F.2d at 1491. A unanimous Supreme Court agreed. Cartwriuht, 108 S.Ct. 1853, 1857. Florida's HAC violates due process and constitutes cruel and unusual punishment. Any meaning this Court could deduce now for HAC would be a bald judicial declaration, not a finding of legislative intent. Due process requires legislatures, not juries or judges, give minimal guides to the law's meaning lest arbitrary enforcement occur. See Papachristou v. City of Jacksonville, 405 U.S. 156, 168-9 (1972); Potts v. State, 526 So.2d 104 (Fla. 4th DCA 1987), aff'd., State v. Potta, 526 So.2d 63 (Fla. 1988). Alternately, this Court

must narrow HAC as argued in Point XXIII. The trial court refused to declare §921.141(5)(h) unconstitutional on this ground. R 1534, 2307, 1632, 2305, 2304, 33, 2036, 2431, 2129, 2429, 2428, 54. The trial court could not rationally construe HAC, as shown by his errors in the sentencing order.

The aggravating circumstance the crime was committed for the purpose of avoiding an arreet would be constitutional if this Court limits its apparent holding in Hitchcock v. State, 16 F.L.W. S23 (Fla. December 20, 1990). Before Hitchcock, this Court required clear proof beyond a reasonable doubt that the dominant or only motive for a crime wae elimination of a witness for the factor to apply. If this Court continues to hold no such motive necessary, this circumstance hae been construed to mean it could apply to any crime. Such judicial. decision-making violates due process, the ex post facto clause, and the prohibition against cruel and unusual punishment requiring aggravators be limited. The statute is also unconstitutional since it fails to narrow the class of death-eligible. See Point XXIV.

The penalty jury instructions assure arbitrariness. They simply repeat the vague words of the statute for each aggravator which is insufficient to guide discretion. See Walton v. Arizona, 110 S.Ct. 3047, 3057 (1990); Cartwright, 486 U.S. 356, 363-4. In Shell v. Mississippi, 111 S.Ct. 313 (1990), the Court held a much more extensive definition of HAC did not pass constitutional muster. Since this Court ordered the vague short instruction be read, see Pope, 441 So.2d at 1078; Lemon v. State, 456 So.2d 885, 887 (Fla. 1984), Florida's statute, as construed, is unconstitutionally vague. Although the instruction read to this jury differed, it still contained vague disjunctive phraees condemned by the Supreme Court in shell. R 796. Mr. Elledge's jury, in reasonable probability, relied on the vague disjunctives to consider evidence which was not statutory or constitutionally appropriate aggravation. The denial of the special requested jury instruction defining HAC to require a purpose to torture was error. R 2607, 706. See also Amazon v. State, 487 So.2d 8, 13 (Fla. 1986)(HAC lessened by irrational frenzy; instruction refused at 2640, 717). The jury had unbounded discretion in deciding penalty. See Jones, 569 So.2d at

1238. The aggravator instruction also allow unehannelled discretion. Florida refuses to require trial courts define the underlying felonies in this felony aggravator. See Hitchcock v. State, 16 F.L.W. 523, 526 (Fla. December 20, 1990). The jury was never told the definition of the rape aggravator. R 795. Such uncontrolled discretion, a result of judicial decision-making, violates due process and the prohibition against cruel and unusual punishment.

A verdict by a bare majority violates due process and prohibition against cruel and unueual punishment. This error harmed Mr. Elledge since his jury voted for death by a vote of 8 - 4. A guilty verdict by less than a "substantial majority" of a 12-member jury is so unreliable as to violate due procese. See Johnson v. Louisiana, 406 U.S. 356 (1972); Burch v. Louisiana, 441 U.S. 130 (1979); cf. Parker, 111 S.Ct. 731(appellate review must comport with Eighth Amendment); Anders v. California, 386 U.S. 736 (1967) (although no constitutional right to appeal, appeal granted by state law must comply with due proceee). Among the states employing juries in capital sentencing, only Florida allows a death penalty verdict by a bare majority. This unreliable procedure, unique among the jurisdictions, must be etruck as violating due procese and the prohibition against cruel and unusual punishment.

In Proffitt v. Florida, 420 U.S. 242 (1976), the plurality upheld Florida's capital punishment scheme in part because atate law required a heightened level of appellate review. In Parker, 111 S.Ct. 731, the Supreme Court reaffirmed this requirement. History hae shown that intractable ambiguities in our statute have prevented the sort of evenhanded application of appellate review and the independent reweighing process envisioned in Proffitt. Refusing to reweigh the aggravating and mitigating evidence calls into question the reliability of death eentences. See Parker, supra. This Court truncates substantive review of death sentences by refusing to examine first degree murder cases in which life is imposed and distinguishing cases based on the jury recommendation alone. This kind of review unconstitutionally injects arbitrariness into the application of the death penalty. See Pulley v. Harris, 465 U.S. 37, 54 (1983). The failure of the Florida appellate review process is high-

lighted by the life override cases. See Cochran v. State, 547 So.2d 928, 933 (Fla. 1989) (inconsiotenciee abound in judging appropriateness of overriding jury recommendations for life). Since this Court declares error harmless without independent review of the record and has not enforced a requirment of complete trial court findings of mitigating circumstances until Campbell, 571 So.2d 415, the statute is also unconstitutional beeauee it does not provide for meaningful appellate review.[73]

Florida has institutionalized disparate application of aggravating and mitigating circumstances by erecting the contemporaneoue objection rule to bar valid claims.[74] See, e.g., Rutherford v. State, 545 So.2d 853 (Fla. 1989); Grossman v. State, 525 So.2d 833 (Fla. 1989); Smalley v. State, 546 So.2d 720 (Fla. 1989). Use of retroactivity principles works similar mischief. See Myers v. Ylst, 897 F.2d 417 (9th Cir. 1990). This system arbitrarily denies meaningful appellate review of death sentences, contraryto due process and the prohibition of cruel and unusual punishment. Cf. Parker, supra.

The trial court below instructed the jury it must find mitigating evidence reaches a 'reasonably convincing' burden of proof before giving any consideration to it. R 798. The court refused to eliminate this unconstitutional burden of proof. R 2118, 2407, 2131, 2405, 2404, 55. If not reasonably convinced the evidence establishes the circumetance, then the evidence is ignored. Ignoring evidence not meeting the reaeonably convinced etandard is the law in Florida for both juries and judges. See Fla.Std.Jury Instr. (Crim.) Penalty Proceedings -- Capital Caeee; Campbell, 571 So.2d 415; Floyd v. State, 497 So.2d 1211, 1216 (Fla. 1986). This Court recently equated this burden with the greater weight of the evidence test. See Campbell, supra; Nibert, 574

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[73] Mr. Elledge moved to declare the statute unconstitutional on this ground and for an evidentiary hearing. R 1512, 2386. The state opposed both motiane. R 1626, 2376. The trial court denied both. R 2375, 32. This court must at least order an evidentiary hearing be held to protect Mr. Elledge's rights to due process, freedom from cruel and unusual punishment, and counsel.

[74] In Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977), this Court held that conaideration of evidence of a nonstatutory aggravating circumetance is error subject to appellate review without objection below because of the "special scope of review" in capital cases. Mr. Elledge contends that a retreat from the special scope of review violates the eighth amendment under Proffitt.

So.2d at 1061. When there is a reasonable likelihood, a standard of certainty greater than a possibility but less than more-likely-than-not, that the finder of fact has been precluded from considerating mitigating evidence, the law violates the Eighth Amendment. See Boyd v. California, 110 S.Ct. 1190, 1198 (1990). Thus, instructing the fact-finder to reject mitigating circumstances under a burden of proof more stringent than reasonable likelihood, as defined in Boyde, unconstitutionally restricts consideration of mitigating evidence. But see Walton, 110 S.Ct. at 3055 (plurality)(states may impoee this burden). The Campbell burden violates this principle; the instructions given below even more so. "Convinced" means certain, not reasonably Likely. See State v. Mischler, 488 So.2d 523, 525 (Fla. 1986). The instruction below led the jury in reasonable probability to reject the mitigators under an overly stringent burden of proof as defined by both Florida law and the Federal Constitution. Since the trial court presumably used the Mischler burden himself, having instructed on it, hie findings are also contrary to state law and the federal conetitution. This court: must reverse for resentencing before a properly instructed jury.

The court instructed the jury not to consider feelings of sympathy in deciding sentence. R 794. This instruction denied consideration of mitigating evidence. See Parka v. Brown, 860 F.2d 1545 (10th Cir. 1988), reveraed on procedural grounds sub nom. Saffle v. Parks, 110 S.Ct. 1257 (1990).

The sentencer wae selected by a system deaigned to exclude Blacks from participation as circuit judges, contrary to the equal protection of the laws, the right to vote, due process of law, the prohibition against slavery, and the heightened reliability and carefully channelled decision making required by the prohibition of cruel and unusual punishment.[75] This system of purposeful discrimination results in imposing the death penalty based on racial factors Mr. Elledge was sentenced by a judge selected by a racially discriminatory system resulting in death sentences based on racial factors, this Court must declare

[75] These rights are guaranteed by the Fifth, Sixth, Eighth, Thirteenth, Fourteenth, and Fifteenth Amendments to the Federal Constitution and Article I, sections 1, 2, 9, 16, 17, and 21 of the Florida Constitution.

this system unconstitutional and vacate the penalty.[76] As the killer of a white, Mr. Elledge is harmed by this discrimination. When the decision maker in a criminal trial is purposefully selected on racial grounds, the right to a fair trial, due process and equal protection require that the conviction be reversed and sentence vacated. See State v. Neil, 457 So.2d 481 (Fla. 1984); Batson v. Kentucky, 476 U.S. 79 (1986). When racial discrimination trenches on the right to vote, it violates the Fifteenth Amendment, enforced in part by the Voting Rights Act, Chapter 42 U.S.C. §1973 et al., as well, The election of circuit judges in circuit-wide races was first instituted in Florida in 1942;[77] before this time, judges were selected by the governor and confirmed by the Senate. 26 Fla. Stat. Ann. 609 (1970), Commentary. At-large election districts in Florida and elsewhere historically have been used to dilute the black voter strength. See Rogers v. Lodae, 458 U.S. 613 (1982); McMillan v. Escambia County, Florida, 638 F.2d 1239, 1245-7 (5th Cir. 1981), modified 688 F.2d 960, 969 (5th Cir. 1982), vacated, 466 U.S. 48, 104 S.Ct. 1577, on remand 748 F.2d 1037 (1984).[78] The history of elections of black circuit judges in Florida and in Broward County in particular, shows the system has purposefully excluded blacks fromthe bench. Florida as a whole has eleven black circuit judgee, 2.8% of the 394 total circuit judgeships; In Broward County, none of the 43 circuit judges are black. See Young, Single Member Judicial Districts, Fair or Foul, Fla. Bar News, May 1, 1990. Florida's populatian is 14.95% black; Broward's 13.5%. County and City Data Book, 1988, United States Department of Commerce. Florida's history of racially polarized voting, discrimination and dieenfranchieement and use of at-large election systems to minimize the black vote showe an invidious purpose

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[76] Mr. Elledge moved to declare 5921.141 unconstitutional on these grounds and for a hearing on this iseue. R 991, 2277, 1529, 2543. The state opposed. R 1614, 2276, 1628, 2541. The court denied both motions. R 2540, 2275, 32. Due process, the freedom from cruel and unusual punishment, and the right to counsel at least require this Court to remand for an evidentiary hearing.

[77] For a brief period, between 1865 and 1868, the state constitution, inasmuch as it was in effect, did provide for election of circuit judges.

[78] The Supreme Court vacated the decision because it appeared that the same result could be reached on non-constitutional grounds which did not require a finding a intentional discrimination; on remand, the Court of Appeals so held.

stood behind enactment of elections for circuit judges in Florida. See Rogers, 458 U.S. at 625-8. It also shows an invidious purpose exists for maintaining this system in Broward County. The results of chooeing judges as a whole in Florida establishes a prima facie case of racial discrimination contrary to equal protection and due process in selection of the decision makers in a criminal trial.[79] These results ehow discriminatory effect which together with the history of racial bloc voting, segregated housing, and disenfranchisement in Florida violate the right to vote as enforced by Chapter 42, United States code, 51973. See Thornburq, 478 U.S. at 46-52. This discrimination also violates the needs €or heightened reliability and carefully channelled decision making required by the guarantee from cruel. and unusual capital punishment. See Turner v. Murray, 476 U.S. 28 (1986); Beck v. Alabama, 447 U.S. 625 (1980). Florida allows just thie kind of especially unreliable decision to be made by aentencers chosen in a racially discriminatory manner and the results of death sentencing decisions show disparate impact on sentences. See Gross and Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencina and Homicide Victimization, 37 Stan.L.R. 27 (1984). Because the selection of senteneera is racially discriminatory and leads to condemning men and women to die on racial factors, thie Court must declare the law violates the Florida and Federal Constitutions. It must reverse the circuit court and remand for a new trial before a judge not so chosen, or impose a life sentence.

Mr. Elledge's sentencer is selected by a vote of the electors at large in the Seventeenth Judicial Circuit. Consequently, a circuit judge's career is often on the line when deciding whether to condemn a defendant. This system violates the heightened reliability required by the cruel and unusual punishment and due process clauses for death senteneings. "To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered." In re Murchison, 349 U.S.

[79] The results of choosing judges in Broward, 0 blacks out of 43 positions is such stark discrimination as to show racist intent. See Yick Wo v. Hopkins, 118 U.S. 356 (1886).

have adopted standards for representation of capital defendants which require cocounsel in capital cases. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES, Guideline §2.1 (1988)(hereafter ABA Guidelines); STANDARDS FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES, Standard S2.1 (National Legal Aid and Defenders Association 1987)(hereafter NLADA Standards). This requirement reflects the practical reality the primary evidentiary burden in sentencing rests on defendants. See COMMENTARY to ABA Guidelines, 52.1. Counsel stated he would have difficulty examining the existing record, much leas perform additional investigation. Further, the scope of legal and factual matters extends far beyond that with which mast practicing trial lawyers are familiar. Mr. Giacoma explicitly noted ha had never done a capital sentencing proceeding before. The ABA requires previous Capital experience for lead couneel. ABA Guidelines, §5.1(1). Also, recent training in the capital field is required. ABA Guidelinea, §5.1(1). Mr. Giacoma professed neither experience nor training in capital cases.

The Federal Constitution's Sixth and Fourteenth Amendments require two counsel be appointed when the death penalty is an option.[81] When the circumstances show a likelihood that fully competent couneel cannot provide effective aaaistance, the conetitution presumes that he has not. See United States v. Cronic, 466 U.S. 640, 659-660 (1984). Although most criminal cases can competently be handled by one attorney, the complexity and importance of capital caaea require two as the general rule. The federal courts are more protective of the right to counsel when the death penalty is at issue. The United States

[81] Alternately, the Florida Constitution's Article I, §§9, 16, 21, and 22, and Article V, §3 require it. See generally In re T.W., 551 So.2d 1186 (Fla. 1989)(Florida Constitution independent source of rights). This Court has authority to put procedures in place to insure defendanta have access to courts with competent counsel. See Rule 3.130(b), Fla.R.Crim.P.(counsel must be appointed upon request at first appearance); Gideon v. Wainwriaht, 153 So.2d 299 (Fla. 1963) (approving predecessor to Rule 3.850 issued under constitutional authority of Article V, §3). The Florida legislature created and funded an office to provide death-sentenced indigents with counsel to collaterally attack their convictions. SS27.7001 et seq., Fla. Stat. (1989). This Court has not hesitated to enforce a minimum standard of competency on lawyers for indigent on appeal, see Hatten v. State, 561 So.2d 562 (Fla. 1990) and in post-conviction. See Scott v. Dugger, 15 F.L.W. S578 (Fla. October 29, 1990). It should now hold a defendant facing the death is entitled to two lawyers at trial upon request.

Congress mandates federal capital defendants have two counsel. 18 U.S.C. §3005. It is the potential for death that triggers the two counsel requirement; the intent of the statute in granting two attorneys is "to reduce the chance that an innocent defendant would be put to death becauee of inadvertence or errors in judgment of hie counsel.** United States v. Shepherd, 576 F.2d 719, 729 (7th Cir. 1978). When death is not at issue, most federal circuits hold one lawyer only is required for federal capital crimes. Id; see United States v. Dufur, 648 F.2d 512 (9th Cir. 1980)(citing cases). Refusing cocounael in a capital case also violates the due process of law. Any procedure which subatantially decreases the risk of an unreliable result in a capital case must be put in place upon demand. See Ake v. Oklahoma, 470 U.S. 68, 77-9 (1985)(appointment of mental health expert for insanity defense and capital penalty mitigation required by due process when denial risks erroneous deprivation of protected interests). Denying cocounsel with complex legal issues and a lengthy procedural history risks erroneous deprivation of Life, especially when the sole appointed counsel hae no capital sentencing experience. The risk of error in a complex field of law over a life and death matter mandatee cocouneel be appointed.

POINT XXVIII

THE TRIAL COURT ERRED BY REFUSING TO ALLOW MR. ELLEDGE TO WITHDRAW HIS GUILTY PLEA.

In 1975, Mr. Elledge pled guilty to the first degree murder of Margaret Straek. No bargain was struck for this plea. Ultimately, Mr. Elledge was sentenced to death, but this sentence waa vacated. Mr. Elledge moved below to withdraw hie plea. R 1971-80. The state oppoeed the motion, R 2009-34, and the court denied it.[82] R 71, 2614. This denial was error.

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[82] The trial court's written order denied the motion in part on the ground the issues were decided in Elledge v. Graham, 432 So.2d 35 (Fla. 1983). R 2614. But, this is not dispositive. It affirmed a denial of a 3.850 motion which challenged hie plea. This Court holds the doctrine of finality means many issues that ordinarily prevail at trial or on direct appeal are foreclosed at post-conviction. Cf. Witt v. State, 387 So.2d 922, 925 (Fla. 1980). A presentence motion to withdraw a plea involves a completely different, more liberal body of law, as explained below. The prosecutor argued below this was not a pressntence plea withdrawal as the sentence had been reversed and was awaiting resentencing. R 2134. However, none of the cases cited by the State - Fick v. State, 388 So.2d 1352 (Fla.5th DCA 1980); Brooks v. State, 209 So.2d 271 (Fla.1st DCA 1968); and Barton v. State, 193 So.2d 627 (Fla.2d DCA 1966) - address whether liberal presentence plea withdrawal standards apply after a sentence is vacated.

"[T]he law favors a trial on the merits" and withdrawals of pleas should be allowed in "the interest of justice". Elias v. State, 531 So.2d 418, 419 (Fla.4th DCA 1988). Although the Supreme Court has not directly addressed the constitutional right to withdraw a guilty plea prior to sentencing, that Court states the standard is what seems "fair and just." Kercheval v. United Statee, 274 U.S. 220 (1927). Refusal to grant a motion to withdraw a plea affects a defendant's right to trial; in Dukee v. Warden, 406 U.S. 250 (1972), Justice Stewart, concurring, said:

> Before judgment, the courts should show solicitude for a defendant who wiahea to undo a waiver of all the constitutional rights that surround the right to trial -- perhape the moat devastating wavier possible under our Conatitution.

Id. at 258. This motion to withdraw was made prior to sentencing; the "manifest injustice" standard is not used. See Williams v. State, 316 So.2d 267, 274 (Fla.1975); Commonwealth v. Starr, 450 Pa. 485, 301 A.2d 592, 594 (1973); Libke v. State, 60 Wis.2d 121, 208 N.W.2d 331 (1973); Paradiso v. United Statee, 482 F.2d 409, 413 (3d Cir. 1973); United States v. Slayton, 408 F.2d 559 (3d Cir. 1969). The policy reasons pertinent to post-eentence withdrawal, such as discouraging "sentence shopping" or "judge-teoting," or "playing games" with the court do not apply. See generallv, Kadwell v. United States, 315 F.2d 667, 670 (9th Cir. 1963); State v. Jackson, 96 Idaho 584, 532 P.2d 926, 930 (1975).

> Resentencing should proceed de novo on all issues....a prior sentence, vacated on appeal, ia a nullity.

Teffeteller v. State, 495 So.2d 744, 745 (Fla.1986); see King v. Duaaer, 555 So.2d 355, 358 (Fla.1990)(resentencing is a "completely new proceeding, separate and distinct" Erom the prior one). Thus, it is error to rely on evidence from a prior proceeding to establish an aggravating circumstance. Huff v. State, 495 So.2d 145, 152 (Fla.1986). The logic of these easee, that resentencing proceeds de novo, shows Mr. Elledge's plea withdrawal should be judged by pre-sentence standards. Moreover, the principles favoring withdrawal are "underscored by the severity and nature of the first degree murder charge" and sentence. Lopez v. State, 227 So.2d 694, 696 (Fla.3d DCA 1969); see also Gardner v. Florida, 430 U.S. 349 (1977)(Eighth Amendment requires full expoeition of facts on which

death sentence based).

The standards for presentence withdrawal of plea are discussed in Yesnes v. State, 440 So.2d 628 (Fla.1st DCA 1983):

> Rule 3.170(f), Florida Rules of Criminal Procedure, provides that "the court may, in its discretion, and shall upon good cause, at any time before a sentence, permit a plea of guilty to be withdrawn" (emphasis supplied) . . . use of the word "shall" indicates that such a showing entitles the defendant to withdraw a plea as a matter of right. Use of the word "may," however, suggests that the rule also allows, in the discretion of the court, withdrawal of the plea in the intereet of justice, upon a lesser showing than good cause. In any event, this rule should be liberally construed in favor of the defendant. Adler v. State, 382 So.2d 1298, 1300 (Fla.2d DCA 1980). The law inclines toward a trial on the merits; and where it appears that the interest of justice would be served, the defendant should be permitted to withdraw his plea. Morton v. State, 317 So.2d 145 (Fla.2d DCA 1975). A defendant should be permitted to withdraw a plea "if he files a proper motion and proves that the plea was entered under mental weakness, mistake, surprise, misapprehenseion, fear, promise, or other circumstances affecting his righte." Baker v. State, 408 So.2d 686, 687 (Fla.2d DCA 1982).

440 So.2d at 634. Mr. Elledge's Motion to Withdraw Guilty Plea contains 'good cause' and 'fair and just' reasons for permitting withdrawal of his plea. He alleged his plea wae invalid because; (1) he was not informed of valid defensee to the charge, (2) he was not informed his plea waived his right to appellate review, (3) it resulted from the ineffective assistance of counsel and (4) inadequate psychiatric evaluations, citing State v. Sireci, 536 So.2d 231 (Fla.1988) and Ake v. Oklahoma, 470 U.S. 68 (1985), (5) the plea colloquy was inadequate, and (6) he was incompetent to enter a plea. R 1971-2. He attached a psychiatric report of Dr. Lewie, in which she details hie life history of physical and sexual abuee, head injuries indicating organic brain damage, psychiatric problems, and alcohol and drug abuse including intoxication during the incident. R 1981-90. Also, defense introduced into evidence a letter from Dr. Lewis stating Mr. Elledge met the test for insanity during the incident. R 2137-8.

The plea colloquy ignored several mandatory requirements of Rule 3.172(c), Florida Rules of Criminal Procedure, including discussing the righte to the assistance of counsel, to compel witnesses, to confront and cross-examine witnesses, and to not be compelled to incriminate oneself. R 1991-2008. Most important, nothing was said about waiver of the right to appeal. See Rule

3.172(c)(iv), Fla.R.Crim.Pro. Mr. Elledge was never told he was waiving his right to appeal the Motion to Suppress and any issues that could arise at trial. This failure suffices to require vacation of a plea, and so establishes good cauee for its withdrawal. See Diaz v. State, 439 So.2d 1011, 1012 (Fla.2d DCA 1983). The prosecutor argued below Mr. Elledge could have appealed from the guilty plea in 1975, claiming Robinson v. State, 373 So.2d 898 (Fla.1979) changed the law. R 2134. However, Robinson, represented "a codification of existing case law." 373 So.2d at 902. There was no right to appeal a guilty plea in 1975. White v. State, 273 So.2d 782 (Fla.2d DCA 1973); Graulich v. State, 287 So.2d 114 (Fla.3d DCA 2973).

The one defense explored, insanity, was rejected baeed on inadequate psychiatric evaluations. Mr. McCain testified his only exploration of the insanity defense was to talk to Mr. Elledge and move the Court appoint experts. R 2024-6. Thoee experts, Dr. Eichert and Taubel, relied solely on their oral interview of Mr. Elledge and reviewed no records. No psychological or neurological testing was done. A proper evaluation would have revealed Mr. Elledge as a victim of Lengthy physical and sexual abuae and had possible organic impairment. Report of Dr. Lewis, R 1981-1990. It would have revealed he suffered from periodic psychotic paranoia greatly exacerbated by alcohol. Thus, a competent evaluation would have shown a basis for an insanity defense. The evaluations of the court appointed doctors are the sort of inadequate evaluations condemned by this Court in Sireci v. State, 536 So.2d 231 (Fla. 1988). They denied Mr. Elledge's rights to competent psychiatric assistance under Ake.[83] His motion to withdraw hie plea ahould have been granted.

A thorough life history and competent psychiatric evaluation would raiea considerable doubt about Mr. Elledge's competency to plead due to his mental illness. This requires withdrawal of the plea. See Derks v. State, 477 So.2d 23 (Fla.1st DCA 1985). In Derks, the court remanded for an evidentiary hearing on the vacating the plea due to a history of mental illness and treat-ment with

[83] These rights are guaranteed by the Federal Constitution's Fifth, Sixth, Eighth and Fourteenth Amendments and Florida's Article I, §§2, 9, 12, 16 and 17.

psychotrapic medication although a court appointed psychiatrist found the defendant competent. The evidence below similarly requires the plea be vacated.

Mr. Elledge's plea was based on counsel's ineffectiveness: counsel never informed Mr. Elledge of many of the rights being given up. The original. trial counsel, Mr. McCain, never attempted to eeek a nolo contendere plea which plea he stated would not be inconsistent with seeking mercy. R 2033-4. McCain cannot remember whether he advised Mr. Elledge about his right to appellate review of the motion to suppress or any other possible issue on appeal. R 2030. In fact, Mr. Elledge was never informed of his waiver of the right to appellate review and a nolo plea was never explored. The insanity defense was inadequately evaluated, leading to the advice for Mr. Elledge to plead guilty. A lawyer's decisions must be baeed on athorough investigation. House v. Balkcom, 725 F.2d 608 (11th Cir. 1989); Youna v. Zant, 677 F.2d 792, 790 (11th Cir. 1982). Here, the decision was patently unreasonable. Mr. McCain waived the right to pursue an insanity defense, the right to a trial on all issues in the case, and the right to appellate review of the Motion to Suppress and any other legal issues. No benefit was gained. These decieiona show counsel was ineffective as they were outside the professional range of competent assistance. They precluded valid defenaee and, in reasonable likelihood, caused him to plead guilty. See Hill v. Lockhart, 474 U.S. 52 (1985).

POINT XXIX

DEATH IS DISPROPORTIONATE FOR THIS CRIME UNDER STATE LAW AND THE FLORIDA AND FEDERAL CONSTITUTIONS.

Mr. Elledge suffered from severe phyeical abuse, rape, and incest as a child. The facts are detailed at the Statement of the Facts. He was a life long alcoholic who suffered from pathological intoxication which caused him to lose control of himself when drinking. Mr. Elledge was drinking and smoking marijuana at the time of the crime. He suffered from extreme mental or emotional disturbance, unable to conform his conduct to the requirements of the law. He cooperated with police, feels remorse for his crime, and adapted to prison where he will spend the rest of his life.

The trial court apparently found Mr. Elledge committed the crime (1) in

an especially heinous, atrocious, or cruel (HAC) manner, (2) in order to avoid arrest (3) during the commission of the felony of rape. R 2687. Mr. Elledge argues elsewhere the trial court erred in finding he committed the crime to avoid arrest. Mr. Elledge also argues that HAC and the felony aggravators do not apply,; thie point assumes without conceding that this Court will uphold the felony aggravator and HAC since if it does not, with one aggravator and many mitigators, Appellant assumes the Court will reduce the sentence. However, even if HAC applies, this Court holds a murder committed in an irrational frenzy lessens HAC's effect. See Amazon, 487 So.2d at 13.

A. MR. ELLEDGE SHOULD BE GIVEN A LIFE SENTENCE BECAUSE HIS SENTENCE IS DISPROPORTIONATE UNDER STATE LAW.

"Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Fitzpatrick v. State, 527 So.2d 809, 811 (Fla.1989). Death is a unique punishment, one requiring "the most aggravated, the moet indefensible of crimes" to be imposed. State v. Dixon, 283 So.2d 1, 8 (Fla.1973), cert. denied 416 U.S. 943 (1974). The purpose of proportionality review is "to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. The Supreme Court of Florida reviews each sentence to ensure that similar results are reached in similar cases." Proffitt v. Florida, 428 U.S. 250, 258 (1976)-(opinion by Powell, J.); see Dixon, 283 So.2d at 8; Brown v. Wainwriaht, 392 So.2d 1327, 1332 (Fla.1981). The constitutionality of Florida's sentencing scheme turns upon the meaningful appellate review given sentences. See Parker, 111 S.Ct. 731 (1991). Mr. Elledge's crime merits a life sentence as shown by comparing the facte of thie case with thoee of others reduced to life.

This Court frequently looks to the mental state *of* the perpetrator in determining if the death penalty is appropriate. It has reduced several death sentences upon finding the defendant suffered from extreme mental or emotional dieturbance at the time of the crime. See Nibert v. State, 574 So.2d 1059 (Fla. 1990); Fitzpatrick v. State, 527 So.2d 809, 812 (Fla.1988); Livingston V. State, 565 So.2d 1288, 1292 (Fla.1990). A killing committed in a rage with little or no premeditation does not qualify for a death penalty. See Farinas v. State,

15 F.L.W. S555, 5557 (Fla. October 11, 1990); Wilson v. State, 493 So.2d 1019, 1023 (Fla.1986); Halliwell v. State, 323 So.2d 557, 559 (Fla.1975) (defendant "having become so angry over the victim's bragging about having beaten Sandra . . . he beat him to death, unable to stop the fatal blowe once he began."), Death generally is disproportionate for a defendant committing felony murder with no premeditation. See Smallev v. State, 546 So.2d 720, 723 (Fla.1989); Cherry v. State, 544 So.2d 184, 188 (Fla.1989)(death disproportionate for victim who died of heart attack in midst of burglary). Death often becomes disproportionate when a defendant has substance abuse problems which are a cause of the killing. See Livingston, supra; Ross v. State, 474 So.2d 1170, 1174 (Pla.1985).

The mix of the aggravating and mitigating circumstances in this case closely match those in Livingston, Fitzpatrick, Wilson, and Smallev. In Fitzpatrick, the defendant killed a police officer and shot at another after taking hostages, intending to use them to rob a bank. The trial court found five aggravatora, including previous violent felonies and committing the crime to avoid arrest. None were struck on appeal. This Court reduced the death sentence to life because the uncontradicted evidence established extreme emotional disturbance and Substantial incapacity to conform his conduct to the law. Similarly, the evidence below establishes theee mitigators, and remorse, cooperation with police, confessions, guilty pleas, and adaptation to prison. His aggravation is much less: he deserves a life sentence like Fitzpatrick.

In Smallev, this Court reduced as sentence to life even though Smalley had repeatedly struck and dunked an infant, eventually picking her up by her feet and banging her head on the floor, making her lose consciousness and die. Smalley, 546 So.2d at 721. Although the crime was HAC, the trial court found mitigation similar to that of Mr. Elledge. Smalley had remorse, was abused as a child, suffered from extreme emotional disturbance, extreme duress, and substantial incapacity to appreciate his criminality or conform his conduct to the requirements of the law. Also, Smalley had a good work record and no prior criminal. history. This mitigation together with a lack of intent to kill made life appropriate. Id. at 723. Similarly, Mr. Elledge lacked an intent to kill.

His mental mitigation and childhood is closely similar to Smalley's; he has a100 shown remorse, cooperated fully with the police, confessed, and pled guilty to the crime. Although, Mr. Elledge waived reliance on no prior criminal history, he did show he had adjusted well to prison life where he will spend his life. Like Smalley, Mr. Elledge deserves a life sentence.

Assuming, arguendo, that this Court reshapes the sentencing order to consider evidence of Mr. Elledge's other crimes as establishing the previous violent felony aggravator, death is still disproportionate. In Livingston, the defendant broke into a houee around noon and stole a pistol and other items; at 8:00 pm, he entered a convenience store, shot the attendant twice and shot at another woman. Livingston carried off the cash register, later contacting a friend to help him open it. Livingston, 565 So.2d at 1289. This Court approved two aggravatora: Livingston was previously convicted of a violent felony and committed the murder in the course of a felony (robbery). Id. at 1292. In mitigation, the Court considered that Livingston faced severe physical abuse and neglect as a child, was immature with marginal intellect, and had extensive use of cocaine and marijuana. Mr. Elledge's aggravation is similar to Livingston's, and his mitigation encompasses more factors. Mr. Elledge was an alcoholic and abused as a child which caused an extreme emotional disturbance at the time of the crime. He had broken up with hie girlfriend the day before. He wae intoxicated and faced provocative sexual behavior which brought up feelings of inadequacy from his childhood experiences of rape and incest. Hi0 impulse control disorder and pathological intoxication took control. Further, unlike Livingston, Mr. Elledge has shown remorse and adaptation to prison life; he will spend the rest of his life in prison.

In Wilson, while visiting his parents' home, the defendant became enraged at his mother over use of the refrigerator and hit her with a hammer. Hie father tried to intervene; Wilson beat him with the hammer as well. He etabbed his cousin in the cheat with a pair of scissors, killing him. Wilson then wrestled a pistol from his mother, shot and killed his father, and emptied the remaining rounds into the closet where his mother hid, wounding her. Wilson,

493 So.2d at 1021. This Court found Wilson had the previous violent felony convictions of second degree murder of the nephew and attempted murder of his mother and committed the crime in an especially heinous, atrocious, or cruel manner. Id. at 1023. Although no mitigating circumstances were found, since the murder "was the result of a heated, domestic confrontation and . . . although premeditated, was moat likely upon reflection of short duration," death was disproportionate. Ibid. As explained above, Mr. Elledge's mitigating circumstances are extensive and compelling; his aggravating are very similar to Wilson's assuming this court finds previous violent felony convictions. Mr. Elledge's rage, albeit not caused by domestic problems, is no less understandable given his background, emotional state, and Strack's behavior. This murder had no or little premeditation. Since he has much more mitigation and about the same aggravation as Wilson, Mr. Elledge's sentence should also be reduced to life.

Although Mr. Elledge deserves a life sentence baaed on these death recommendation cases, defendante given life by this Court in accord with their jury recommendations also show Mr. Elledge's penalty should be life. See Freeman v. State, 547 So.2d 125 (Fla.1989)(defendant committed felony murder and abuaed as child, aggravators were HAC, felony, prior violent felony: life sentence imposed); Carter v. State, 560 So.2d 1166 (Fla.1990)(defendant's mental disability and drug use required life eentence even though 5 aggravatore found); Coehran v. State, 547 So.2d 928 (Fla.1989) (Prior violent felony, including another homicide, felony (kidnap), and pecuniary gain aggravatora applied, but life required because defendant young and had emotional disturbance). Mr. Elledge was similarly disturbed plus he showed remoree, cooperated with police, confessed, pled guilty, and has adjusted to prison. His aggravation is the same or less serious. Like them, hie sentence should be reduced to life.

B. MR. ELLEDGE SHOULD BE GIVEN A LIFE SENTENCE BECAUSE DEATH IS DISPROPORTIONATE UNDER THE FLORIDA AND FEDERAL CONSTITUTIONS.

The mental state of Mr. Elledge described above - that he could not control his behavior due to pathological intoxication and impulse control disorder - also means he cannot be given a death sentence because it would

conatitute cruel and unusual punishment, prohibitted by the Federal Constitution's Eighth Amendment and Article I, §17 of the Florida Constitution. Both the state and federal constitutions prohibit imposition of the death penalty on one, like Mr. Elledge, who lacked substantial capacity to conform his conduct to the requirements of the law at the time of the offense.[84]

The Supreme Court excludes the death penalty for classes of defendants who lack the especially culpable mental state needed to impose a death sentence. See Enmund v. Florida, 458 U.S. 782, 800 (1982); Tison v. Arizona, 481 U.S. 137, 156 (1987); Thompson v. Oklahoma, 108 S.Ct. 2687, 2698 (1988)(plurality); see also Penry v. Lynaugh, 109 S.Ct. 2934, 2957 (1989)(opinion by O'Conner, J.)(jury found mildly retarded defendant able to conform conduct to the law, at 2954: eligible to be executed).

> A critical facet of the individual determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply ingrained in our tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished.

Tison, 481 U.S. at 156. The Court concluded that reckless indifference to human life, as well as intentional taking of it, is culpable enough to impose the death penalty. Ibid. The Court requires an especially culpable mental state to square the clase of death eligible with the two purposes of the death penalty: deterrence and retribution. See Thompson, 108 S.Ct. at 2699. No penalty can deter behavior which is not purposeful. Nor is it appropriate retribution. See Ford v. Wainwright, 477 U.S. 399, 407 (1986). Societal outrage at one who did not act of hie own volition at the time of the crime is not retribution, but rather the mindless vengeance decried by the Court in Ford. Id. at 409. Imposing the death penalty on one who acted when substantially unable to conform him conduct to the law's requirements is just euch mindless vengeance. By definition, this finding means the dedfendant did not act purposefully, with the

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[84] This Court must interpret Florida's constitutional protections independently of the Federal's. See In re T.W., 551 So.2d 1186 (Fla.1989). Death is too severe a sanction - under Article I, §17 of the Florida Constitution - to be applied to one incapable of conforming his conduct to the law's requirements.

high degree of culpability required by the Court in Tison and Thompson. Also, Mr. Elledge's voluntary intoxication prevented his level of culpability from reaching that required to impose death under Tiaon and Thompson.

POINT XXX

THIS COURT DENIED MR. ELLEDGE DUE PROCESS, THE EFFECTIVE ASSISTANCE OF COUNSEL, AND A MEANINGFUL APPELLATE REVIEW BY REFUSING TO CONSIDER HIS FIRST INITIAL BRIEF AND ORDERING IT BE LIMITED.

This Court has previously refused to accept appellant's Initial Brief in this matter. Appellant has been forced to summarily brief many ieeues and not brief others. Appellant hae submitted a supplemental brief with fuller discussion of all the effected claims. If this Court refuses to accept this supplemental brief, it will deny Mr. Elledge several constitutional rights.

First, it will deny the effective assistance of appellate counsel by not allowing counsel to raise and argue all arguable issues. See GWIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES Guideline 11.9.2.D, Duties of Appellate Counsel (1989); STANDARDS FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES standard 11.9.2(d), Duties of Appellate Counsel (NLADA 1988). Mr. Elledge's counsel's duty on appeal is not to forego substantial legal and factual arguments. See Penson v. Ohio, 488 U.S. 75 (1989). Usurpation of counsel's authority amounts to an actual denial of counsel, contrary to the Federal Sixth and Fourteenth Amendments. See Strickland v. Washington, 466 U.S. *668,* 686 (1984); Geders v. United States, 425 U.S. 80 (1976); see also Richardson Greenshields Securities, Inc. v. Lau, 825 F.2d 647, 652 (2d Cir. 1987)(interfering with civil trial counsel's authority to file pleadings error). Refusal of the supplemental brief so interferes. Second, refusing the brief would deny Mr. Elledge a reasonable opportunity to present have his federal claims heard by this Court, a due process violation. See Davis v. Wechsler, 263 U.S. 22, 24-5 (1923). Mr. Elledge's only other choice to have these claims heard would require him to omit valid state claims. As in Davis, the state may not use its procedures to force such a choice. Nor, may the state deny meaningful access to poat-conviction proceedinge by restricting its own direct appeal review. Cf. Pennsylvania v. Finley, 481 U.S. 551 (1987)(no need for lawyer in post-conviction, because appellate couneel

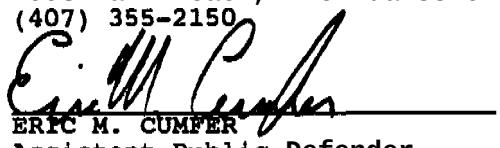
assumed to have developed the record). Third, procedural due process and the need for meaningful appellate review of death sentencee requires full eoneideration of all claims of error. In Parker, surpa, and Clemmons, supra, the Supreme Court held appellate courts, to affirm in the face of error, must independently decide the mitigating and aggravating circumstances, or remand for the trial court to do so. Otherwise, no individualized determination of eentence occurs. The courte cannot perfonnthie function without considering all claims of error. The Eighth Amendment requires this Court accept the supplemental brief. Because coneidering all issuee in a capital. case, where the law is confusing, transitory, and complex, adda a great deal to the reliability of the result, it is also mandated by procedural due process. See Ake v. Oklahoma, 470 U.S. 68, 77 (1985).

CONCLUSION

For the foregoing reasons, Appellant respectfully urges this Court to vacate hie conviction and sentence, and impose a life sentence or remand for proceedinge consistent with its opinion.

Reapeetfully eubmitted,

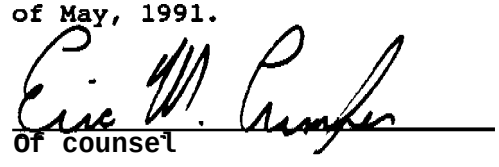
RICHARD YORANDBY,
Public Defender
15th Judicial Circuit of Florida
9th Floor, Governmental Center
301 N. Olive Avenue
Weet Palm Beach, Florida 33401
(407) 355-2150



ERIC M. CUMFER
Assistant Public Defender,
Fla. Bar no. 0764663

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing haa been furnished by Federal Express Next Day Delivery to Carolyn Snurkowski, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida, 32399 this 8th day of May, 1991.



Of counsel