IN THE

SUPREME COURT OF FLORIDA

WILLIAM DUANE ELLEDGE Appellant,	)	
vs.	)	CASE NO. 74,789
STATE OF FLORIDA, Appellee.	)	

REPLY BRIEF OF APPELLANT

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

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PRELIMINARY STATEMENT

Mr. Elledge will rely on the following addition symbols:

"IB" Initial Brief of Appellant

"AB" Answer Brief of Appellee.

For Points V, XV, XVII, XXIV, XXV, XXVI, XXVII, AND XXX, Mr. Elledge relies on his Initial Brief.

STATEMENT OF THE FACTS

The State, by rewriting a statement of facts without specifying any area of dieagreement, has failed to follow the dictates of Rule 9.210(c). Mr. Elledge will clarify those areas of disagreement here and in the relevant Points. First, the state notes that Mr. Elledge denied ever burning Strack with cigarettes. AB 5. Mr. Elledge notes there is no evidence that the victim was burned by cigarettes. The medical examiner who testified extensively about the body never said he found any cigarette burna or any burns at all. R 454-7. The photographe of the corpse reveal nothing which are apparent burn marks. For some reason, the police officer interrogating Mr. Elledge a few days after the incident indicated there might have been cigarette burns. Mr. Elledge denied having burned her, but said Strack had dropped a marijuana cigarette and may have been burned then. R 427-8.

The state claims Dr. Fatteh testified he found needle tracks on Strack's arm. AB 8. That testimony was struck by the court upon objection by the State. R 466-7.

In discussing the Nelson homicide, the State neglects to mention both that her grandson had a rifle in his room which Mr. Elledge took after a scuffle, R 535-6, and that her husband held an unloaded gun in his hand when Mr. Elledge shot him. R 530, 537.

The State says at AB 12 that Daniel Elledge was asked to opine on his brother's life. The trial court sustained an objection to:

> You turned out not having any problems with the law, you grew up in the same environment as Bill, why him, why not you? Any idea?

R 564.

The State correctly notes that Daniel Elledge testified that his mother told him that her husband was not Daniel's father. AB 12. Undersigned counsel stated at IB 2 that their mother had told William Elledge her husband was not William's father. Undersigned counsel erred in this regard.

The State correctly says Dr. Caddy diagnosed Mr. Elledge as suffering from pathological intoxication at the time of the crime. AB 15. Dr. caddy also opined Mr. Elledge suffered from impulse control disorder, first manifesting

itself at age 3. R 600-4.

The State claims Dr. Caddy admitted saying at deposition that Kr. Elledge had not told him about having sex with his sister. AB 16. The record page cited actually shows Caddy questioned making this statement; the deposition was not put in evidence.[1]

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[1] The transcript says:

Q Do you remember giving me a deposition on August 2nd, 1989, last week?

A Yes.

Q And I asked you if Mr. Elledge told you that he had sex with his sister and you told me no, he did not, Would you Like to see it?

A Would I like to see the deposition?

Q Yes.

A No. I don't remember whether -- I don't remember whether I said no or yes.

MR. SATZ: Mr. Giacoma, it's on page 38.

BY MR. SATZ:

Q Here's the front of the deposition and there's the question right there.

Is that my question to you and is that your response, that he didn't tell you that?

A I accept that it's written down. I don't have any independent recollection of what my reaponae to you was though. On Line 21 it says no.

Q It saya no, he did not?

A Yea, it does. It saya that and I don't know whether that was a transcription error or whatever but I knew when we came into that deposition that he had indicated that he had sex with his sister so I can't explain why I would say no.

Q So you think it's a possible transcription error?

A Perhaps.

Q What if it's not?

A Then I misunderstood the question.

R 630-1.

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.

Mr. Elledge must clarify several. claims about the record contained in the Answer Brief.[2] The State asserts only hearsay evidence establishes that Mr. Elledge's childhood mitigated. AB 29-30. Abundant testimony based on personal knowledge establishes these mitigators. On direct, Daniel Elledge testified:

> Q. Did you ever see any kind of special physical contact between Connie and Bill?
> A. Yes, I did.
> Q. Would you describe it fox us?
> A. Well, it was as far back as I can remember there was sexual intercourse and, you know, I don't know --
> Q. Between your brother and sister?
> A. Yes, it was.

R 563. Nothing in Daniel's direct testimony at 558-60 or his cross at 565-8 suggested he did not have personal knowledge of the sex between Connie and Bill and the daily, vicious, extensive beatings of Bill occurring in the boys' home. On direct, Sharon Jennings avowed ehe was close to her cousins then. R 680.

> Q. Over the course of your childhood, did you ever see Geneva punish or injure Bill Elledge?
> A. Many times.
> Q. What's many, ma'am? Was it once a month? Once a year? Describe it to us.
> A. Oh, no. Every day. Hitting on the back of the head. Hitting with a bat. Anything handy. Hitting with a belt, skillet, shoe, anything.

R 681. Later, she testified:

> Q. Did Bill's father intervene on those beatings?
> A. Most of the time that I can recall he had to pull her off several times, and several times he told her that was enough and he didn't want it any more. He did pull her off several times.
> Q. Did they fight?
> A. Yes.
> Q. A lot?
> A. Yes.
> Q. One of these beatings you saw, about how long would they last? Two or three hits?
> A. 15, 20 minutes at a time.

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[2] The State in its Answer Brief initially faults Mr. Elledge for raising only fourteen of the fifteen mitigators argued below. Mr. Elledge omits claiming the victim consented, leaving fourteen valid mitigators.

Q. Continual beating?
A. A continual beating. Yes, continuous.

R 686. Nothing in testimony indicated it was anything but personal knowledge; the State did not cross examine her. R 688, The State also asserts evidence shows that Bill Elledge never told Caddy that Elledge had sex with his sister. AB 30. Caddy testified Mr. Elledge told him about the sex and no evidence contradicts him.[3] R 598-9.

The Answer also misstates the substance of Mr. Elledge's confession, claiming Mr. Elledge killed Strack after she threatened to call police because he had raped her. The confession shows Mr. Elledge strangled her as an impulsive reaction to her refusal to have sex. He first grabbed her throat when Strack initially refused to have sex. R 414. He tried to force himself on her. When she scratched him, Mr. Elledge became angered, R 415, and began to strangle her. R 416. Strack stopped resisting, but then told him she would call the police and began to scream. R 417. At the time Strack mentioned calling the police, no noneonsensual sexual penetration had occurred.' Mr. Elledge told police he then began strangling her and penetrated her. R 417-8. He totally lost control and went blank until he noticed she was turning blue some time later. R 419-20. Both before and after the threat was uttered, it was Strack's resistance to sex - not a desire to eliminate a witness - that triggered strangulation by the intoxicated and emotionally distraught Mr. Elledge.

Dr. Caddy never said his diagnosis was "identical" to prior diagnoses of anti-social personality disorder (ASPD): he called the prior diagnoees "overly simplistic," R 660, and "superficial," R 670-1. Be further testified Mr. Elledge sought help in 1975, strong evidence he did <u>not</u> have ASPD. R 670. The State claims Dr. Caddy relied on statements by Mr. Elledge to show his remorse. AB 37. Caddy did not relate statement6 of remorse: he found remorse based on

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[3] The State may refer to the attempt to impeach Caddy with his deposition. Caddy questioned whether he made any contradictory statement. R 630-1. Neither the deposition nor any other evidence was entered showing he had said something different than his testimony.

[4] Mr. Elledge had earlier digitally penetrated Strack, but in a consensual way. R 413.

Mr. Elledge's confessions, pleas of guilt, and seeking help. R 619.

The State claims Officer Kuek "chose" not to read Mr. Elledge's disciplinary reports before testifying. AB 38. The record shows that Kuck had access to the reports, not that he refused to read them before trial. R 552.

The State relies in part on Gilliam v. State, 16 FLW 5292 (Fla. June 15, 1991). *AB* 26. The State is mistaken if it means to argue that the law in effect at the time of Mr. Elledge's sentencing differs materially from the law now.[5] This sentencing occurred in August, 1989. Mr. Elledge relies on Campbell v. State, 571 So.2d 415 (Fla. 1990) and Nibert v. State, 557 So.2d 27 (Fla. 1990) as convenient restatements of the law in effect in 1989: Campbell and Nibert are not new law. Well before this sentencing, this Court found mitigators an appeal when the trial court ignored uncontradicted evidence thereof. In Huckaby v. State, 343 So.2d 29 (Fla. 1977), the defendant was convicted of rape of a child and sentenced to death. This Court ordered Huckaby be sentenced to Life:

> The trial judge ignored every aspect of the medical testimony in

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[5] This Court's atatement in Gilliam that Campbell refined the law was in response to a claim the trial court made no reasoned exercise of judgment by failing to discuss explicitly statutory mitigation. Gilliam, 16 FLW at S293. Failing to exercise reasoned judgment requires this Court impose a life sentence. See Bouie v. State, 559 So.2d 1113 (Fla. 1990). In this Point, Mr. Elledge merely requests this court find mitigation for purposes of appeal and remand for resentencing. As argued in the text, Campbell does not change the law at all for getting this relief. Alternately, should this Court have meant Gilliam to hwld the requirement a sentencing order discuss mitigation will be enforced only prospectively, it must revisit that question. It relies on Witt v. State, 387 So.2d 922 (Fla. 1980), which says evolutionary refinements of the law cannot be applied retroactively. However, Witt concerns retroactive application of new law after a conviction is final; it is the interest in finality that triggers its standard. See Witt, 387 So.2d at 925; State v. Glenn, 558 So.2d 4,7 (Fla. 1990). This Court consistently holds the appellate court must apply the law as interpreted at the time of a direct appeal. See State v. Castillo, 486 So.2d 565 (Fla. 1986); Dougan v. State, 470 So.2d 697, 701 n.2 (Fla. 1985); Wheeler v. State, 344 So.2d 244, 245 (Fla. 1977). Refusing to apply Campbell to his case would violate Mr. Elledge's right to be treated equally with those similarly situated, contrary to simple fairness and the constitutional guarantees of due procees and the equal protection of the laws. See Griffith v. Kentucky, 479 U.S. 314, 327-8, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987); Myers v. Ylst, 897 F.2d 417, 421 (9th Cir. 1990); *flee* also James B. Beam Distilling Company v. Georgia, 111 S.Ct. 2439, 2444-5 (1991)(plurality)(once court applies rule in civil case, it should apply it to appeals not yet decided, relying in part on Griffith which "abandoned the possibility of selective prospectivity in the criminal context"). Relying on this faulty order would also violate the Eighth Amendment's requirement of meaningful appellate review. See Parker v. Dugger, 111 S.Ct. 731 (1991); smith v. McCormick, 914 F.2d 1153, 1165-6 (9th Cir. 1990)("The sentencing order must therefore explicitly discuss in its written findings all relevant mitigating circumstances. . ." even if they do not require a lesser sentence).

this case when he found no mitigating circumstances existed. There was almost total agreement on Huckaby's mental illness and its controlling influence on him . . . Our review of this record shows that the capital felony involved in this case was committed while Huckaby was under influence of extreme mental or emotional disturbance and . . . his capacity to appreciate the criminality of his conduct and conform it to the requirements of the law was substantially impaired. These findings constitute two mitigating circumstances which should have been weighed in determining his sentence.

Id. at 33-4. This Court reduced the sentence to life because of these mitigators. Rogers v. State, 511 So.2d 526 (Fla. 1987) set general procedures for trial courts to follow in making nonstatutory mitigating findings. Rogers urged error because the trial court failed to find proposed mitigation. After reviewing the failure of trial courts to specify mitigating findings and noting that the Federal Constitution requires their consideration, this Caurt held:

> [W]e find that the trial court's first taek in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment ... If such factors exist in the record at the time of the sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

Id. at 534(e.a.). This Court went on to review the mitigating evidence; although ultimately finding the error harmless or the facts not mitigating, it did hold the trial court erred by not finding Rogers was intelligent and articulate and a good husband, father and provider to his family. Id. at 534-5. These findings were 'compelled' by the record or 'not contested.' Ibid. This Court clarified the standard6 to be used for finding mitigators as a matter of law in Hardwick v. State, 521 So.2d 1071 (Fla. 1988), although rejecting Hardwick's claim impairment should have been found since there was no substantial evidence of it:

> We agree that such evidence (of impairment through drug and alcohol use] must be considered in mitigation . . . (cites omitted], especially where established by uncontroverted factual evidence in the record. Brannen v. state, 94 Fla. 656, 661-62, 114 So. 429 (1927); Merrill Stevens Dry Dock Co. v. G & J Investments Corp., Inc. 506 So.2d 30, 32 (Fla. 3d DCA 1987) . . . .

Id. at 1076(e.a.); see Solano v. Carnival Cruise Lines, Inc., 491 So.2d 325 (Fla. 3d DCA 1986); Republic National Bank of Miami, N.A. v. Roca, 534 So.2d 736 (Fla. 3d DCA 1988). Brannen and its progeny established long ago that uncontroverted factual evidence must be accepted as a matter of law.

Thus, before this sentencing occurred and Campbell and Nibert were issued, this Court had already held in Rogers that the trial courts must first make findings of fact for proposed mitigators. See Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990)(crime occurred in October, 1988 with decision in September 1990: Rogers required diecussing nonstatutory mitigation in sentencing order). This Court, in Huckaby and Hardwick, had held mitigators must be found if there is substantial uncontroverted evidence to establish them, adopting in part the well-known uncontroverted evidence rule of Brannen. See Santos v. State, 16 FLW S633 (Fla. Sep't. 26, 1991). In Santos, sentencing was held before Campbell was issued, yet this Court held:

> Mitigating evidence must at least be weighed in the balance if the record discloses it to be both believable and uncontroverted, particularly where it is derived from unrefuted factual evidence.

Id. at S634. This court had already reviewed findings in mitigation on appeal, ordering Huckaby's sentence reduced, finding the error harmless or the facts not mitigating in Rogers, and holding the record showed no error in Nardwick. Campbell/Nibert conveniently restates these holdings, but adds no new law to them; Mr. Elledge may rely on them.

If the State is claiming the error was harmlese, Cook v. state, 581 So.2d 141 (Fla. 1991) is easily distinguishable. In Cook, this Court found the trial court had made a proper factual finding that Cook was not using drugs or substantially impaired at the time of his offense and held the other possible mitigation would, to the exclusion of any reasonable doubt, not affect Cook's sentence. Id. at 141. The mitigation for Mr. Elledge was much more likely to affect a fair decision-maker. His mental/emotional problems which resulted in an inability to conform hie conduct to the law's requirements, abused family life which caused the emotional problems, and use of intoxicants which directly affected his behavior in the homicide is similar to the mitigation in Huckaby. It is not only substantial mitigation: the crime and its aggravators "were a direct consequence of his mental illness." Huckaby, 343 So.2d at 34. Like Huckabv, the failure to find or even understand this mitigation was very prejudicial. Other powerful mitigation, detailed in the Initial Brief, exists.

Moreover, this Court must at least find the mitigation for purposes of appeal.

The State makes a number of arguments about individual mitigatora. Assuming the State means to point out conflicts in the evidence sufficient to reject the mitigation under the Brannen/Campbell rule, it does not do so. First, the State claims the court properly considered evidence of psychiatriata who did not testify to reject the extreme mental/emotional disturbance mitigator. Mr. Elledge relies on the argument and authoritiee at IB 16, 18-23, 72 which explains why this material wae not competent evidence.[6] Even if this evidence were properly before this Court, the trial court merely states the doctors reporting on competency did not volunteer a finding that Mr. Elledge's mental condition met the statutory mental mitigating criteria. R 2687. Since these doctors apparently made no finding either way on that issue, their 'evidence' does not conflict with Dr. caddy's opinions. Also, the State concedes Strack and Mr. Elledge smoked three marijuana cigarettes immediately before the assault. AB 66.

Mr. Elledge has explained the record support for his childhood mitigating circumstances. Neither Scull v. State, 533 So.2d 1137 (Fla. 1988) nor King v. Dugger, 555 So.2d 355 (Fla. 1990) concern finding child abuse and psychological testimony linking such abuse to a mental/emotional disturbance at the time of the crime. Scull and King concern discretion to find age as a mitigator when the defendant is twenty-something. Neither Rivera v. State, 561 So.2d 536 (Fla. 1990) nor Randolph v. State, 562 So.2d 331 (Fla. 1990) support ignoring the uncontroverted evidence of Mr. Elledge's mental/emotional disorder. This Court summarily dismissed the claim in Randolph that the trial court should have found mitigation, but Randolph had no evidence to support the opinion of the psychiatrist who testified, unlike the extensive record evidence here establishing the mitigators. In Rivera, this Court agreed the trial court could reject some mental mitigation due to conflicts in the evidence; here there is

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[6] Also, in Huff v. State, 495 So.2d 145, 151-2 (Fla. 1986), this Court held a trial court may not rely on evidence from prior proceedings in a resentencing. To do so wauld deny Mr. Elledge a fair opportunity to be heard and challenge that evidence, to confront witnesses, and to have a reliable sentencing proceeding. U.S.Const.Amend. V, VI, VIII, XIV.

no conflict. The State's argument that Mr. Elledge's ability to recount the incident and actions after the killing refute hie mental/emotional mitigators are specious. No fact in this record or legal authority exists that one must be amnesic for the mental mitigators to apply. Hiding the crime might show that Mr. Elledge knew he did wrong, but not that he had the capacity to conform his conduct to the law's requirements. Dr. Caddy's testimony and the proposed mitigators went to Mr. Elledge's inability to control his behavior when it happened, not inability to distinguish its wrongfulness.

Although Sochor v. State, 580 So.2d 595 (Fla. 1991) has some similarities with the instant caee, it does not control. First, Mr. Elledge is not an 'admitted rapist' in the sense he had raped anyone before Margaret Strack. Mr. Elledge's acts, in light of his horrid childhood experiences of sex and violence together with the circumstances he had just broken up with his girlfriend and spent the entire intervening day either drinking or sleeping and faced sexual teasing by the victim, were not those of a 'rapist,' but rather an emotionally disturbed, intoxicated man confronted with extremely stressful circumstances who lost control as a result. Unlike the doctors in Sochor, Dr. Caddy was unequivocal in his opinions which were backed by uncontradicted evidence. The connection between Mr. Elledge's horrid childhood experiences and his emotional dysfunction when killing Strack shows the proposed mitigators ameliorate the enormity of his guilt. The trial court erred in not finding them.

The State also might be arguing the trial court could accept mitigators or not, entirely within that court's discretion. AB 28-38. Such an argument, simply put, requires this Court to overrule Huckabv, Rogers, Hardwick. Cheshire, Campbell, and Nibert. This contention, if accepted, would lead to arbitrary and capricious punishment by refusing consideration of mitigating evidence, contrary to the Eighth Amendment to the Federal Constitution. See Parker v. Dugger, 111 S.Ct. 731 (1991); Smith v. McCormick, 914 F.2d 1153, 1166 (9th Cir. 1990); see also Rogers, 511 So.2d at 534. Neither Capehart v. State, 16 FLW S447 (Fla. June 13, 1991) nor Valle v. State, 581 So.2d 40 (Fla. 1991) support this contention. In Capehart, this Court' simply repeated the adage that the trial court

determines the weight given a mitigator. This principle is limited; the court may not ignore uncontradicted evidence of mitigation by giving it no weight. Rogers, supra; Santoa, supra. In Valle, the trial court properly rejected, as a factual matter, the defendant's mental illness in the sentencing order's discussion of statutory mitigators. This Court held the trial court need not repeat this rejection specifically for nonstatutory mental mitigators. Here there are no valid rejections of either statutory or nonstatutory mental mitigators, both of which are established by uncontradicted evidence. Ignoring the same would be the height of arbitrariness.

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

The state implies Dr. Caddy relied on the prior mental health evaluations of Mr. Elledge in formulating his opinion. AB 40, 43. The record does not support such a characterization of his testimony. Caddy first mentions the reports on direct in response to the question:

> Q. What type of documentation have you had a chance to review prior to being here today?

R 586. Dr. Caddy listed numerous documents he had seen, among which were the mental health reports. R 586-8. He never stated what the prior mental health diagnoses were nor that ha used them in formulating his opinion. Nor did he implicitly suggest they supported his opinion since he disparaged the reports when he mentioned them on direct. R 588. Contrary to the State's contention at AB 45, Dr. Caddy did question the accuracy of the opinions on redirect after the State brought them out in cross.[7] R 670-1. It could not be more apparent that Caddy neither relied upon nor implied he relied upon the prior diagnoses in

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[7] Also, the State's Answer Brief imports nonrecord facts to support its arguments. The State claims the defense did not explore the unreliability of prior reports in more depth becauee bad facts about Mr. Elledge's background would be revealed. AB at 46,n.2. As explained below, this argument misses the point. That Dr. Caddy may have known of any of these alleged bad facts is pure speculation on the part of the State. It also relies on facts from a collateral hearing in a transparent attempt to poison this Court with nonrecord allegations which Mr. Elledge cannot fairly challenge or explain. This is improper. See Jackson v. State, 575 So.2d 181, 193 (Fla. 1991).

formulating his opinion.

The State's Answer is most striking for what the State doea not say. Never does the State mention, much leas distinguish, the many cases cited at IB 20-1 holding when an expert does not actually rely on an opinion in a report to formulate her own opinion, that opinion is not admissible as 'impeachment' or otherwise. The State has overlooked this distinction, apparently because the State has no arguments to counter it. This Court should follow the reasoning of the various jurisdictions cited and declare expert opinions seen but not relied upon by a testifying expert are inadmissible in cross since they are unreliable hearsay from unqualified opinion makers.

None of the cases cited by the State conflict with this distinction. Mr. Elledge has already explained why Muehlman v. state, 503 So.2d 310 (Fla. 1987) and Parker v. State, 476 So.2d 134 (Fla. 1985) do not support the State's position in light of this distinction. IB at 21. Bender v. State, 472 So.2d 1370 (Fla. 3d DCA 1985) and Robinson v. Hunter, 506 So.2d 1106 (Fla. 4th DCA 1987) support the State's position no better. In Bender and Robinson, the experts explicitly relied on the reports which the appellate court held were admissible. Dr. Caddy explicitly disaareed with the opinions in the records.

The State also quotes extensively from Valle v. State, 581 So.2d 40 (Fla. 1991) which relies on Hildwin v. State, 531 So.2d 124 (Fla. 1988), aff'd 490 U.S. 638 (1989), but never connects these cases with the instant one. First, in both Valle and Hildwin, as in Bender, Robinson, Muehlman, and Parker, the witnesses relied on the records used to impeach them to formulate their opinions; here, there was no reliance. Further, Valle and Hildwin hold specific instances of misconduct may impeach. Here, the question is not whether specific instances of misconduct conflict with an opinion, but rather whether the hearsay opinions of others on Mr. Elledge's mental/emotional state may be so used. Of course, the State may introduce the opinions of other witnesses, but must use competent evidence to do so. As numerous cases cited at IB 19 hold, hearsay opinions of unqualified witnesses who cannot be cross examined puts thoroughly unreliable - and hence incompetent - evidence before the trier of fact.

E the State means to suggest the trial court was right for the wrong reason, contending that §921.141(1), Florida Statutes, authorizes the admission of such hearsay, it is mistaken €or several reasons.[8] Hearsay must be fairly rebuttable to be admissible under 5921.141. Expert opinion testimony is never fairly rebuttable in a meaningful sense without scrutinizing the factual predicate, methods, and reasoning employed by the expert in forming the opinion: absent cross-examination, the opinion takes on an aura of infallibility. Mental health testimony is especially difficult to rebut because the facts are inherently difficult of proof and opinions subject to the professional's theoretical bent. See Ake v. Oklahoma, 470 U.S. 68, 81 (1985)("psychiatrists disagree widely and frequently" and jury should have full exposition of the science); Hodge v. state, 7 So. 593, 596 (Fla. 1890) (experts differ widely on insanity; unfair to require defendant to prove it). Without cross, the expert's predilections cannot be exposed; psychiatric hearsay opinion evidence cannot be fairly rebutted. Cf. Dragovich v. State, 492 So.2d 350, 355 (Fla. 1986) (reputation evidence not fairly rebuttable since based on hearsay and opinion).

Alternately, this Court has adopted a rule of procedure which conflicts in this case with §921.141(1)'s hearsay provision. "In all proceedings based upon section 921.141 . . . Each side will be permitted to cross-examine the witnesses presented by the other side." Rule 3.780(a), Fla.R.Crim.Pro. The ntate made the opinion-makers witnesses by introducing their statements and using them as substantive evidence. Rule 3.780's guarantee of cross, not §921.141's allowance of hearsay, controls since the use of evidence at sentencing is a matter of practice and procedure which this Court, not the Legislature, regulates.[9] Fla.Const. Article V, §2; see Huntley v. State, 339

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[8] Mr. Elledge also relies on the arguments made at IB 19,n.17 that the State has waived this ground by failing to raise it below. Also, the failure to qualify the opinion-giver makes the evidence inadmissible under the opinion rules. Cf. Hitchcock v. State, 578 So.2d 685, 690 (Fla. 1991)(5921.141 does not rescind wholesale the rules of evidence).

[9] Although this Court has previously held $921.141 is constitutional against broad claims it regulates procedure, it has not addressed the narrower issue whether 921.141's hearsay provision is substantive or procedural. This Court said it 'adopted' the procedural aspects of §921.141 when it approved Rule 3.780. See Morgan v. State, 415 So.2d 6, 11 (Fla. 1982). If that statute's procedural

So.2d 194 (Fla. 1976); see also Glendening v. State, 536 So.2d 212, 215 (Fla. 1989)(hearsay exceptions procedural matters, so no ex post facto violation to apply new one to crime committed before its adoption).

Critically, the use of this hearsay violates the Confrontation Clauses, and so cannot be admitted under both 5921.141's terms,[10] and those of the Florida or Federal Constitutions, as set out at IB 22-3.[11] See also United States v. Fortier, 911 F.2d 100, 103 (8th Cir. 1990)(Confrontation Clause applies to felony sentencings). In this regard, the State contends Mr. Elledge did not preserve a claim that he could not cross the witnesses; the State concedes Mr. Elledge objected to the cross as outside the scope of direct and hearsay. AB 44. This Court rejected a like contention in Tomwkins v. State, 502 So.2d 415 (Fla. 1987). In Tompkins, the defense objected on hearsay grounds only to testimony from police about prior offenses. Nonetheless, this Court discussed the confrontation clause problem, recognizing that hearsay objections fairly put confrontation issues before the trial court. Id. at 420; see also Jackson v. Scully, 781 F.2d 291, 295 (2d Cir. 1986)(hearsay objection satisfied notice to state courts of confrontation claim, allowing issue to be raised in habeas petition); Hutchins v. Wainwright, 715 F.2d 512, 518 (11th Cir. 1983), cert. denied 465 U.S. 1071 (1984)(same); Thomas v. Estelle, 582 F.2d 939, 941 (5th Cir. 1978)(same). As related at IB 20 and 22, both the confrontation clauses and

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aspects conflict with a Rule promulgated by this Court, the Rule prevails. See State v. Ferguson, 556 So.2d 462 (Fla. 2d DCA), rev. denied 564 So.2d 1085 (Fla. 1990)(state must consent to judge sentencing despite statute's language that defendant may waive jury); The Florida Bar, 343 So.2d 1247 (Fla. 1977)(adopting Rule 3.780 and providing it "shall supersede all conflicting rules and statutes.")

[10] "However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida." §921.141(1), Fla.Stat. (1989).

[11] The State incorrectly contends the doctor in Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir.), modified 706 F.2d 311 (1983)was unavailable and the court rested its analysis there on his unavailability. However. the opinion simply noted sprehe had not been able to attend the hearing on the-day in question, and when the defense aeked for a chance to cross him about his report, the trial court agreed not to consider his report, but then did use it to rebut mitigating evidence. Proffitt, 685 F.2d at 1250 and 1255.

the hearsay rules are based on the sound policy that live testimony with the witness open to cross exam produces more reliable and complete evidence. Mr. Giacoma's extensive and vigorous objections quoted at AB 44 show he vividly presented the substance of the confrontation clause and inability to cross claims to the trial court. Steinhorst v. State, 412 So.2d 332 (Fla. 1982) is not germane to this issue: it concerns raising a theory of relevancy for excluded evidence that was not raised at trial.

Contrary to the state's arguments, the issue here is not whether the prosecutor misstated what was in the reports, but whether the opinions related were reliable. Thus, although the defense could correct a misstatement by the prosecutor about the report's contents, he was limited in attacking the prior opinions to problems appearing in the face of the reports. The State provides no policy reasons whatsoever why it should not be required to produce mental health evaluators in court to be examined by both sides before the trier of fact. There, the defense can pose hypotheticals to the witness which may change the substance of the diagnosis. The witness' qualifications could be aired. The witness' theoretical predilections could be exposed. The witness' reasoning and methodology could be scrutinized. The witness' demeanor could be observed. None of this vital information can be presented to the trier of fact if the State is allowed to present the bare final opinion to the jury via the cross of an opposing expert. Such a ruling would undermine the vital truth-seeking function of capital sentencing hearings.

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.

The State misstates the grounds raised below, saying "Prior to [Nelson] testifying, the court overruled defense counsel's objection to her testimony on Booth grounds, asserting that the other cases, to-wit: the other murders, had no bearing on the instant resentencing." AB at 47. In fact, the grounds

presented below cover and preserve the grounds argued on appeal.[12]

The State misreads the cases relied upon by Mr. Elledge to claim there was no error in admitting Nelson's testimony. Mr. Elledge relies on the correct explanation of Freeman v. State, 563 So.2d 73, 76 (Fla. 1990) and Rhodes v. State, 547 So.2d 1201 (Fla. 1989) at IB 23-4. In Rhodes, this Court alternately held the victim should not have been allowed to testify at all. Id. at 1205.

Although the Supreme Court overruled part of Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987) in Pavne v. Tennessee, 111 S.Ct. 2597 (1991), Pavne does not affect the argument made in this case. This case involves

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[12] At the pretrial hearing to exclude Mre. Nelson from testifying, Mr. Giacoma noted that Booth had prohibitted victim impact testimony, and also told the court:

> Although it was a victim impact statement in lieu of the testimony, I think the Court has got to weigh what effects she can have and what emotion she can produce to sway the jury on something that's not an aggravating factor and weigh that against Mr. Satz's abilities to present the same testimony without a family member taking the stand and being emotional. He has got the lead detective for Gaffney. He can have the lead detective in Jacksonville.

R 62. The written motion is baaed not only on Booth, but on this Court's statements in Elledge 11 that only facts of a prior violent felony going to the defendant's character are admissible. R 2098, 2477; see Elledge, 408 So.2d at 1022. Mr. Giacorna also noted it is improper to aggravate a capital crime because a previous violent felony was heinous, atrocious, or cruel. R 2096, 2475. When Mrs. Nelson was called, Mr. Giacoma objected at side bar:

> Judge, same thing, Booth v. Maryland, Elledge two, that the facts in these other two cases, the jury shouldn't know them in great detail, victim impact, primarily Booth v. Maryland. There's other ways than to have a close family member testify. We object to them at this time.
>
> THE COURT: Overruled.

R 519. After she testified, Mr. Giacoma moved for a mistrial because Mrs. Nelson's emotional display inflamed the jury which motion the court denied. R 550. When the State attempted to introduce the photos of Gaffney's corpse, Mr. Giacoma objected:

> I object on the same basis, Your Honor, under Booth v. Maryland, and Elledge II that the photos of the prior homicide are not necessary at this point. It's already been identified, already been told to the jury, and there's no probative value to them at this point to be continually discussed.
>
> MR. SATZ: It's going to indicate where the wounds are, Your Honor, and identity to the deceased and that's it.
>
> THE COURT: Overruled.

R 460-1. This objection was repeated when the State moved the photos into evidence. R 462. Mr. Giacoma objected during the state's opening to the detailed rendition of the prior violent felonies, but was overruled. R 335. He moved for a new trial because the court's repeated errors in admitting prejudicial evidence of the prior violent felonies and thereby allowing these collateral offenses to become the focus of the proceeding destroyed Mr. Elledge's chance for a fair hearing. R 2711-2, 2697-8, 2700, 2701. This motion was denied. R 824.

the introduction of collateral crime victim evidence. Nothing in Payne suggests that the impact on victims from collateral offenses is relevant in a capital sentencing context, nor does §921.143(2), Florida Statutes or any other statute or court decision auggest that the suffering of collateral victims is relevant to a capital Sentencing. This Court's decisions, listed at IB 23, are directly to the contrary. To rule collateral victim impact is admissible in a capital sentencing, thie Court would have to overrule Rhodes, Freeman, and Trawick v. State, 473 So.2d 1235, 1240 (Fla. 1985).

Sound policy underlies those decisions; Florida has long regulated use of victim testimony, closely scrutinizing it.[13]

> These same concerns were addressed by this Court on the issue of guilt well before Booth in Weltv [v. State, 402 So.2d 1159 (Fla. 1981)]. Welty reasserted the well established rule that "a member of the deceased's family may not testify for the purpose of identifying the victim where nonrelated, credible witnesses are available to make such identification." Welty, 402 So.2d at 1162; see also Lewis v. State, 377 So.2d 640 (Fla. 1979); Rowe v. State, 120 Fla. 649, 163 So. 22 (1935); Ashmore v. State, 214 So.2d 67 (Fla. 1st DCA 1968).... Although the testimonv is somewhat different from that which occurred in Booth, [footnote omitted] we conclude that the guilt phase identification of the victims by Brock's sister and brother and Perry's sister, in violation of Weltv, created an equal risk of an arbitrary capital-sentencing decision.
>
> A verdict is an intellectual task to be performed on the basis of the applicable law and facts. It is difficult to remain unmoved by the understandable emotions of the victim's family and friends, even when the testimony is limited to identifying the victim. Thus, 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 relative's testimony was necessary to establish the identity of the victims. It is apparent that such testimony was impermissibly designed to evoke the sympathy of the jury.

Jones v. State, 569 So.2d 1234, 1239 (Fla. 1990). Using victim impact evidence as a nonstatutory aggravating factor should not be allowed. See Grossman v. State, 525 So.2d 833 (Fla. 1988); Walton v. State, 547 So.2d 622, 625 (Fla. 1989). The State presents no reason to change this well established state law.

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[13] Justice O'Conner in Payne recognizes states can and should regulate the introduction of victim impact evidence. Id. at 2612 (O'CONNER, concurring) ("Trial courts routinely exclude evidence that is unduly inflammatory . . . ."). The majority opinion in Payne also recognizes this type of evidence can violate the due procees clause. Id. at 2608.

Alternately, the use of prejudicial information with little or no probative value so infected this trial as to deny Mr. Elledge the due process of law.[14]

In arguing the photos of Gaffney's corpse were properly admitted, the State ignores the primary contention in the Initial Brief, that identity and cause of death are not material facts in proving a prior violent felony. Thus, whether the photos show these facts does not matter, since relevancy must be relevancy to a material fact. The cases strung cited at AB 49, with the exception of Randolph v. State, 562 So.2d 331 (Fla. 1990), all concern introduction of photos to prove a murder charge. In Randolph, this Court held the photos of the homicide victim's corpse were relevant to the heinous nature of the offense. None involve depictions of a collateral victim's corpse.

The State distinguishes the 'focus' Williams Rule cases cited at IB 28-9 because they do not involve proving the prior violent felony aggravator, contending since the State must prove aggravators beyond a reasonable doubt, it cannot be restricted in its presentation of evidence.[15] It would be extraordinarily peculiar if a rule designed to protect defendants - the beyond a reasonable doubt burden of proof - were used to admit endless reams of prejudicial information which destroy any chance for a fair hearing. The law does not require such a peculiarity. This Court has already ruled, in the several recent cases cited at IB 23, that prejudicial evidence of prior violent felonies should be restricted. The only case the State cites in support of its argument is Valle v. State, 581 So.2d 40 (Fla. 1991). Valle is distinguishable;

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[14] The Florida Constitution demands exclusion of victim impact and opinion evidence. Article I, § 17 of the Florida Constitution prohibits cruel and unusual punishments. Article I, § 9 requires due process before any person may be deprived of "life, liberty, or property." This Court construes Florida's Constitution independently of the Federal. See In re T.W., 551 So.2d 1186 (Fla. 1989); State v. Glosson, 482 So.2d 1082, 1085 (Fla. 1985) (contingency fee agreements with informants violates Article I, § 9). Permitting evidence of the victim to be considered means death will be baaed on the social acceptance of the victim and the victim's relatives' opinions on penalty, a wholly arbitrary factor which will destroy any appearance of rationality in the administration of the death penalty. As such, it trenches on the fundamental right to life and creates cruel and unusual punishment, contrary to Article I, §§ 9 and 17.

[15] Mr. Elledge again notes he did not contest his prior convictions. The State's contentions at AB 50,n.3 that this evidence rebutted mitigation are puzzling; the State concedes at AB 82,n.5 that Mr. Elledge properly waived relying on the no significant prior criminal history mitigator.

this Court held the State may, in a resentencing, establish the circumstances of the homicide for which sentence is being conaidered since the state must prove the aggravators. However, the State need not reprove each element of the prior conviction: proof of conviction with no details suffices. The law now allows the State to provide details of the offense, if the State wishes, but does not require proof of each detail beyond a reasonable doubt. Thus, the State has no need for unrestricted evidence to prove the details.

Finally, Mr. Elledge would note two recent case8 which show the extensive evidence of his prior offenses violated his double jeopardy rights. In Lesko v. Lehman, 925 F.2d 1528, 1545 (3d Cir. 1991) and Rogers v. Lynaugh, 848 F.2d 606, 611 (5th Cir. 1988), the courts of appeals held arguments by prosecutors which would naturally and necessarily exhort the juries to punish the defendant for prior crimes violates the defendants' right to freedom from double jeopardy. Ibid; see also State v. Gillies, 135 Az. 500, 662 P.2d 1007, 1018 (1983)(using collateral crime victim to establish violence of prior conviction violates basic tenets of due process). Likewise, introducing and arguing voluminous details of prior felonies naturally and necessarily pushes juries to punish a defendant for the prior offenses and so violates double jeopardy.

POINT IV

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

One record problem must be clarified. Although Fatteh testified he found needle marks on Strack's body, that testimony was struck by the court upon objection by the State. R 466-7.

The State initially faults Mr. Elledge €or not demonstrating the harm to the error of admitting a hearsay statement the victim had a blood alcohol level (BAL) of .06%. The burden of showing lack of prejudice lies with the State: it must demonstrate the error was harmless beyond a reasonable doubt. See State v. Diguilio, 491 So.2d 1129, 1135 (Fla. 1986). The State has not and cannot meet this test. The evidence affected consideration of the material fact of the victim's level of intoxication. The importance of the victim's intoxication is

argued at Point XXIII; it establishes a defense to or leseens the weight of the heinous, atrocious, or cruel (HAC) aggravator.

Mr. Elledge's confession stated he had 9-10 drinks at the bar that afternoon and Strack 4-5 beers, saying the pair sat in the bar from around 3 pm until 5:30 or 6:00. R 406, 408. The bartender, Janet Pocis, testified Elledge had 2 drinks and Strack 3 beers, and sat in the bar for about an hour. R 359. The .06% BAL, inasmuch as it reflected Strack's level of intoxication, harms the HAC defense on a disputed point by showing Strack may have been in control of her faculties. The statement a .06% BAL meant the witness had 2-3 beers before death could have been taken by the jury to mean Pocis was correct and Elledge wrong about the number of drinks they had at the bar.[16]

Primarily, the State contends that the BAL was properly admitted as a fact underlying Dr. Fatteh's opinion, citing Capehart v. State, 16 FLW S447 (Fla. June 13, 1991). Although §90.705, Florida Statutes, allows experts to base opinions on facts not in evidence, Florida courte uniformly hold experts cannot be mere conduits for inadmissible evidence. See Riggins v. Mariner Boat Works, Inc, 545 So.2d 430, 431 (Fla. 2d DCA 1989)(citing cases); Kurvnka v. Tamarac Hospital Corp., 542 So.2d 412, 413 (Fla. 4th DCA 1989)(error to admit opinion on decedent's cocaine usage based on inadmissible lab report); Bunyak v. Clyde J. Yancey and Sans Dairy, Inc., 438 So.2d 891, 893 (Fla. 2d DCA 1983). In Riggins, the deceased, while walking one night to visit hie son, was killed by one defendant's automobile driven by the second defendant. The defendants claimed the wreck occurred as a result of the pedestrian's intoxication. The trial court ruled an autopey report of the deceased's ocular vitreous fluid alcohol level report was inadmissible absent a predicate as a bueiness record. The defendants then called a chemical toxicologist who multiplied the report's occular alcohol level by a etandard conversion factor and testified the decedent's BAL was .11%. The Second District Court of Appeal reversed, holding

[16] Fatteh did not explicitly relate back Strack's BAL at the time of her death to a number of drinks to reach that level and stated she could have drunk more shortly before her death, R 465, so the state's claim at AB 54 that Pocis 'corroborates' the BAL level is not proven by the record. R 460. However, the jury might have taken Fatteh to mean that 2-3 drinks were imbibed at the bar.

"the expert's testimony was merely used as a conduit." Id. at 432. The same is true here: Dr. Fatteh did not baea his opinion on the decedent's cause of death on the BAL; he merely repeated the contents of an inadmissible report during his testimony. In Capehart, the doctor who performed the autopsy had died before trial, and the witness gave an opinion on the cause of death based on the autopsy reports. Fatteh never based hie opinion on cause of death on the BAL: the information was related soley to reveal otherwise inadmissible evidence. Fatteh acted as a conduit for the hearsay BAL report, as in Riggins.[17]

POINT VI

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

The state claims Mr. Elledge waived this claim by not objecting at trial. Mr. Giacoma's failure to object below does not waive this issue because such objection would have been futile. This Court has held: "A lawyer is not required to pursue a completely useless course when the judge has announced in advance that it will be fruitless." Brown v. State, 206 So.2d 377, 384 (Fla. 1968); see Rodriquez v. State, 494 So.2d 496, 498 (Fla. 4th DCA 1986)(failing to object to policeman's comments on silence and prosecutor's arguments thereon did not waive issue since court overruled objection to other officer's similar comments). Mr. Giacoma moved pretrial to redact from the statements any reference to uncharged criminal activities, although not specifically referring to Mr. Elledge's alias. R 56, 2083. The state Attorney agreed, R 57-8, but the trial court stated that he would not require it:

> COURT: On the request to, on the motion in limine as to the fact, Paragraph 2 is denied, three is denied, four is denied, five is denied. Just strike the references that Mr. Satz said and I wouldn't even strike that, but since he agreed to it, that's fine.
>
> MR. GXACOMA: I didn't hear that. Are you saying mine is totally denied, but as far as the burglary, which is already agreed upon --
>
> COURT: He agreed upon. I probably wouldn't have even ruled that way, but since he agreed with that, that's fine with me. I don't care, anything you can agree on, but I think its important for the jury to find out what happened.

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[17] Since this hearsay exception is not firmly rooted in American law, see Hutchinson v. Groskin, 927 F.2d 722, 725 (2d Cir. 1991), its use also violates the confrontation clause. IB 37-40.

R 59-60. Any further objections would have been futile.

POINT VII

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

Mr. Elledge haa shown this issue was preserved at IB 43, n.44.

POINT VIII

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

The State apparently concedee Mr. Elledge's jury knew "the fact that he was placed on death row on more than one occasion,'' AB 59, but argues such knowledge is harmless. During voir dire, two jurors in this very case expressed impatience with defendants who have spent long periods on death row or had multiple appeals. R 153, 155, 209-14 (Doyle), 284(Black). The beliefs that convictions are reversed on technicalities and death sentences are executed too slowly are widespread. Knowledge of multiple appeals leads jurors to believe the defendant is abusing the system. It calls attention to appellate review, thus relieving jurors of responsibility for their role in imposing sentence. The harm is similar to that in Caldwell v. Mississippi, 472 U.S. 320 (1985) in which the Court held referring to appellate review caused the sentencing to be so unreliable as to violate the Eighth Amendment. That Mr. Elledge's chance for a life sentence was harmed can be seen by his jury's narrow vote of 8-4 for death. Haliburton v. State, 561 So.2d 248 (Fla. 1990), cited at AB 59, concerns inadvertent reference to a prior appeal which did not reveal. the outcome of the prior proceedings. Here, by contrast, the reference to prior proceedings was deliberate, as in Jackson v. State, 545 So.2d 260, 263 (Fla. 1989), and the Appellee admits the jury knew what happened before.

POINT IX

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

Appellee relies completely on the doctrine of law of the case for its response to this issue, AB 60-62, citing Sullivan v. State, 441 So.2d 609 (Fla. 1983); Dobbert v. State, 456 So.2d 424 (Fla. 1984) and Quince v. State, 477 So.2d 535 (Fla. 1985). However, none of these cases are remotely similar.

Sullivan and Dobbert involved appeals from successor Rule 3.850 motione. Quince involved application of rulings on direct appeal to a 3.850 appeal. Here, Mr. Elledge received a de novo resentencing. A resentencing is a completely new proceeding. Huff v. State, 495 So.2d 145, 152 (Fla. 1986); King v. Dugger, 555 So.2d 355 (Fla. 1990). Appellee cites no case in which a ruling on an ineffective assistance of counsel claim in post-conviction binds a court on the merits of a motion to suppress at resentencing.

Law of the case does not apply for other reasons. The doctrine of law of the case is limited to "questions of law actually presented and considered on formal appeal." U.S. Concrete Pipe Co. v. Bould, 437 So.2d 1061, 1063 (Fla. 1983) (e.a.); see Coastal Petroleum v. American Cyanamid, 492 So.2d 339, 344 (Fla. 1986) (dicta in an opinion is not law of the case); Myers v. Atlantic Coast Line Railroad Company, 112 So.2d 263, 267 n.6 (Fla. 1959) (same); Bee also Prime Management Co. v. W & C Associates, 548 So.2d 696, 697 (Fla. 3d DCA 1989) (par curiam affirmance of trial court order granting a new trial on several grounds ie not approval of all the grounds). In this case, the prior court was ruling on an ineffective assistance claim, not the merits of the motion to suppress. Thus, law of the case is not applicable. Alternately, Owen v. State, 560 So.2d 207, 210-211 (Fla. 1990), is intervening case law which controls this issue and requires reversal. A court may reconsider its ruling if convinced the original ruling is erroneous. Beverly Beach Properties v. Nelson, 68 So.2d 604, 607-608 (Fla. 1953); Massie v. University of Florida, 570 So.2d 963, 964-976 (Fla. 1st DCA 1990). Intervening case law is grounds to reconsider a previous decision. United States v. Cherry, 759 F.2d 1196, 1208 (5th Cir. 1985).

POINT X

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

Amazingly, the State never mentions or distinguishes the many cases at IB 48-50 which show Kuck was competent to opine Mr. Elledge would do well if he received term of imprisonment, even thoughthe state primarily contends Xuck was not qualified. Officer Kuck was in charge of a wing at Florida State Prison and has been employed there for over 7 years; previously he was an Army drill

instructor and combat engineer for 22 years. R 543, 544. His experience supervising people gives him insight into who will cause trouble. R 544. We first met Mr. Elledge around 1981 and has known him well for the two years during which time Kuck supervised a wing on death row. R 543. That Officer Kuck's testimony might be impeachable[18] does not make it inadmissible. The State cites Burch v. State, 522 So.2d 810 (Fla. 1988); in Burch, the court excluded a presentence investigation report on other sentences, written years before the murder. Such a stale report obviously had little relevance. Muehlman v. State, 503 So.2d 310, 313 (Fla. 1987) has even less to do with the instant issue: there this Court held the trial court need not admit irrelevant or cumulative evidence. The opinion of Mr. Elledge's jailor that he would do well. in prison, in contrast, is competent and material evidence as shown at IB 48-50.

Next, the State seems to argue excluding this testimony was harmless since Dr. Caddy testified that Mr. Elledge had adjustedto prison. AB 63-4. Dr. Caddy testified that Mr. Elledge had adjusted to death row, not being a danger to anyone there; however, Caddy stated that the special conditions of death row helped lead to this adjustment and never stated Mr. Elledge could do so well off death row.[19] This testimony was not sure proof that Mr. Elledge would

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[18] Mr. Elledge does not believe the disciplinary reports actually impeached Kuck's testimony, but accepts they could here only for the sake of argument. Further, the State used an unrevealed stack of documents to impeach Kuck during cross; the connection between these documents and the stipulation later entered regarding Mr. Elledge's record has not been shown.

[19] Dr. Caddy had testified Elledge's dangerousness had profoundly decreased since he had been in prison, R 614-5, but Dr. Caddy noted:

> It seems that Death Row is a slightly different place and maybe a significantly different place from the normal population of people in prison. Its a context within which some intimacies can evolve and Bill has developed, apparently, the capacity to have friendahips that really mean something to him.

R 615-6. After a recess, the direct exam continued:

> Q. Not to go into any great detail, because we already went through some of this, but how is Bill Elledge doing now on Death Row? How is he coping, is he a danger?
>
> A. There doesn't appear to be any evidence of him being any danger to anybody in the system. He reports that he has had essentially one altercation in prison.
>
> Q. Do you remember the time period of that?
>
> A. A number of years ago, not recently. And that he feels he is doing okay.

R618.

succeed off death row. Officer Kuck would have directly testified Mr. Elledge would do well if sentenced ta a term of imprisonment. R 545. The State points to nothing in the record which positively shows Mr. Elledge would adjust to prison conditions off death row; the excluded testimony of Ruck was not cumulative. The State also attacked the credibility of Dr. Caddy, among other things arguing he relied too much on his interviews with Mr. Elledge in forming his opinions generally. R 621-5, 750-1. The harmless error analysis of Skipper v. South Carolina, 476 U.S. 1 (1986) is on all fours with these facts:

> Finally, the State seems to suggest that exclusion of the proffered testimony was proper because the testimony [of jailers] was merely cumulative of the testimony of petitioner and his former wife that petitioner's behavior in jail awaiting trial was satisfactory, and of petitioner's testimony that, if sentenced to prison father than to death, he would attempt to use his time productively and would not cause trouble . . . [C]haracterizing the excluded evidence as cumulative and its exclusion as harmless is implausible on the facts before us. The evidence the petitioner was allowed to preeent on the issue of his conduct in jail was the sort of evidence that a jury naturally would tend to discount a8 self-serving. The testimony of more disinterested witnesses - and, in particular, of jailers who would have had no particular reason to be favorably predisposed towards one of their charges - would quite naturally be given much greater weight by the jury.

Id. at 8. Even more telling, the record shows the jury discussed this very issue. The court revealed a juror had sent the court a note:

> MR. GIACOMA: "If the man has been in jail by himself and controlled for 15 years, how will he act if put into the community of other prisoners and what would he do if he -" Something - "No again?"
>
> MR. SATZ: It says, "And what would he do if he hears no again? Do we make a decision on just what we hear in court? Wow is this going to be brought about? I think this is very important. Juror number five."

R 689-90. Excluding evidence answering this question prejudiced Mr. Elledge's case, especially in light of the jury's narrow 8-4 vote for death.

The State next makes the incredible argument that Daniel Elledge was not competent to testify how his own life experiences helped him overcome his abueed childhood. The State itself, in the prosecutor's arguments below, R 2680 and the Answer Brief's arguments to this Court, AB 28-9, is the only party "speculating" about the effects of the child abuse on Daniel and Connie Elledge. The Answer extensively argues that Daniel's and Connie's lack of criminality show Mr. Elledge's childhood did not affect his later behavior. Yet, while the

State allows itself to speculate about Daniel Elledge's life experiences on appeal, it claims the witness is not competent to testify how he overcame this abused childhood. Preventing William Elledge from testifying haw his life affected his behavior would have been error. See Bell v. Ohio, 438 U.S. 637, 641 (1978) (plurality)(companion case to Lockett[20] in which court ignored, inter alia, defendant's account of his life and how it affected his behavior); see also Gardner v. State, 480 So.2d 91,93 (Fla. 1985)(cited at IB 51, holds police officer may testify to a codefendant's personality after a mere five hours of observation). Daniel Elledge similarly must be allowed to testify about his own life: with a life time of observation and intimate knowledge how his personality was formed, he is the moet competent witness to it. The State's argument defies underatanding.

POINT XI

STRIKINGTESTIMONY SHOWINGTHE VICTIMUSED DRUGS VIOLATED MR. ELLEDGE'S RIGHT TO CONFRONT WITNESSES AND PRESENT MITIGATING EVIDENCE IN A CAPITAL PROCEEDING.

The State's argument is a transparent attempt to avoid discussing the issue and confuse this Court. First, the State's record quotation at AB 65 omits the relevant testimony the State moved to strike: that Fatteh said on cross that Strack had 17 needle marks on her elbow and hand. R 466. Dr. Fatteh had testified on direct exam in response to a question by the prosecutox that a blood screen showed no signs of anything in the victim's blood except for alcohol. R 460. The defense should be allowed to show Fatteh knew of evidence showing hard drugs were present. The State's contention that Mr. Elledge somehow for some unspecified reason should not be allowed to claim a right to cross on this evidence because he also argues elsewhere the evidence should not have been admitted at all is specious. No legal authority is cited. Such a contention defies common sense. The court wrongly admitted the evidence and then wrongly denied a full cross exam on it. Two errors occurred, so two points are argued. The State's contention that defense counsel was allowed to "explore" with Fatteh whether Strack used drugs simply ignores the fact the court excluded

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[20] Lockett v. Ohio, 438 U.S. 586 (1978).

the relevant evidence showing she did use drugs and declared before the jury Strack had not used hard drugs although such evidence exists and was offered.

The State cites a number of cases which uphold excluding evidence of drug use by a homicide victim as irrelevant, but: does not discuss their application to the instant case. The prosecutor below opened the whole area to discussion in his direct exam of Dr. Fatteh, by asking him the findings of the toxicology blood screen. The State should not be heard to complain now that the victim's drug use is irrelevant. Further, the State admits Strack's marijuana and alcohol use is relevant, but tries to say her use of hard drugs was not! Mr. Elledge attempted to establish the victim was intoxicated as a defense to the heinous, atrocious, or cruel aggravator (HAC) or to lessen the weight of HAC. Thus, the victim's drug use is relevant on these facts. See Rhodes v. State, 547 So.2d 1201, 1208 (Fla. 1989)(HAC finding invalid despite strangulation death since defendant said victim drunk, corroborated by evidence that victim frequented bars). Taylor v. State, 16 FLW S469 (Fla. June 27, 1991), Hayes v. State, 581 So.2d 121 (Fla. 1991), Gunsby v. State, 574 So.2d 1085, 1088 (Fla. 1991), and Lucas v. State, 581 So.2d 121, 126 (Fla. 1991) relied upon by the State are all factually dietinguishable. They do not say victim drug use is always irrelevant:

> Although such evidence [of the victim's recent consumption of cocaine and marijuana] may be relevant in some circumstances, it was not relevant to any material. issue on the facts of this case.

Hayes, 581 So.2d at 126. In Haves and Gunsby, HAC was not at issue. In Lueas, the defense claimed the victim's drug use somehow impeached her hearsay statements about the defendant which were admitted, but never showed the victim was using the drugs at the time the statements were made. There was no contention of victim drug use at the time of the crime in Lucas. In Taylor, the defendant did testify the incident began when the victim offered sex in exchange for drugs and sought to show the victim used cocaine before; Taylor was attempting to show the victim used drugs to prove consent to sex ae a defense to a sexual battery. The opinion says nothing about the victim's drug use as a defense to HAC nor is it clear that victim ever actually used drugs before her death. Strack's drug use, in contrast, is relevant as a defense to HAC.

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.

Mr. Elledge must first clarify two items about the record. Officer Kuck's testimony about Mr. Elledge's disciplinary reports, quoted at AB 67 without record attribution, all occurred during the prosecutor's cross exam. R 546-7. Second, the State misquotes the record, putting words into the mouth of the defense counsel at trial, having him admit to not notifying the state of theee particular witnesses. In fact, Mr. Giacoma said he could not recall whether he had so notified the State.[21] The record shows, R 1970, the defense subpoenaed Officers Kuck and Blye to testify for the April sentencing, - four months before the disciplinary reports were used during Kuck's cross exam on August 8 - and then resubpoenaed them for the August sentencing on July 26. Attachment A, Motion to Supplement the Record with Attached Documents. The record does not show whether the trial court even took notice of this document, much less decide when the State waa aware corrections officers generally would be called.

The State contends a sufficient Richardson[22] inquiry was held, citing a number of cases without further explanation. No inquiry at all waa held; the court actually ruled no discovery violation occurred because the state had no

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[21] The transcript says, after the court asked if Mr. Satz waa required to anticipate rebuttal:

> MR. GIACOMA: Your honor, 3 believe he should have . . . especially since he has known I was going to be calling people from death row when I started my case, my first witness list, I presume over a year ago.
> THE COURT: Mr. Satz.
> MR. SATZ: Your honor, he didn't tell me he was going to be calling these three guys until, when was it, yesterday or the day before.
> MR. GIACOMA: No sir. My first witness list had ten officers from Florida State Prison on it,
> MR. SATZ: And these three guys weren't one of them.
> MR. GXACOMA: Maybe different names, Judcre, I don't recall it.

R 548-9 (emphasis added). The Answer brief quotes Mr. Giacoma thusly:

> In response, Mr. Giacoma said that, "Well, there were people from the Department of Corrections on the list but they were different names." (TR 549).

AB 68.

[22] Richardson v. State, 246 So.2d 771 (Fla. 1971).

obligation to anticipate rebuttal evidence.[23] The State does not dispute this ruling was error. See Smith v. state, 500 So.2d 125, 127 (Fla. 1987); IB at 55.

None of the cases the State cites supports the State's contention an adequate Richardson inquiry was held below.[24] In smith v. State, 515 So.2d 182 (Fla. 1987), this Court found there was no discovery violation and also held any possible prejudice was cured since the defendant deposed the witness before the testimony. In Ziegler v. State, 402 So.2d 365, 372 (Fla. 1981), this Court held the trial court remedied any discovery error by acceding to a defense request for a 30 minute recess, after which no further objection was made. Here, the court wrongly ruled there was no discovery violation. No remedy for possible prejudice was provided: the court would not even pause for Mr. Giacoma to read the documents.

In Duest v. State, 462 So.2d 446 (Fla. 1985), this Court held the court conducted a full. inquiry:

> In the instant case, there was full disclosure as to why both state witnesses were not thoroughly identified, including their whereabouts prior to trial. The significance of their testimony was explored a8 well as the impact on the defendant's ability to prepare for trial. Defense counsel had the opportunity to speak with both witnesses prior to their testimony and conceded at trial there was no prejudice to the defendant other than the simple fact that the witnesses had not been fully disclosed prior to trial.

Id. at 448. Similarly, in Banda v. State, 536 So.2d 221, 223 (Fla. 1988) and Cherry v. State, 544 So.2d 184, 186 (Fla. 1989), this Court held proper inquiries were held and prejudice remedied.

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[23] After Mr. Giacoma complained he had not been given the records, the Court asked:

> THE COURT: is he supposed to anticipate what you put on there and show you his rebuttal before you put it on?

R 548. The attorneys then made conflicting statements about when the State was told Officer Kuck would teetify, but the prosecutor never said when he got the disciplinary reports. The court then overruled the objection. R 549. Mr. Giacoma requested at least a chance to read the documents.

> THE COURT: I imagine this is on rebuttal and cross examination, and if there's any objection, let's just proceed. I am not going to recess at this time.
>
> MR. GTACOMA: I am not asking you to recess. I am just saying I am totally unprepared to talk about 40 pages that I have never read or seen.

R 549.

[24] Welty v. State, 402 So.2d 1159 (Fla. 1981) is irrelevant: it has nothing to do with the sufficiency of Richardson inquiries.

The court below failed to make these inquiries. As noted above, the court never sought the truth on when the State had been notified about the use of corrections officers by the defense. It ignored Mr. Giacoma's volunteered statement he needed to investigate the reports to see if some had been dismissed. The court never asked how the surprise evidence prejudiced defenee preparatione, what could be done to correct any surprise, when the state came into possession of the documents, whether the state acted wilfully or inadvertently in withholding them, or how substantial the documents were. In addition to the cases showing specific failures to make inquiry cited at IB 55-6 - arguments the State hae not disputed - Mr. Elledge would also point to Raffone v. State, 483 So.2d 761 (Fla. 4th DCA 1986). During trial in Raffone, the State revealed an eleven month old lab report which opined a substance found inside the defendant's residence was cocaine. The prosecutor said he had just gotten the report, but did not say when he knew of it. Upon objection to the lab technician's testimony about the test, the court stated the defense had not been prejudiced. The Fourth District found the court, having ruled no discovery violation occurred, had not conducted any of the relevant inquiries pursuant to Richardson and reversed. The court's actions below were similar and the error the same: the court believed the State was not required to anticipate rebuttal and so conducted none of the relevant inquiries. Also, Peterson v. State, 465 So.2d 1349, 1351 (Fla. 5th DCA 1985), cited by the State, supports Mr. Elledge's position: the trial court erred there by not inquiring into prejudice €or the State and possible remedies before excluding tardily disclosed defense witnesses; the Fifth District reversed. No such inquiry was held below; this sentence muet be vacated.

POINT XIII

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

Mr. Elledge relies on the argument in hie Initial Brief, but needs to point out the state has mischaracterized the issue and the record. Mr. Elledge claims it was error for the prosecutor to tell the jury that the tape was edited

at the request of the defense counsel, thus implying statements damaging to Mr. Elledge were removed. Mr. Giacoma had no reason to object when the witness first stated the tape was redacted becauee the witness did not aay they were edited upon a defense request. After the court overruled a best evidence objection, the following transpired:

> MR. SATZ: That these were played [sic] at the request of Mr. Giacoma. I mean, why is he saying it's not the best? I don't understand.
>
> MR. GIACOMA: No Judge. What I said, I would like to make clear, if I may, is that those were made -- 3 understand they were made at my request. I object to him bringing them up, but were they made from copies or from originals.

R 470 (e.a.). The court did not then rule on Mr. Giacoma's objection to the prosecutor bringing out he had requested the deletions. The prosecutor then established from the witness that the edited tapes were copied from the originals. At that point, Mr. Giacoma stated he had no objection to the admission of the tapes, but never waived his objection to the prosecutor revealing the defense had requested the edits. At the next break when the jury was absent, Mr. Giacorna moved for a mistrial because of the prosecutor's statement, which the court denied. R 507. This issue was properly preserved.

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 EMBARRASSING QUESTIONS.

The State claims Mr. Elledge has not preserved any of the three errors for review. First, the State asserts, without citation to authority, that a defendant must object to the court's ruling after the court has sustained a state objection. Such a rule of procedure would be as senseless as it is unprecedented. The purpose of objections is fairly to put before the court the legal issue to be decided. See Castor v. State, 365 So.2d 701, 703 (Fla. 1978). If the State objects, the issue has been fairly put before the court. To require the defendant: to object again serves no purpose. Cf. Bender v. State, 472 So.2d 1370, 1373 (Fla. 3d DCA 1985)(when defense evidence excluded after motion in limine, defendant need not offer evidence at trial); Simwson v. State, 418 So.2d 984, 986 (Fla. 1982)(defendant need not move for mistrial if court

overrules objection since court considered issue and mistrial motion futile).

At AB 73, the State also claims that Mr. Giacoma questioned jurors with regard to aggravators and mitigators, citing R 190-1. The only questions Mr. Giacoma asked this juror in regards to the aggravatore and mitigators was whether he knew aggravators were limited and mitigators not. Following the court's order not to discuss specific mitigators, R 73, Mr. Giacoma never asked this juror or any juror whether they could consider specific mitigators.

The State primarily argues that the question posed by Mr. Giacoma was objectionable because it asked the juror to accept some evidence as mitigation. AB 75. Had this question been asked, it would be objectionable, but the State mischaracterizes the record. Mr. Giacoma never outlined any evidence he planned to present and ask if the juror would accept it; he asked "Do you think that change in a positive would be considered by you to be a mitigating circumstance if someone did something good with their life?" R 188-9. This Court holds positive adjustment after incarceration is a well-recognized mitigating circumstance, a category of evidence which must be found by the trier of fact if the evidence supports it. See Campbell. v. State, 571 So.2d 415, 419 n.4 (Fla. 1990); Copeland v. Dugger, 565 So.2d 1348, 1349 (Fla. 1990). Asking if a juror could consider a well recognized mitigating circumstance - which is what Mr. Giacoma did - is appropriate, as the State seems to concede.

The State cites Stano v. State, 473 So.2d 1282, 1285 (Fla. 1985) for the proposition a court may restrict argumentative or repetitive questioning. Stano is inapposite; counsel below was not being argumentative and was not allowed to ask any questions about the jurors' religious affiliations or ability to consider specific mitigators.

The State also argues no harm occurred from the error. Restrictions on voir dire impair a fundamental right. See Williams v. State, 424 So.2d 148 (Fla. 5th DCA 1982). In Poole v. State, 194 So.2d 903 (Fla. 1967), this Court ruled an improper restriction occurred - the trial court refused voir dire on granting mercy in a rape prosecution under the old capital sentencing scheme - and refused to consider whether the error was harmless. In Lavado v. State,

49 So.2d 1322 (Fla. 1986), in which this Court held an improper restriction of voir dire occurred, there was no hint a harmless error analysis was or should be applied. Other jurisdictions agree that an improper restriction on voir dire requires revereal without any showing of prejudice. See United States v. Hill, 738 F.2d 152, 155 (6th Cir. 1984); United States v. Rucker, 557 F.2d 1046, 1049 (4th Cir. 1977); see also Swain v. Alabama, 380 U.S. 202, 219, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965) (when right to peremptory challenges impaired, error cannot be harmless); Gomez v. United States, 109 S.Ct. 2237, 2248 (1989)(when magistrate presided at jury selection, error cannot be harmless); Knox v. Collins, 928 F.2d 657, 661 (5th Cir. 1991)(misstatement by court during voir dire on instructions which affected defendant's choice of strikes not subject to harmless error analysis). The State cites Carroll v. Dolsworth, 565 So.2d 346 (Fla. 1st DCA 1990) in support of its argument these errors were harmless. In Carroll, the court held an improper reference during voir dire by one counsel which denigrated the opposing side's main witness was prejudicial error; nothing in Carroll suggests harmless error analysis should be applied when a voir dire is restricted. The Eleventh Circuit in United States v. Nash, 910 F.2d 749 (11th Cir. 1990) did not engage in harmless error analysis; it held there was no error in asking certain questions propounded by the defense. The Eleventh Circuit examined the entire voir dire and jury instructions to determine if the unasked questions were covered by other questions and jury instructions. In the instant case, no other questions were asked about the jurors' religion or ability to apply specific mitigating circumstances; the trial court itself improperly relied on the Location of the corpse in a church parking lot in aggravating the crime, as explained at IB 74, 77, and the jury was never instructed on specific nonstatutory mitigating circumstances, as argued at IB 63-5. Even if harmless error analysis applied, this error would be found prejudicial: the jury voted for death by a narrow vote of 8-4.

POINT XVI

THE TRIAL COURT DID NOT ADEQUATELY DEFINE NONSTATUTORY MITIGATING CIRCUMSTANCES.

In addition to the authorities cited in his Initial Brief, Mr. Elledge

would also rely on Cunningham v. Zant, 928 F.2d 1006, 1011 (11th Cir. 1991). In Cunningham, the Eleventh Circuit found that an instruction to the jury to consider "all mitigating and/or extenuating facts and circumstances" without any further definition did not constitutionally instruct the jury what to consider. Florida's "catch-all" mitigator also leaves open the question what should mitigate entirely to the jury's imagination.

POINT XIX

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

The State claims the trial court copied its old sentencing order because the evidence presented below was the same as before; this assertion is unsupported by the record and without basis in fact. Mr. Elledge has moved this Court to notice the prior records to clarify this Point. Neither Dr. Caddy nor any other mental health expert testified at the prior sentencings. Neither Sharon Jennings, nor Daniel Elledge, nor the Florida corrections officers, nor any like witnesses had testified before.

The State claims this Court rejected a similar argument in Elledge v. State, 408 So.2d 1021 (Fla. 1982). Mr. Elledge previously challenged one particular finding in the order. As the State notes, the cases Mr. Elledge now relies on were issued after 1982 and so the 1982 decision does not control in any event. Bouie v. State, 559 So.2d 1113 (Fla. 1990) marked the end of thin Court' a patience with the sort of incompreheneible, unreasoned form order for death which the court below signed.

Inasmuch as the State relies on Gilliam v. State, 16 FLW S292 (Fla. June 15, 1991), €or the proposition that Campbell cannot retroactively require life be imposed €or an unreasoned exercise of judgment, the State is mistaken.[25] Not discussing mitigators, the problem identified in Campbell, is one sign of a more fundamental flaw: not exercising reasoned judgment. The law that unreasoned judgment by a trial court requires a life sentence be imposed was created well

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[25] Gilliam suggests Campbell. may be read to require a life sentence when the sentencing order does not evaluate mitigating evidence; the Court in Campbell ordered a judge resentencing.

before Campbell or Bouie. See Van Royal v. State, 497 So.2d 625, 627-8 (Fla. 1986)(granting life sentence when judge made no findings at sentencing).

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 State suggests that the trial court used Mr. Elledge's prior history of confinement to rebut his evidence he had adjusted to Death Row. Nothing about the trial court's findings suggeated he had been a problem prisoner, and the State does not explain how the findings actually made would rebut the mitigator. Moreover, the State ignores the fact the trial court had no information whatsoever properly before it to make such a finding. Mr. Elledge does not suggest he had no prior criminal history; he states he waived any reliance on that mitigator below and therefore any findings made on it constitute nonstatutory aggravation.

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.

Mr. Elledge argues here, in the alternative to Points I and II, that the trial court erred by relying on outside the record evidence in rejecting mental/emotional mitigating circumstances. The cases which the State cites at AB 86 are inapposite. They find the trial court properly relied on 'competent' evidence or equivocation in the evidence to reject the mitigators. Here, incompetent, extra-record information was used to reject unequivocal proof of the mental/emotional mitigators.

POINT XXII

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

The State again makes the unsubstantiated and untrue claim that the record below was identical to that at the earlier resentencings and so relies on this Court's prior holding to argue the trial court properly found the avoid arrest aggravator. Mr. Elledge refutes this untrue claim at Reply Point XIX. When a

As in Rogers and Garron, the State has not proved the motive to avoid arrest is the dominant or only one.

POINT XXIII

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

Mr. Elledge would first note, in response to the implication of the State at AB 89, that there is no evidence that the victim was burned by cigarettes as explained in the above Statement of Facts.

The State relies on a number of cases at AB 88 to the effect that strangulation murders are usually especially heinous, atrocious, or cruel (HAC). Strangulation murder is not always HAC: the State never distinguishes Rhodes v. State, 547 So.2d 1201, 1208 (Fla. 1989) in which the victim was strangled yet this Court held that alone did not set the crime apart from the norm of capital felonies. This case is much closer to the facts of Rhodes: the evidence of victim intoxication below is even stronger than in Rhodes. Nothing in Hitchcock v. State, 578 So.2d 685, 693 (Fla. 1990) suggests that victim, a young teenager, was anything but completely sober and aware. Nor does the State distinguish Teffeteller v. State, 439 So.2d 840, 846 (Fla. 1983) and Mills v. State, 476 So.2d 172, 178 (Fla. 1985) in which victims physically suffered for a lengthy period and knew death was imminent, yet HAC was struck. HAC usually applies when a victim is strangled not simply because of the victim's suffering, but because one can usually infer the perpetrator intended such suffering to occur. In this case, as in Teffeteller and Mills, the evidence shows a reasonable hypothesis Mr. Elledge had no such intent, as explained at IB 76-7. HAC should not have been found.

POINT XXVIII

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

Appellee claims Elledge v. Graham, 432 So.2d 35 (Fla. 1983), a post-conviction case, controls this issue. AB 100-1. In post-conviction, it is well-settled there are especially strong concerns for finality, not present in other contexts. Witt v. State, 387 So.2d 922 (Fla. 1980). Mr. Elledge does not col-