IN THE SUPREME COURT OF FLORIDA

WILLIAM DUANE ELLEDGE,

Appellant,

v. Case No.: 83,321

STATE OF FLORIDA,

Appellee.

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Elledge confessed to the rape and murder of Margaret Strack and the murder and robbery of Edward Gaffney in Hollywood, Florida; and the murder and robbery of Kenneth Nelson in Jacksonville, Florida, between August 24 and August 26, 1974.

On October 30, 1974, Elledge pled guilty to the murder of Kenneth Nelson in Jacksonville, Florida, and was sentenced to life imprisonment. On March 17, 1975, Elledge pled guilty to the rape and murder of Ms. Strack. Subsequently, Elledge pled guilty to the murder and robbery of Robert Gaffney and was sentenced to life imprisonment.

On March 18, 1975, Elledge was sentenced to death following a jury's recommendation of death by a vote of 11 to 1. On appeal the Florida Supreme Court reversed the sentence and remanded for a new sentencing hearing. Elledge v. State, 346 So.2d 998 (Fla. 1977). Elledge was again sentenced to death on remand and said sentence was affirmed by the Florida Supreme Court. Elledge v. State, 408 So.2d 1021 (Fla. 1982).

In a motion for post-conviction relief and a state habeas corpus petition, Elledge questioned the voluntariness of his guilty plea and alleged ineffectiveness of defense counsel. Relief was denied in Elledge v. Graham, 432 So.2d 35 (Fla. 1983), providing

that ". . . our review of the record convinces us that the appellant's confessions and guilty plea were properly admitted and that the allegations of ineffective assistance of counsel has not been shown." Certiorari review was denied. Elledge v. Graham, 464 U.S. 986 (1983).

Subsequently, Elledge received federal habeas corpus relief from the Eleventh Circuit Court in Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987), reh'g granted in part, 833 F.2d 250 (11th Cir. 1987).

A third sentencing proceeding was held in 1989. Elledge again asserted that he be permitted to withdraw his guilty plea.[1] Relief was denied pretrial, and Elledge was again sentenced to death following the new jury's 8 to 4 recommendation of death. The new death sentence was vacated, Elledge v. State, 613 So.2d 434 (Fla. 1993), based on a sentencing order deficiency and a Richardson hearing problem.

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[1](1) He was awaiting resentencing and he should be permitted to withdraw his 1975 guilty plea pursuant to Fla.R.Crim.P. 3.170(f); (2) the totality of the circumstances based on the plea should warrant withdrawal pursuant to Fla.R.Crim.P. 3.170(f); (3) Elledge had not been properly informed of his waiver of his rights of appellate review; (4) Elledge's plea was involuntary because he was not apprised of all valid defenses; (5) he had ineffective assistance of counsel; (6) the plea was based on inadequate psychiatric evaluations contrary to caselaw; (7) the plea colloquy was inadequate, and (8) Elledge was incompetent to enter a plea.

On June 10, 1993, prior to the fourth resentencing, Elledge again moved to be permitted to withdraw his guilty plea. He asserted his plea was voluntary. The trial court denied Elledge's request on the merits, concluding Elledge's request was insufficient on its face. (TR 3135).

The original 1975 plea colloquy reflects the court inquired of Elledge. (TR 3095-3135).[2]

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[2]Elledge was a 24 year old married carnival worker. (TR 3098). He had completed the 11th grade in school and had been in trouble as a juvenile. (TR 3098-3099). As an adult he had been convicted in Colorado of a second degree felony of menacing with a weapon and had received drug and alcohol treatment as an outpatient. (TR 3099). Pretrial he had been examined by Dr. Taubel and Dr. Eichert regarding any mental defenses. (TR 3099). He appreciated that "plea could result in the death penalty or a minimum-mandatory 25 year life sentence prior to being eligible for parole." (TR 3100). Elledge specifically acknowledged that he discussed defenses with his attorney, discussed the nature of the case and received advice from counsel as to what to do. (TR 3101). No threats or force were used to get him to change his mind regarding the plea and he was satisfied with counsel's representation. (TR 3102). Counsel discussed with him the penalty phase process and the consequences of any jury's recommendation. (TR 3103). The court concluded Elledge knew what he was doing in changing his plea from not guilty to guilty. (TR 3104).

The court further inquired of Elledge about the facts of the crime. Specifically, whether Elledge knew that he was facing first degree murder charges for the August 24, 1974, murder and rape of Margaret Strack. (TR 3104-3105). Elledge described how he met her at a bar in Hollywood and they had a few drinks. (TR 3106). They left together to go to his motel room in her car. They smoked some marijuana and at some point Ms. Strack started to sexually tease him. (TR 3107). Elledge was aroused, but Strack said no. (TR 3107). Elledge stated he blew his cool and told her she was going

At the 1993 resentencing proceeding, the State called a number of witnesses in support of the statutory aggravation. Without objection (TR 1136), the State read to the jury the previously presented testimony of State Marine Patrol Officer Charles Perrone. (TR 1136-1140). On August 25, 1974, he was dispatched to the Resurrection Catholic Church in Dania, Florida, as a result of a report that a body was lying in the parking lot. At 7:33 p.m., he arrived and found a white female lying in the parking lot. Her ankles were bound with an extension cord and she had bruises about the face, legs and other portions of her body. Her panties were pulled down to her right ankle and her blouse was pulled up exposing her breasts. (TR 1136-1140).

Dr. Abdullah Fatteh performed an autopsy August 25, 1974, and concluded that the cause of death was asphyxiation by strangulation. (TR 1143-1147). He observed numerous bruises and injuries to the neck, a fractured hyoid bone, soft tissue bruising, tiny hemorrhages to the eyelids, bruises around the left eyelid and

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to anyway. He freaked out and forcibly raped her. (TR 3108). Elledge admitted he strangled Ms. Strack for 15 to 20 minutes. (TR 3108). Elledge admitted he raped her in the process of choking her. (TR 3109).

The trial court concluded that a valid factual basis for the plea existed, to which defense counsel agreed an the plea was accepted. (TR 3110-3111).

on the forehead. (TR 1148). There were ligature marks on both ankles and all injuries occurred prior to death. (TR 1148-1149). Vaginal swabs indicated that sexual intercourse occurred prior to death and seminal fluids were found in the vagina. (TR 1150). Ms. Strack's blood alcohol level was .06 which was consistent with the consumption of two or three beers prior to death. (TR 1151). On cross he testified he did not test regarding drugs but further observed that all the injuries were consistent with a struggle occurring. (TR 1161). Defense counsel specifically asked how many times Dr. Fatteh had testified in this case. (TR 1164).

The State next called Allen Devin, a private investigator who, in 1974, was working with the Hollywood Police Department. (TR 1168). Mr. Devin testified that on Monday, August 26, 1974, he went to the Normandy Hotel and entered Room 3 at 609 North Ocean Boulevard, and found a woman's purse under pillows hidden in the closet. (TR 1169-1170). Items in the purse revealed that it belonged to Margaret Ann Strack. (TR 1170). Mr. Devin first met Elledge in Jacksonville, Florida, at a detention center August 27, 1974, when he went there to interview him. (TR 1171). After executing two waiver forms, Mr. Devin obtained a taped statement from Elledge concerning the Strack homicide. (TR 1174-1176, 1185). Specifically, Elledge confessed to two murders in Hollywood and

gave the location and the specifics with regard to the circumstances of the murders. (TR 1192). A taped confession was played to the jury.[3]

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[3]The statements reveal that on Saturday, August 18, 1974, Elledge traveled from Toledo, Ohio, with Paula Fain, who he had planned to marry once he divorced his wife, Diane Elledge. (TR 1202-1203). Once they arrived in Hollywood, they stayed at the Alpine Village Apartments until Friday, August 23, when Elledge had a fight with his fiancé and they split up. (TR 1204). He then went drinking that day and drank quite a bit. Needing a place to stay, he ultimately checked into the Normandy Hotel, Room 3, paying for three nights. (TR 1212). He showered and slept until the next afternoon around 2:00 p.m., and then went to the beach and the bars. (TR 1228). Elledge recalled in his statement that he was sitting at the bar and near the hotel when a girl came up and started talking to him. He bought drinks, he was drinking Seagrams and Seven-Up with no ice and she drank Budweiser. (TR 1229-1230). He identified a photograph of the victim, Margaret Ann Strack, as the girl who was in the bar with him and the person he killed on August 24, 1974. (TR 1229-1230). In his statement Elledge observed that he had 9 or 10 drinks and that she had 4 or 5 drinks at the bar and then they left to go smoke some marijuana. (TR 1234).

They left the bar at 5:30 or 6:00 p.m., both feeling quite high, and drove to the hotel in Ms. Strack's blue '67 Camaro convertible. (TR 1233). When they got to the hotel, they talked awhile and smoked some marijuana. Some point shortly thereafter, Ms. Strack started to sexually tease Elledge and she "grabbed hold of his joint and played with it." (TR 1234). Ms. Strack told Elledge that she was not going to do anything and he told her she was. Elledge stated that she had teased him too much and he could not hold back. He grabbed her by the throat with one hand and by the wrists with his other hand. (TR 1236-1237). He forced himself on top of her and at some point she pressed her fingernails into his wrists, which made him mad. (TR 1238-1239). Elledge stated that he choked her as he gasped for air and stopped when she finally agreed to have intercourse. (TR 1239-1240). He tried to mount her, however, she again resisted and screamed. He grabbed her by

Following the conclusion of Elledge's statement, Mr. Devin asked Elledge whether he could read and write and whether the statement was voluntarily made. (TR 1258). The tape ended at 7:00 p.m., on August 27, 1974. (TR 1259).

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the throat and forced himself into her. She yelled that she would call the police because he was raping her. (TR 1240). Elledge said that he choked her screams off completely using two hands around her throat and Strack started fighting, hitting the wall with her arms. (TR 1240-1241). Elledge testified he raised her up, choked her and then threw her on the floor. "Totally out of control", he continued to choke her for approximately fifteen minutes until she turned purple. (TR 1241-1242). Ms. Strack's eyes rolled back into her head, her nose started to bleed and Elledge testified he choked her until she was dead. (TR 1242-1243). He then stood up, put his joint away, and knew he had to get rid of the body. Elledge waited until it got dark to get rid of the body and observed that he went through her purse only the next day. (TR 1243). He took the body from the living room to the bathroom and washed the blood off Ms. Strack's face. (TR 1244). He cleaned the floor in the bathroom area of blood and, after smoking a few cigarettes and waiting until dark, dragged her out and tossed her body outside the front door. (TR 1245-1246). He managed to get her into her car and drove off and dumped her in a church parking lot. (TR 1247-1248). He stated that he left her where she fell in the parking lot and further denied ever burning her with cigarettes. (TR 1248-1250).

After dumping the body, he picked up a hitchhiker with whom he went drinking. Later, driving around, he lost control of the car and smashed into a fence. (TR 1252-1253). He finally returned to the Normandy Hotel and at that time went through Ms. Strack's purse, but found no money. (TR 1255). He hid the purse in the closet under some pillows. (TR 1256). He then left the apartment at approximately 2:00 p.m., and went to the House of Foam. There he asked the bartender to call a cab and went to the Greyhound Bus Station where, with cash, he bought a ticket to Jacksonville, Florida. (TR 1256-1257).

The State also published over the objection raised by defense counsel (TR 1286), Elledge's voluntary statement regarding the Gaffney murder. (TR 1288).[4]

Mr. Devin identified two hand-drawn sketches by Elledge of the motel apartment and the church parking lot. (TR 1320).

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[4]At sometime between 10:30 p.m., August 24, 1974, and 1:00 a.m., August 25, 1974, Elledge crashed a stolen car he was driving and started walking around a storefront area. (TR 1292-1293). After ransacking a gas station, he gained entry into a Pantry Pride store through an air vent near the ceiling or roof. (TR 1294). He looked around the store for a few minutes and while walking down towards the end of an aisle, saw a man with a mop. (TR 1294-1295). The man took a swing at him, Elledge stepped back, kicked the man in the ribs and then pulled his gun out and told the man to back up. The man gave no resistance to Elledge. (TR 1294-1295). Elledge stated that he turned away for a moment and when he turned back, he saw the man coming up and he shot him twice. Elledge went through the man's pockets and found thirty-five to forty cents in change. (TR 1295-1296). He found some tools and started to pry open the drawers in the office but found no money. He saw a donation box for Muscular Dystrophy, which he emptied. (TR 1297-1298). He beat up a Coke machine for money but could not get any. Before he departed, he got mad and started breaking wine bottles and other items in the store. He rummaged through the store looking for possible hidden money, but found none. On his way out of the store, he grabbed a Levi jacket hanging on a hook which had a girl's name on the jacket. (TR 1302-1303). In discussing the Gaffney murder, Elledge observed that he fired two shots at a downward angle at Mr. Gaffney between four and five feet away. He used a Colt .38 special blue 1½ inch barrel snub nose revolver which he had previously purchased. (TR 1305-1307). Upon leaving the store he walked across the parking lot to a Royal Castle Coffee Shop where he sat and drank a couple of cups of coffee. He finally returned to his room at the Normandy Hotel, slept awhile and ultimately went to the Greyhound Bus Station where he caught a bus to Jacksonville, Florida. (TR 1310-1311, 1315). The statement ended at 9:08, August 27, 1974. (TR 1320).

Janet Pocis was also called by the State and testified that on Saturday, August 24, 1974, she was a bartender at the McGowan Lounge. (TR 1214). During the course of her day shift from 11:00 a.m. to 6:00 p.m., Ms. Pocis observed Elledge come in a have a few drinks around 3:00 p.m. (TR 1216). Shortly thereafter, a woman came in and sat down next to him. Ms. Pocis testified that both Elledge and the woman appeared sober. After having a few drinks together, they got up and left the bar. She recalled serving the woman two Budweiser beers and serving Elledge three Seagrams and Seven-Up with no ice. (TR 1217). Ms. Pocis testified that Elledge appeared sober to her when he left the bar. (TR 1218).

Over defense counsel's objections,[5] Katherine Nelson was called by the State. (TR 1368-1369). The trial court overruled the objection, stating that Mrs. Nelson was a fact witness to the crime there was no taped statement by Elledge of the Nelson murder. (TR 1369).

Mrs. Nelson testified that on August 26, 1974, she was living at the Beacon Motel, managing the motel with her husband and grandson when she awoke around 2:00 a.m., by the sound of the

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[5]Based on the fact that he had stipulated to the prior violent felony aggravating factor and that Katherine Nelson's testimony was too prejudicial because it was basically victim impact evidence.

doorbell. She saw a young man standing outside wanting a room. (TR 1370-1371). When she attempted to register him for a room, Elledge flashed a gun and told her not to move. She was then made to go into her bedroom where her husband was located and forced to tie him up. (TR 1372). Elledge told her to lie down on her stomach and put her hands on her back. He tied her up, placed her next to her husband. Elledge stated that he wanted money and she told him where to look in the office. (TR 1373). He returned when he found nothing and was furious. He threatened to kill them if they didn't tell him where the money was. (TR 1373). Elledge informed them that he had been there a week before and knew that they were filled with registrants. (TR 1374). He searched around looking for his original registration card from a week ago because he had put his true identity on it. (TR 1374). Mrs. Nelson testified that she told Elledge she had never seen him before. (TR 1375). Mr. Nelson attempted to move at which point Elledge said not to or else he would kill him. (TR 1375). Elledge said, "I've already killed two people this week and one more won't matter. And if you don't believe me, you read the Hollywood papers." (TR 1375). At that point, Elledge left the room and went into her grandson's bedroom where she heard him slap her grandson around. The child was brought into the bedroom and tied up. (TR 1376-

1377). Elledge again threatened to kill them and the child and at that point, gagged Mrs. Nelson. When Elledge returned to the office looking for more money, Mr. Nelson broke loose and went into the hallway. (TR 1377). Mrs. Nelson testified that she heard a shot, heard her husband say, "Don't son, you got me", and then heard another shot. (TR 1378).

On cross-examination, Mrs. Nelson admitted that until her husband got loose, Elledge had not really hurt anyone in the motel. (TR 1379).

The State then asked the court to take judicial notice of Colorado's Criminal Code dealing with menacing. (TR 1382).[6]

The defense's case consisted of a number of witnesses both lay and expert that presented evidence as to all aspects of Elledge's life. The first four witnesses were family members who all

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[6]During the course of Elledge's case, Judge Dean C. Mabry was called by the State to testify that on March 5, 1973, he was a presiding judge when Elledge entered a plea to a reduced charge of menacing with a deadly weapon which was a felony. During the course of the factual plea, Elledge admitted that he used a .22 caliber Taurus eight-shot pistol in a forced assault in Colorado. Elledge admitted all the facts of the crime and he was sentenced to two years probation after serving a ninety day sentence. (TR 2057).

reflected that Elledge suffered physical and mental abuse from his mother up to the day he left home permanently.[7]

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[7]Sharon Jenkins testified that her aunt Geneva, Elledge's mother, would punish Elledge for no reason and that his mother would never show affection and was abusive to all her children. (TR 1403-1405). Elledge was skinny at birth and a blue baby. He had to be fed goat's milk because he had colic until he was six months old. (TR 1406). In Ms. Jenkins' opinion, Elledge needed more attention than his abusive, alcoholic parents gave him and his nature was very meek. (TR 1407). Ruby Sparks, Elledge's aunt, first testified about her and Elledge's mother's abusive father and how they were treated as children. (TR 1420-1421). Ms. Sparks observed that Elledge's mother liked playing music and that she and her husband Rayburn, used to go to clubs and play at bar, enjoying the night life and drinking the weekends away. (TR 1423-1424, 1429). She recalled that many weekends the kids were left alone while the parents went drinking all weekend and, more importantly, that her sister Geneva inflicted most of the child abuse on the children. (TR 1430-1431). At age 11, Elledge went to live with the Wilcox family in an effort to straighten Elledge out. (TR 1433). Ms. Sparks recalled that he was badly beaten by Mr. Wilcox and that the eventually started running away all the time and ending up at detention centers when he was 13 or 14. (TR 1434-1435). On cross-examination, Ms. Sparks said the last time she saw Elledge was in early 1974, and that she never met Elledge's wife nor visited him in prison. (TR 1443). In fact, she admitted that she did not have much contact with the family at all from 1950 through 1974 with the exception of a few letters, talking on the phone and a couple of visits. (TR 1445). Ms. Sparks' recollection was that Elledge's father was a gentle and kind man who kept the family together and cared for the children. (TR 1447). She was unaware that Elledge had been in a foster home (TR 1448), but did recall that the Wilcox's had tried to straighten Elledge. (TR 1449).

Connie Moffitt, Elledge's older sister, recalled how her mother physically and mentally abuse both her and her brothers. (TR 1454-1455, 1458, 1460, 1464). She testified that when her parents were away playing on the weekends at clubs and drinking all weekend, she stayed home and took care of her siblings. (TR 1456-1457). She

recalled that, at birth, Elledge was a blue baby and always exhibited a stubborn streak. As a child he would hold his breath and stop breathing which resulted in Elledge's mother sticking Elledge's head under water to get him to start breathing. (TR 1547). Elledge started to run away between 8 and 9. His mother would beat him every time she could yet the police would bring him back. (TR 1460). Mrs. Moffitt recalled that her mother was abusive to her husband. (TR 1462). Her father would never spank her and was a good man. (TR 1463). Elledge finally ran away for good around at 14 and since that time she has only seen her brother three or four times. (TR 1464-1465). Elledge was sent to live with the Wilcox's and probably received worse beatings from Mr. Wilcox who was mean and abusive. (TR 1465).

Mrs. Moffitt recalled that Elledge was slow to develop as a baby, he was slow walking and talking, and her mother thought he was retarded. (TR 1467). They were poor and although they went to school, Elledge always was in trouble in school. (TR 1469, 1472-1473). Since incarcerated, she has only seen her brother twice in court. (TR 1470). On cross-examination, she testified that although she met Elledge's wife, she has never visited Elledge in prison. (TR 1477).

Daniel Elledge, Elledge's brother, next testified that the last two times he saw his brother were in 1985, in federal court in Miami, and then in 1989 in state court. (TR 1489). He had never visited Elledge in prison (TR 1490), and admitted that he turned his life around when his brother got in trouble in 1974. (TR 1501). Daniel Elledge detailed that his mother would beat him and his brother and sister three to five times a week or more. (TR 1490-1491). Elledge finally left home at around 14 or 15 (TR 1493), which explained why he had limited contact with his brother. He did not find out until 1989 that his brother was in jail. (TR 1508). As children his parents were never there on weekends because they played music and that it was his sister who was in charge when they were gone. (TR 1494-1495). He admitted that he and his sister Connie had become intimate and that Connie had had sexual relations with both of her brothers. (TR 1495). He recalled that his brother started using drugs and drinking early (TR 1497). Daniel believed that although he drank, because he stayed home and took care of his father, he turned out okay. (TR 1502).

The defense next called Dr. Gary Schwartz, a psychologist, who tested Elledge for mental health considerations. (TR 1541, 1543-1552). After reviewing Elledge's life history, he observed that overall Elledge's childhood was marked with severe emotional abuse and physical abuse from his alcoholic parents, especially his mother. (TR 1555-1556). They were very poor, living in a ghetto atmosphere, wandering from place to place. At times, they stayed in cars overnight and they had limited food and clothing. (TR 1556). Elledge did poorly in school and did not adjust well, he had problems with his teachers and other students, he would get into fights at school and then when he came home, suffered abuse from his mother. (TR 1557). Dr. Schwartz thought Elledge could possibly could have suffered from fetal alcohol syndrome since his mother drank and through interviews with family members, learned that Elledge was a blue baby at birth which meant that he had an oxygen deprivation and that he was underweight. (TR 1558). As a

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On cross-examination, Daniel Elledge admitted that his father was good to them and that he stayed with his father who was disabled until he died. (TR 1509). He recalled that after age 11, Elledge was in and out of reform schools and that he only saw Elledge once every four or five years. (TR 1510). Between the ages of 6 and 9, he was intimate with his sister when they were left alone. (TR 1511-1512).

teen, Elledge was involved in drugs and criminal offenses. (TR 1558). It was Dr. Schwartz' view that Elledge was very impulsive and functioned poorly under stress, using poor judgment. (TR 1658-1659). Although Elledge's IQ was 103 (TR 1673), it was his view that there may be some brain damage based on one test which Elledge did not process "normally." (TR 1674). He observed that Elledge was a drug abuser (TR 1676), and that his thinking patterns were disturbed. (TR 1678). Elledge had a poor self-concept and "was a very disturbed person overall." (TR 1678). Because Elledge was a blue baby, there could be organic brain damage, and clearly because he was underweight, his growth development lagged. (TR 1690). Because Elledge was denied mothering, he had severe emotional problems. (TR 1691). Based on the information received regarding Elledge's early years, Dr. Schwartz believed Elledge had an inability to deal with stress and could not control impulses. (TR 1702). He testified that in 1974, Elledge could not conform his conduct to the requirements of law and was under extreme emotional and mental stress or disturbance. (TR 1704-1705).

On cross-examination, Dr. Schwartz stated that Elledge was a quick thinker, acting very impulsively. (TR 1759). Dr. Schwartz said Elledge was not schizophrenic (TR 1760), and admitted there was no evidence of brain damage from tests done by another doctor

only one month earlier. (TR 1765). It was his view, however, that any organic brain damage would not have allowed him to process information correctly in 1974. (TR 1768). The organic brain damage caused irritability, poor impulse control and the use of drugs would have contributed to his actions. (TR 1769). Dr. Schwartz admitted that Elledge had some control because he knew what he wanted to do, however, it was his view that both the Gaffney and Nelson murders occurred while Elledge was suffering from post-traumatic stress syndrome after the murder of Ms. Strack. (TR 1780-1784). Dr. Schwartz admitted that a 1973 hospitalization diagnosis revealed that Elledge had a personality disorder but suffered from no organic brain damage or psychosis. (TR 1788). It was Dr. Schwartz' view that Elledge had an anti-social personality disorder (TR 1791), and further admitted that earlier, contemporaneous doctors' reports from Dr. Miller and Dr. Taubel, revealed that Elledge had no neurological problems, no other major neurotic or psychotic problems, rather, Elledge suffered from anti-social personality disorder. (TR 1793-1801).

On redirect, Dr. Schwartz again stated that Elledge suffers from anti-social personality disorder, organic personality disorder, alcohol and drug abuse and was under excessive mental and emotional duress and could not conform his conduct to the

requirements of law at the time of Ms. Strack's murder. (TR 1877-1889).

Michael Radelet, a professor of sociology at the University of Florida, testified that he first met Elledge in 1979 or early 1980, through his affiliation with Margaret Vandiver. (TR 1574-1575). It was Dr. Radelet's view that if spared the death penalty, Elledge put back in general population, [8]would adjust "just fine" and did not pose a danger to other inmates. (TR 1584).

The defense then called a number of character witnesses regarding Elledge's adjustment to prison since 1975.[9]

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[8] Mr. Radelet testified that he believed based on Elledge's record he would never get out of jail, that he did not present a future danger to anyone in prison. (TR 1592). On cross-examination, Radelet admitted that he was opposed to the death penalty (TR 1594), and attempted to explain away the 19 disciplinary reports Elledge had received since he was on death row. (TR 1598-1600). Radelet stated that he was opposed to Elledge ever getting released from prison. (TR 1636).

[9]Dr. Margaret Vandiver started corresponding with Elledge in 1977, and started visiting him at Florida State Prison. (TR 909-911). She was on a personal friend basis with Elledge and has maintained correspondence with him over the years. She believes Elledge has matured and come to terms with his situation and bettered himself. (TR 1917-1918). Elledge has helped inspire her to get her degrees and helped her through her life crises (TR 1919-1920). Ms. Vandiver informed the jury that Elledge received his GED in 1983, and plans to start his paralegal education. (TR 1920-1925). Ward Lasher, a corrections officer from 1978 through 1982, testified that he never had any problems with Elledge, although he admitted he did not look at Elledge's prison records (TR 1931), and did not know about the nature of the disciplinary reports. (TR

Father Kenneth Roach, an episcopal priest since 1989, next testified. In 1974 he was a detective at the Jacksonville Beach Police Department and questioned Elledge about the Nelson murder. In his discussions with Elledge, Elledge told him about the murders

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1933). Virgil Lee, another corrections officer, did not know anything about Elledge's having any disciplinary reports but admitted that the nature of the disciplinary reports might change his mind with regard to Elledge's prison conduct. (TR 1938-1939). John Coley worked on death row at Florida State Prison (TR 1940), and also testified that he had no problems with Elledge. (TR 1941). On cross-examination, he did not know any of the officers who had issued the 19 disciplinary reports against Elledge and considered that setting fire to one's mattress and having a handcuff keys were serious infractions that would warrant disciplinary reports. (TR 1943). Rudolph Chisholm testified similarly that he had no problems with Elledge while he worked on death row. (TR 1945-1946).

Arthur Schafer, a former death row inmate, testified that Elledge and he met on death row and that they started talking (TR 1949-1953). Elledge helped him get started to become a paralegal and provided him support and told him to keep the faith. (TR 1957-1958). Elledge was his friend (TR 1961), who gave him legal advice and medical advice. (TR 1962). George Kuck, another prison guard, testified that he knew Elledge between 1981 and 1985, and sometimes saw Elledge on a daily basis. (TR 2058-2059). It was his view that Elledge had changed his life around in 1983 when he became better and started spending more time writing and watching television. (TR 2059). Mr. Kuck did not know the specifics of Elledge's 19 disciplinary reports but he had never seen Elledge physically aggressive. (TR 2061). Elledge could get along okay in general population. (TR 2066). On cross-examination, Mr. Kuck admitted that he would have given an individual a disciplinary report for setting a fire in his cell or threatening someone and that he knew nothing about the 1988/1989 letters to Ms. Wood which were threatening. (TR 2067). Mr. Kuck observed that based on these letters, Elledge may still had some violent tendencies. (TR 2072).

in Hollywood (TR 2081). He recalled at the time that after talking about the murders, Elledge wanted to call his father and told him about it presumably to cleanse his soul. (TR 2082). It was Father Roach's view that Elledge was very remorseful and emotional. (TR 2086). On cross-examination, Father Roach admitted that when he first started talking to Elledge about the murders in 1974, Elledge was very evasive and had lied to him. (TR 2087). After reviewing the facts of the Nelson murder, Father Roach admitted that he did not need Elledge's confession because he had eyewitnesses to the Nelson murder. (TR 2096-2097). Father Roach admitted that Elledge was remorseful only after he confessed and he had no idea of Elledge's state of mind prior to being arrested. (TR 2098).

Following the testimony of Annabelle Officer and Paula Fain (TR 2159-2176), Dr. Glenn Caddy, a psychologist opposed to the death penalty, testified that he first met Elledge in 1989. (TR 2179-2183). Dr. Caddy performed no tests but rather relied on the psychological testing by other doctors including Dr. Schwartz. (TR 2184-2187). Elledge had a chaotic upbringing, marked by violence and abuse. He came from a poverty-class environment and moved around a lot which contributed to his inability to fit in at school. (TR 2189-2190). Elledge's parents were alcoholics and his mother ran around on his father. (TR 2191). Elledge experienced

a sexual encounter with an adult neighbor at age 12 and was once picked by a man who sexually assaulted him and then threw him over a bridge. Dr. Caddy recalled that from age 13 to 14 Elledge was being placed in detention centers because he ran away from his family (not being able to stand the abuse). (TR 2191). Elledge came from a dysfunctional family where there was no role model and, as a result, was an alcoholic at age 12. (TR 2193-2194). He was a street kid into drugs in his early teens and could not manage his temper. (TR 2194-2195). He was a sociopath with poor impulse control (TR 2198), who was out of control at the time of the murders. (TR 2201). In Dr. Caddy's view, Elledge holds all the victims responsible. As an example, Dr. Caddy stated that it was Mr. Nelson who set the stage for his own murder. (TR 2201-2204). Elledge had a normal IQ, was not stupid and had potential. (TR 2208). It was his view that Elledge was acting under extreme emotional and mental duress at the time of the murders (TR 2212), but Elledge did not suffer fetal alcohol syndrome; did not suffer from post-traumatic stress syndrome in 1974; but had a sociopathic personality disorder with overtones of polysubstance abuse, childhood physical abuse, sexual childhood abuse, impulse control disorder, organic personality disorder with rage episodes and a thought processing disorder. As a result of the aforenoted, Dr.

Caddy observed that Elledge could not control his behavior to the requirements of law at the time of the murder and that for the 48 hour period of these murders was totally out of control. (TR 2219-2220).

On cross-examination, the State elicited from Dr. Caddy that Elledge had a personality disorder (TR 2259), that this disorder permitted Elledge to play by his own rules and permitted instant gratification for whatever he wanted. (TR 2287-2290). In exploring the crime scenes with Dr. Caddy (TR 2292-2304), Dr. Caddy testified that as the criminal episode went on, Elledge got more and more out of control and therefore the first murder broke down the "bounds of control." (TR 2307). Although Elledge was under extreme emotional distress: he was not psychotic (TR 2317), nor did he have severe brain damage which would have influenced the commission of the crimes (TR 2318), nor was he suffering from bipolar mood disorder (TR 2318). Dr. Caddy's diagnosis of mixed-personality disorder with a substantial feature of impulse control disorder is not a functional disorder nor organicity or psychosis. (TR 2324).

Defense counsel at this point objected to the State exploring with Dr. Caddy the nature of the other murders, arguing that it was distracting attention away from the crime. The court ruled the

questions were proper but offered to provide a cautionary instruction with regard to these other murders. (TR 2346-2348).[10]

On redirect, Dr. Caddy testified that Elledge has an anti-social personality disorder and that Elledge knew when he came to Florida in 1974 that he was out of control. (TR 2351-2370). Elledge was under extreme emotional and mental duress and that he was substantially impaired and could not conform his conduct to the requirements of law. (TR 2374-2376).

On rebuttal, the State called Dr. Harley Stock, a forensic psychologist (TR 2631), who reviewed a plethora of evaluating Elledge and doing more testing. (TR 2641-2644).[11] Dr. Stock found

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[10]The following cautionary instruction was read to the jury (TR 2351):

> The facts of the Nelson and Gaffney homicides should not be considered by you except as they may be considered as an aggravating factor. There is no other significance except as background for this doctor's expert opinion for you to consider. And you should be careful to view this evidence in this way.

(TR 2351).

[11]Including viewing the transcripts from March 17, 1975, depositions of Dr. Caddy, depositions of Dr. Schwartz, depositions of Dr. Radelet, reports from Drs. Eichert, Lewis, McMahon, Miller, Norman, a report of Ms. Marzulli, the reports of Dr. Todd and Dr. Taubel, records from Colorado State Hospital, California Youth Authority and records from the Florida Department of Corrections, as well as other letters and police reports. He also listened to Elledge's taped confessions and spent fourteen hours over a two-day

no evidence of organicity and observed that the Carlson test performed by Dr. Schwartz could not predict the future dangerousness because an incorrect analysis was performed. (TR 2659-2660). The results of the Bender-Gestalt test found no evidence of organicity or brain damage and Dr. Stock related that Elledge had no mental illness, no organic brain damage, but rather suffered from an anti-social personality disorder. (TR 2661). Dr. Stock opined that an anti-personality disorder commences in adolescence and continues through adulthood resulting in people making bad choices but that the bad choices are a result of conscious and volitional choices. (TR 2662). Elledge was not suffering from any mental illness at the time he committed the Strack murder, but rather exhibited anti-social behavior which allowed him to make choices within his own control. (TR 2662). Dr. Stock did not believe Elledge was under an extreme emotional or mental disturbance, but rather his conduct evidenced conscious volitional control therefore, his ability to conform his conduct to the requirements of law was not impaired. (TR 2663-2665). Dr. Stock found that Elledge could not have suffered from fetal alcohol

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period evaluating Elledge and doing more testing. (TR 2641-2644). Dr. Stock testified that he believed that Elledge was malingering on the MMPI test administered by Dr. Schwartz. (TR 2649-2657).

syndrome because he did not meet the specific criteria and appearances associated with that syndrome. (TR 2666). Elledge suffers from an anti-social personality disorder which continues through life. In the right circumstances, Elledge might continue to be dangerous. (TR 2668-2669).

On cross-examination by defense counsel, Dr. Stock admitted that he had been hired by Satz' office to perform this evaluation. (TR 2670-2671). It was Dr. Stock's view that the MMPI tests were important because they determine that Elledge did in fact have an anti-social personality disorder which was evidenced by his continuing efforts to manipulate the system. (TR 2681). The State rested. (TR 2698). Defense counsel stated that there was no surrebuttal. (TR 2698).

SUMMARY OF THE ARGUMENT

I. The trial court did not err in denying Mr. Elledge's motion to withdraw his guilty plea.

II. The trial court did not err in allowing the prosecution to go beyond the judgment on prior violent felonies.

III. Testimony concerning prior violent felonies did not become a feature of the case.

IV. The trial court did not allow improper cross-examination, beyond the scope of direct examination, concerning inflammatory details of a prior violent felony.

V. The prosecution did not improperly introduce inflammatory, irrelevant evidence concerning after death activity.

VI. Mr. Elledge was not improperly subjected to a compelled mental evaluation.

VII. The prosecution was not improperly allowed to use a compelled mental evaluation to rebut mitigation as to future dangerousness to counter non-mental health experts.

VIII. Disallowing a defense mental health expert to view the testimony of the prosecution's mental health expert, was not error.

IX. The trial court did not err in sustaining a state objection to defense counsel's exercise of a peremptory challenge.

X. Voir dire was not restricted.

XI. The extraordinary delay in this penalty phase did not prejudice Mr. Elledge thus requiring a life sentence to be imposed.

XII. This delay does not violate the Florida and United States Constitutions.

XIII. The reasonable doubt instruction is constitutional.

XIV. A special jury instruction on non-statutory mitigation is not required when the standard jury instruction is given.

XV. A jury instruction explaining the nature and function of mitigation is not part of the standard jury instruction and is not required.

XVI. The jury instruction on especially heinous, atrocious or cruel aggravation is constitutional.

XVII. No undue weight was given to the jury's recommendation of death.

XVIII. No presumption of death was applied in this case.

XIX. The trial court did not err in refusing to consider and/or find a statutory mitigator that the victim participated in the murder.

XX. The lower court did not commit reversible error in his sentencing order.

XXI. The lower court did not refuse to consider an/or find non-statutory mitigators.

XXII. The trial court did not err in the weight it accessed child abuse as a mitigator.

XXIII. The avoid arrest aggravator is supported by the evidence.

XXIV. The especially heinous, atrocious or cruel aggravator is supported by the evidence.

XXV. The felony murder aggravator is constitutional on its face and as applied.

XXVI. Electrocution does not violate the Florida and United States Constitutions.

XXVII. The death penalty statute is constitutional.

ARGUMENT

Issue I

THE TRIAL COURT DID NOT ERR IN DENYING ELLEDGE'S MOTION TO WITHDRAW HIS GUILTY PLEA.

On March 17, 1975, Elledge, with the assistance of counsel, entered a plea of guilty to first degree murder and rape, following an inquiry as to the circumstances of that plea. (TR 3095-3135). Prior to Elledge's fourth sentencing proceeding, he again argued that he should be permitted to withdraw his guilty plea because of the "manifest injustice" which occurred due to the inadequate plea colloquy in 1975, citing Koenig v. State, 597 So.2d 256 (Fla. 1992). Specifically, Elledge argues,

> The colloquy briefly mentions the right to a trial by a jury but contains no explanation that there is a right to the assistance of counsel at trial (R 3097-3112). There is no discussion of the right to compulsory process witnesses (R 3097-3112). There is no mention of the right to confront and cross-examine witnesses (R 3097-3112). There is no mention of the right to be free from self-

> incrimination (R 3097-3112). There was no mention of the waiver of the right to appeal all matters relating to the judgment (R 3097-3112). Thus, except for a brief mention of the right to trial by jury, there was a complete failure to explain to Mr. Elledge the legal rights which he was waiving.

(Appellant's Brief, p. 25-26).

Moreover, Elledge urges that there was serious deficiency in the factual basis for the plea in that the court never explained the elements of first degree murder or felony murder and does not reflect a "extensive inquiry into the factual basis for the plea." (Appellant's Brief, p. 27, 29).

What Elledge fails to mention in rearguing his case for withdrawal of his 1975 guilty plea is that this Court, as well as the federal appellate court, previously concluded that the plea was knowingly and voluntarily made. See Elledge v. Graham, 432 So.2d 35 (Fla. 1983), and Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987).

Pre-resentencing, the trial court entered an order denying Elledge's motion to withdraw his guilty plea on the merits of his claims. The court observed:

> The extensive procedural history of this case has afforded the defendant numerous opportunities to raise these identical issues now before the court. On two occasions, the Supreme Court of Florida has affirmed the

> denial of the defendant's request to vacate or withdraw his plea. Elledge v. Graham, 432 So.2d 35 (Fla. 1983), and Elledge v. State, 613 So.2d 434 (Fla. 1993) (when the court declines to rule on an issue it is considered rejected. See Shayne v. Saunders, 176 So.2d 495 (Fla. 1937)). The State's response to the defendant's motion, including the voluminous appendix, clearly and succinctly sets out the law of the case this court is bound by.
>
> The court finds that defendant's motion is legally insufficient. It asserts no new or additional grounds for the court to consider other than that which has been previously raised and ruled on. Nor has the defendant established the requisite manifest injustice or prejudice. Further, the court finds that the defendant's plea was knowingly and voluntarily entered into and that the trial court acted appropriately under the prevailing law in accepting the defendant's plea. Finally, the court finds that the defendant's plea was not the result of ineffective assistance of counsel in accordance with the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984), and its progeny.

(TR 3135-3136).

The procedural history of this case makes clear that Elledge's current motion to withdraw his plea of guilty may not be addressed. Elledge has twice before moved to either vacate his plea or to have it withdrawn. On both occasions, Elledge's requests were denied. This Court, in Elledge v. Graham, 432 So.2d 35 (Fla. 1983), and Elledge v. State, 613 So.2d 434 (Fla. 1993), denied relief, either

specifically or based on the fact that the case was remanded for still another resentencing rather than an opportunity to withdraw his plea. See Elledge v. State, 613 So.2d 434 (Fla. 1993). As such, this Court's rulings on the voluntariness of the defendant's plea of guilty and his attempts to withdraw or vacate, constitute the law of the case as to this issue. Brunner Enterprises, Inc. v. Dept. of Revenue, 452 So.2d 550 (Fla. 1984); Airvac, Inc. v. Ranger Insurance Co., 330 So.2d 467 (Fla. 1976); State v. Stabile, 443 So.2d 398 (Fla. 4th DCA 1984), and State v. Thompson, 357 So.2d 428 (Fla. 4th DCA 1978). Resolution in a prior appellate decision of the same legal issue becomes the law governing that case. Moreover, where, as here, Elledge has had ample previous opportunity to raise the identical facts per this claim for withdrawal that he raises today in his earlier pleadings, he is estopped from attempting to get around a previous appellate adjudication by arguing a different set of facts. See State v. Thompson, supra.

As already eluded to, this Court's remand in Elledge v. State, in 1993, for a fourth resentencing, necessarily passed upon the validity of Elledge's guilty plea raised therein. Because Elledge's conviction and sentence for first degree murder of Margaret Strack was based on his plea of guilty to the crimes

charged, this remand would have been not just for resentencing but rather, to give Elledge an opportunity to withdraw his plea. "Appellant raises thirty issues in this appeal. Because we again remand for resentencing, we address only those issues relating to the sentencing proceeding." Elledge v. State, 613 So.2d at 435. See Shayne v. Saunders, 176 So.2d at 495 (1937) (where a case is affirmed by an appellate court, it will be presumed that no reversible error has been found and where a case is reversed on stated point, it will be presumed that all other assignments of error have been examined and found to be without merit when assignments of error are presented by brief prepared according to the rules of the court.) See Hoffman v. Jones, 280 So.2d 431 (Fla. 1973).

Moreover, in his 1983 motion for post-conviction relief, Elledge specifically seeks post-conviction relief based on the voluntariness of his guilty plea. This Court stated that the identical record before this Court today convinced the Court in 1983 that, the Appellant's confessions and guilty plea were properly admitted and, that the allegation of ineffective assistance of counsel has not been shown. 432 So.2d at 37.

Pointing to Fla.R.Crim.P. 3.172, Elledge argues the "plea colloquy in the current case fails to address many of the required

areas under the rule." (Appellant's Brief, p. 25). What Elledge fails to mention, however, is that Rule 3.172, Fla.R.Crim.P., was not in effect in 1975, when Elledge entered his plea. In fact, the rule governing the taking and acceptance of pleas in 1975 was Fla.R.Crim.P. 3.170(j), which reads, in material part:

> (j) Responsibility of Court on Pleas.
>
> No plea of guilty or nolo contendere shall be accepted by a court without first determining, in open court, with means of recording the proceedings stenographically or by mechanical means, that the circumstances surrounding the plea reflect a full understanding of the significance of the plea and its voluntariness, and that there is a factual basis for the plea of guilty.

The specific requirements set forth in Fla.R.Crim.P. 3.172 for the acceptance of guilty pleas became effective July 1, 1977.[12] See Re: Florida Rules of Criminal Procedure, 343 So.2d 1247 (Fla. 1977).

The record of the change of plea hearing held on March 17, 1975, clearly satisfies the requirements of Rule 3.170(j), Fla.R.Crim.P. in existence at the time and fully complied with

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[12]Moreover, the Florida Supreme Court's decision in Williams v. State, 316 So.2d 267 (Fla. 1975), which was the catalyst for the adoption of Rule 3.172 in its current form, was not rendered until June 23, 1975, three months after Elledge entered his plea of guilty therein.

Williams v. State, 316 So.2d 267 (Fla. 1975). Not only did the trial court inquire of Elledge as to his age and educational level (TR 3098-3099), but the court learned that Elledge had received drug and alcoholic treatment as an outpatient in 1973, when he was convicted in Colorado of a second degree felony of menacing with a weapon. (TR 3099). The court knew that Elledge had pretrial been examined by Dr. Taubel and Dr. Eichert for any mental defenses (TR 3099), but Elledge was also informed that a plea made him eligible for the death penalty or a life sentence with a minimum mandatory sentence of twenty-five years. (TR 3099-3100). Elledge specifically acknowledged that he discussed defenses with his attorney, discussed the nature of the case and received advice from counsel as to what to do. (TR 3101). Elledge provided that defense counsel had discussed with him the penalty phase process and the consequences of a jury recommendation (TR 3103). In presenting a detailed factual basis for the plea, Elledge informed the court that he had been drinking and smoking marijuana. He also remembered however, that Elledge blew his cool when Ms. Strack said no. He forcibly raped her and strangled her for fifteen to twenty minutes. (TR 3108-3109). The plea colloquy explored all issues

regarding the voluntariness of Elledge's plea.[13] See Boykin v. Alabama, 395 U.S. 238 (1969), and Lamadalin v. State, 303 So.2d 17 (Fla. 1974). Additionally, Elledge's claim that he was not fully informed of his right to appeal the denial of a motion to suppress because, he waived said right by an entry of a guilty plea, was not critical to the plea. (1) This Court has found Elledge's confessions in Elledge v. Graham, 432 So.2d 35 (Fla. 1983), to be properly admitted. (2) Based on the physical evidence, the conviction for the first degree murder of Margaret Strack would have still obtained. See Robinson v. State, 373 So.2d 898, 902 (Fla. 1979), wherein the court held that there was an automatic review from a guilty plea in capital cases. Therefore, as evidenced in Elledge v. State, 346 So.2d 998 (Fla. 1977), Elledge had the opportunity to raise those issues which were compelling including whether an adequate plea colloquy occurred at the time his plea was entered.

Elledge's complaint that his guilty plea was not knowingly and voluntarily entered because he was unaware of the nature of the

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[13]Additionally, in support of the fact that Elledge's plea of guilty was knowingly and voluntarily entered, on October 30, 1974, before Elledge pled guilty in the instant case, he pled guilty to the murder of Kenneth Nelson in Jacksonville, Florida. Clearly at the time of the instant plea on March 17, 1975, Elledge was neither a stranger to the criminal justice system nor was he in any way deprived of his constitutional rights.

charges against him is wanting. The plea colloquy negates most of this contention to the extent that Elledge admitted that he both raped and committed first degree murder against Margaret Strack. As to whether he appreciated that first degree murder was a specific intent crime and that the defense of voluntary intoxication was not a legitimate defense, obviously that is the reason he pled guilty.

Elledge was charged by indictment with the crime of rape and with the felonious and premeditated first degree murder of Margaret Ann Strack. Under Knight v. State, 338 So.2d 201 (Fla. 1976), an indictment charging premeditated murder would permit the State to proceed on either theory of premeditated murder or felony murder or both. In this case the underlying felony for purposes of felony murder was the crime of rape. In order to prove first degree felony murder, the State need not prove premeditation or a specific intent to kill, but rather, needed to prove that the accused entertained the mental element required to convict on the underlying felony. Gurganus v. State, 451 So.2d 817, 822 (Fla. 1984). See Simmons v. State, 10 So.2d 426 (Fla. 1942), Askew v. State, 118 So.2d 218 (Fla. 1960), Hendricks v. State, 360 So.2d 1119, 1123 (Fla. 3rd DCA 1970) (the act of rape infers a criminal intent from the facts itself, therefore no specific intent is

requisite other than that evidenced by the doing of the acts constituting the offense). Because rape is not a specific intent crime, voluntary intoxication is not to said crime. Because of the nature of the factual basis submitted by Elledge, voluntary intoxication was not a viable defense to the crime of rape or felony murder.

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

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

> trial court erred in rejecting his claim as unfounded.

564 So.2d at 1063.

The test in determining whether the trial court erred in disallowing the withdrawal of Elledge's guilty plea is to show manifest injustice. That he cannot do. Elledge does not sit in the same position as the defendant who pleads guilty but prior to sentencing decides to change his mind. In Elledge's case, he has been judicially thwarted from withdrawal of his plea. See Elledge v. Graham. Yet, once again, nineteen years after the original plea, he is asserting new grounds which are woefully lacking. The trial court did not abuse its discretion in rejecting Elledge's renewed motion to withdraw his plea. He has presented no colorable basis upon which to suggest that the voluntariness of said plea was in any way in question. Based on the foregoing, all relief should be denied as to this claim.

ISSUE II

> THE TRIAL COURT DID NOT ERR IN ALLOWING THE STATE TO INTRODUCE THE DETAILS OF PRIOR VIOLENT FELONY CONVICTIONS

Elledge next argues that the trial court erred in permitting the prosecution to introduce the details of two prior homicides over defense counsel's objection and despite an offer to stipulate

to the validity of the prior convictions. Elledge points to no specific incident in this case which demonstrates how harm accrued with regard to the State's case-in-chief. Elledge is strictly dealing with the generic issue of whether the State may present evidence of the underlying facts of a prior violent felony to "prove up" an aggravating factor. Elledge points to "a better rule" outlined in Brewer v. State, 650 P.2d 54 (Okla.Crim. 1982), stating that "the court held that defendant must be given an opportunity to stipulate to the validity of his prior violent felony convictions. Id. If the defendant stipulates to the validity of the prior convictions, then the prosecution is limited to the introduction of the judgment and sentence on the prior felonies. Id. The court, in Brewer, placed strict limitations on the introduction of evidence concerning the prior felony even in cases "where the defendant refuses to stipulate" . . . "the Oklahoma procedure is far preferable to the current ill-defined limits. Its set out a bright line rule for everyone to follow as opposed to the current imprecise balancing test. This procedure also satisfies all of the concerns of the capital sentencing process. If a defendant stipulates to the prior convictions, then there is no need to prove this aggravating circumstance." (Appellant's Brief, p. 33-34).

Without pointing to specifics in the instant case, Elledge's concerns are noteworthy but certainly not subject to reversible error. The record reflects the medical examiner, Dr. Abdullah Fatteh, made no reference to any murder other than the Strack murder. Detective Devin was used to introduce the taped confessions of Elledge. One of those tapes described what Elledge did after the Strack murder as to the Gaffney murder which happened a few hours after the death of Ms. Strack. Defense counsel timely objected to the admission of this evidence (TR 1286), however the trial court overruled that objection, concluding the admission was part of the "entire criminal episode." Catherine Nelson, the widow of Kenneth Nelson, was found to be a fact witness. The admissibility of her testimony was decided in Elledge v. State, 346 So.2d at 101-102, wherein the court held:

> The question then arises whether it was proper to permit Mrs. Nelson to testify concerning the events which resulted in the conviction as opposed to restricting the evidence to the bare admission of the conviction. We conclude it was appropriate to admit Mrs. Nelson's testimony. This is so because we believe the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case. Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge. It is a matter which can

> contribute to the decisions as to sentence which will lead to uniform treatment and help eliminate 'total arbitrariness and capriciousness in [the] imposition' of the death penalty. Proffitt v. Florida, supra, 96 S.Ct. at 2969 . . .
>
> The testimony of Mrs. Nelson obviously related to the aggravating circumstance delineated in Sec. 921.141(5)(b), Fla.Stat. If it be appropriate to admit the testimony, then clearly it was appropriate for the prosecutor to comment upon it in arguing for the death penalty. We do not perceive it to have been the intent of the legislature that sentencing proceedings under Sec. 921.141, Fla.Stat., be as antiseptic as Appellant contends.

346 So.2d at 101-102.

Moreover, Mrs. Nelson's testimony was germane as to whether Elledge committed the crimes. She testified that when Elledge threatened her husband not to move or else he would kill him, he said "I've already killed two people this week and one more won't matter. And if you don't believe me, you read the Hollywood papers." (TR 1375).

Lastly, it should be noted that while the factual scenario necessary to prove beyond a reasonable doubt that prior violent felonies occurred, the United States Supreme Court has not suggested that any limitations be placed on the State with regard to the proof of prior violent felonies. See Johnson v. Mississippi, 486 U.S. 578 (1988), wherein the Court concluded that

reliance solely on a judgment and sentence which was subsequently vacated required reversal, however the Court noted that a harmless error analysis might have been appropriate had a factual basis for the underlying prior convictions existed. Moreover, as noted in Rhodes v. State, 547 So.2d 1201 (Fla. 1989), "although this Court has proved introduction of testimony concerning the details of prior felony convictions involving violence during the penalty phase of a capital trial, Tompkins; Stano, the line must be drawn when the testimony is not relevant, gives rise to a violation of a defendant's confrontation rights, or the prejudicial value outweighs the probative value. . ." 547 So.2d at 1204. In the instant case, as evidenced by a review of the State's case in chief, none of the dangers feared in Rhodes materialized sub judice. All relief must be denied as to this claim.

ISSUE III

THE TRIAL COURT DID NOT ERR IN ALLOWING TESTIMONY CONCERNING PRIOR VIOLENT FELONIES TO BECOME A FEATURE OF THE CASE

In conjunction with Point II, presumably Elledge is now asserting that the details of the prior homicides became a feature of the case. Without restating the facts as to evidence of the Gaffney and Nelson murders presented in the State's case in chief, the facts remains that the circumstances surrounding the Gaffney

murder was limited to Elledge's own taped statement found on pages 1294-1297, 1306-1308, of the record. As to the Nelson murder, Katherine Nelson was a victim of Elledge's attempt to rob the Beacon Motel in Jacksonville, Florida. Mrs. Nelson's testimony concerning her husband's homicide is found in the record at pages 1378-1379. It can be hardly said that these record citations became the feature of the State's case in chief.

Moreover, the record reveals that it was Elledge in his case through the testimony of Dr. Schwartz and Dr. Caddy and the cross-examination of those doctors, where the bulk of the evidence surrounding the murder was presented. Clearly, the State has the right to cross-examine once the issue is brought to the attention of the jury in the defense's case on direct.[14] For example, Elledge argued that the Gaffney and Nelson murders were a result of Elledge

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[14]Moreover, the record reflects that the defense drafted "cautionary instructions" which was read to the jury (TR 2351), which reads as follows:

> The facts of the Nelson and Gaffney homicides should not be considered by you except as they may be considered as an aggravating factor. There is no other significance except as background for this doctor's expert opinion for you to consider. And you should be careful to view this evidence in this way.

suffering from post-traumatic stress syndrome after he killed Margaret Strack.

Elledge's continual reference to the fact that Mrs. Nelson's testimony was highly inflammatory, not relevant, was decided adversely to Elledge in his first appeal in Elledge v. State, 346 So.2d at 101-102.

All relief must be denied as to this claim.

Issue IV

THE TRIAL COURT DID NOT ERR IN ALLOWING IMPROPER CROSS EXAMINATION OF KEN ROACH

Elledge next contends that the trial court improperly cross-examined a defense witness, Father Ken Roach. Citing the cross-examination colloquy, Elledge argues that "irrelevant, collateral details concerning the Nelson homicide were admitted bringing out improper details of a prior violent felony." (Appellant's Brief, p. 42).

The defense introduced Kenneth Roach as an episcopalian priest since 1989 (TR 2074),[15] who was the detective in the Jacksonville Beach Police Department that investigated Elledge regarding the

[15]Who had also worked in a public defender's office and had been a hearing examiner for the parole commission, and a police officer in Jacksonville, Florida.

murders. (TR 2074-2075). It was the defense who brought out that he was an acquaintance of Mr. Nelson and that he talked with Mrs. Nelson at the time of the crime. (TR 2075). It was the defense who brought out that Elledge finally confessed to Father Roach about the two murders in Hollywood, Florida, and the murder of Mr. Nelson in Jacksonville, Florida. (TR 2081-2082). It was the defense who brought out that Father Roach testified to the sentencing jury that Elledge called his father and told him about the murders and "cleansing his soul" after he confessed to Father Roach. (TR 2082). It was Father Roach who testified on direct examination that Elledge was very remorseful and emotional with regard to confessing to the murders. (TR 2086).

On cross-examination, the State in an effort to dispel the "influences" of "Father" Roach testifying, asked Mr. Roach whether Elledge had been evasive and lied to him with regard to his involvement in the Nelson murder. (TR 2087). Moreover, the State asked Mr. Roach what the facts and circumstances were of the Nelson murder in order to negate the impression that, but for Elledge's confession to "Father Roach" the State would not have had a case. Evidence surrounding the Nelson murder revealed the State had a strong case against Elledge because there were eyewitnesses to the murder. (TR 2096-2097). Lastly, Mr. Roach admitted that Elledge's

remorsefulness came only after he confessed and that Mr. Roach had no idea of Elledge's state of mind prior to being caught. (TR 2098).

On redirect, Father Roach testified that Elledge took him to where the weapon was located. (TR 2100).

Based on the foregoing, it is clear that there was no improper expansion of the scope of cross-examination based on the direct examination and the inferences the defense to draw from the direct testimony. There was no reversible error sub judice with regard to the State's cross-examination of Father Roach.

ISSUE V

THE TRIAL COURT DID NOT ERR IN ALLOWING INFLAMMATORY EVIDENCE OF AFTER DEATH ACTIVITY

Citing Halliwell v. State, 323 So.2d 557, 561 (Fla. 1975), Elledge next argues that the circumstances as to what Elledge after Mrs. Strack was killed, such as cleaning her body and then moving it to a place other than his motel room and subsequently rifling through her purse for money, should not have been introduced at the penalty phase of Elledge's trial. First and foremost, the jury, was entitled to know the facts and circumstances surrounding the murder. They were entitled to no know less testimony than any jury who would have sat through both guilt and the penalty phase of a

trial. To suggest that the State should be limited in presenting evidence that went to the nature of the crime or the character of the defendant, as suggested, is arguing that there should be some limitation with regard to Lockett v. Ohio, 438 U.S. 586 (1978).

Elledge's reliance on Halliwell is misplaced. Halliwell stands for the proposition that the jury may not consider in assessing aggravating factors odious acts done to the deceased. Nowhere in Halliwell did this Court suggest that facts and circumstances surrounding the disposal of the body, to-wit: removing it from the crime scene, or rifling through a purse or where a body is ultimately disposed of somehow was not part of the circumstances of the crime. Elledge has demonstrated no error, let alone harmless error, as to this issue.

ISSUE VI

THE TRIAL COURT DID NOT ERR IN SUBJECTING ELLEDGE TO A COMPELLED MENTAL HEALTH EXAMINATION BY A PROSECUTION EXPERT

Elledge next argues that the trial court erred in permitting a compelled mental health evaluation of Elledge by the State's expert. Arguing that the entire concept of compelled mental health evaluations violates the United States and Florida Constitution, Elledge points to a Texas case, Bradford v. State, 873 S.W.2d 15 (Tex.Crim.App. 1993), cert. denied, Texas v. Bradford, ___ U.S.

___, 115 S.Ct. 311, ___ L.Ed.2d ___ (1994), as authority for this proposition.

The State would submit that this Court's decision in Burns v. State, 609 So.2d 600 (Fla. 1992), made it clear that perhaps a level playing field should be available to both the State and the defense in the presentation and the defense of any presentation of mitigating evidence. Compelling mental health evaluations by the State once notice has been presented that mental health mitigation will be tendered in mitigation, in no way restricts the defense from presenting evidence. If anything, compelled mental health examinations merely test the validity of the mitigation presented. See Leland v. Oregon, 343 U.S. 790 (1952), and Lockett v. Ohio, 438 U.S. 586 (1978), wherein the Court suggested relevant mitigating evidence be presented. In Amendments to Fla.R.Crim.P. 3.220-Discovery (3.202-Expert Testimony of Mental Mitigation During Penalty Phase of Capital Trial, 20 Fla.L.Weekly S552-553 (November 2, 1995), ___ So.2d ___, the Florida Supreme Court set forth Rule 3.202, permitting expert testimony of mental mitigation during the penalty phase of capital trials providing notice and an examination by a state expert. In doing so, the court provided:

> . . .that in subsection (d), "After the filing of such notice and on the motion of the State indicating its desire to seek the death

> penalty, the court shall order that, within forty-eight hours after the defendant is convicted of capital murder, the defendant be examined by a mental health expert chosen by the State. The attorneys for the State and the defendant may be present at the examination. The examination shall be limited to those mitigating circumstances the defendant expects to establish through expert testimony." 20 Fla.L.Weekly at S553.

The procedures undertaken in the instant case met the requirements this Court has set forth in Rule 3.220, Fla.R.Crim.P. The State's expert, Dr. Stock, had available a plethora of information regarding Elledge. (TR 2641-2642). Dr. Stock was not permitted to sit or listen to any of the expert testimony but rather, relied on prior depositions of Dr. Schwartz and reviewed the testimony of Dr. Caddy from a prior resentencing. Dr. Stock evaluated Elledge for 14 hours over a two-day period and performed two tests, specifically the MMPI-II and the Clinical Analysis Questionnaire and rescored the IQ test given by Dr. Schwartz. (TR 2642-2644). Prior to Dr. Stock testifying before the jury, his testimony was proffered regarding what his role was with regard to his testimony before the jury, specifically to address the three areas of mitigation that Elledge had presented, to-wit: whether Elledge was under extreme emotional and mental duress, whether Elledge's capacity to appreciate the criminality of his conduct at

the time of the murder was impaired, and Elledge's future dangerousness. (TR 2482). The trial court observed that he would not allow any evidence introduced through Dr. Stock that had not previously been presented to the jury or which might tend to form an aggravating factor. (TR 2545). A review of Dr. Stock's testimony reveals that he countered Dr. Schwartz' testimony as to Elledge's future dangerousness and found contrary to Dr. Schwartz' and Dr. Caddy's findings that, Elledge could appreciate the criminality of his conduct at the time of trial and was not suffering from severe mental or emotional disturbance at the time of trial.

Elledge argues, assuming arguendo that a compelled mental health evaluation for penalty phase is lawful, he finds two reasons why compelled examination was not in the instant case. First, he argues that there was no rule or procedure which authorized a compelled mental health examination at the time of the offense and therefore any application of the rule would be an ex post facto application; and that since Mr. Elledge had already had an examination for competency and sanity and the State had access to these reports, "this is not a situation where only experts retained by the defense had examined the defendant." (Appellant's Brief, p. 49).

In reviewing the rule fashioned by this Court permitting the compelled mental health examination, the State is not suggesting that this Court apply the "rule" to the instant case. However, even if it were, there would be no ex post facto violation. See Windom v. State, 656 So.2d 432, 439 (Fla. 1995) (court found no ex post facto violation regarding victim impact evidence as to the admission of evidence). See also Glendening v. State, 536 So.2d 212 (Fla. 1988), cert. denied, 492 U.S. 907, 109 S.Ct. 3219, 106 L.Ed.2d 569 (1989). Rather, the State would submit that the failure to have a rule in place at the time does not necessarily serve as a bar since the trial court has wide discretion in insuring that due process is provided the State as well as the defendant.[16] For example, Sec. 916.11(b), Fla.Stat., provides, in material part:

> The court may appoint no more than three nor fewer than two experts to determine issues of the mental condition of the defendant in a criminal case, including the issues of competency to stand trial, insanity and involuntary hospitalization or placement.

Beyond peradventure, the list of issues set forth in this statute is not limited or exclusive, rather it applies to those

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[16]In pointing to the current rule, the State is merely noting that in 1993 the trial court's procedures were acceptable and not contrary to the spirit of the new procedure found in Rule 3.202.

circumstances when the mental condition of the defendant is at issue including claims of voluntary intoxication and claims relating to mitigating factors presented by the defendant. A court clearly has the power to compel an examination which does not violate the defendant's rights. See Parkin v. State, 238 So.2d 817, 822 (Fla. 1970), cert. denied, 401 U.S. 974 (1971) ("the defendant's right at trial to offer evidence on the issue of his sanity at the time of the alleged crime is conditioned upon his cooperation during a psychiatric examination on behalf of the prosecution in court."). See also Henry v. State, 574 So.2d 66, 70 (Fla. 1991).

Compelling a psychiatric examination of a defendant, who puts his mental status at issue, by the State's experts, does not raise any constitutional violations. Parkin v. State, supra; United States v. Byers, 740 F.2d 1140 (D.C. Cir. 1984); Buchanan v. Kentucky, 483 U.S. 402 (1987); Estelle v. Smith, 451 U.S. 454 (1981). In Estelle v. Smith, supra, the Court specifically noted that when a defendant interjects his mental status into the case, he may be required to submit to a mental examination by the prosecution's expert:

> When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State

> of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several courts of appeals have held that, under such circumstances, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist. (Cites omitted).

In Buchanan v. Kentucky, 483 U.S. 402 (1987), the Court, relying on Estelle v. Smith, acknowledged that in situations where a defendant asserts an insanity defense or offers psychiatric evidence at trial, the State has an interest in introducing evidence at trial to rebut such defenses, (see also Marshall, J., dissenting, 483 U.S. at 433, n.5) ("the commonwealth is free of course, to compel a separate examination specifically inquiring as to the mental condition of the defendant at the time of the alleged offense, once put on notice that the defendant will place his mental condition in issue. Estelle v. State (cite omitted). Given notice, the commonwealth bears full responsibility for being prepared at trial to rebut a mental status defense.").

In United States v. Byers, 740 F.2d 1140 (D.C. Cir. 1984), the court, in a plurality opinion, expressly held that when the defendant seeks to interject a mental status defense in criminal proceedings, he may constitutionally be subjected to compulsory examination by court appointed or government psychiatrists. In

Byers, citing to Pope v. United States, 372 F.2d 710 (8th Cir. 1967) (en banc), vacated and remanded on other grounds, 392 U.S. 651 (1968), the Court noted:

> It would be a strange situation, indeed, if, first, the government is to be compelled to afford the defense ample psychiatric service and evidence at government expense and, second, if the government is to have the burden of proof, . . . and yet is to be denied the opportunity to have its own corresponding and verifying examination, a step which perhaps is the most trustworthy means of attempting to meet that burden. 372 F.2d at 720. We agree with this concern and are content to rely upon it alone as the basis for our rejection of the Fifth Amendment claim. We share the dissent's solicitude for the 'private enclave of the human personality,' dissent at 1151. But when as here, a defendant appeals to the nature of that enclave as the reason why he should not be punished for murder, and introduces psychiatric testimony for that purpose, the State must be able to follow where he had led.
>
> Appellant and amici would have us believe that the mere availability of cross-examination of the defendant's experts is sufficient to provide the necessary balance in the criminal process. That would be so if psychiatry were as exact as science as physics, so that, assuming the defense psychiatrist precisely described the data (consisting of his interview with the defendant), the error of his analysis could be demonstrated. It is, however, far from that. Ordinarily, the only effective rebuttal of psychiatric opinion testimony is contradictory testimony; and for that purpose, as we said in Rollerson v. United States, 343 F.2d 269, 274 (D.C. Cir.

> 1964), 'the basic tool of psychiatric study remains the personal interview, which requires rapport between the interviewer and the subject.'

Byers, 740 F.2d at 1113-1114. See also Isley v. Dugger, 877 F.2d 47, 50 (11th Cir. 1989); Battie v. Estelle, 655 F.2d 692, 702, n.22 (5th Cir. 1981) ("By introducing psychiatric testimony obtained by the defense from a psychiatric examination of the defendant, the defense constructively puts the defendant himself on the stand and therefore the defendant is subject to psychiatric examination by the State in the same manner." . . . "Any burden imposed on the defense by this result is justified by the State's overwhelming difficulty in responding to the defense psychiatric testimony without its own psychiatric examination of the accused's and by the need to prevent fraudulent mental defenses.").

There is no sound policy or constitutional prohibition which prevents the trial court from exercising its authority to ensure that a sentencing hearing is conducted in a fair manner. Once the defendant has put his mental state at the time of the offense in issue, fairness dictates that the State be permitted a full opportunity to rebut that testimony. In fact, such is contemplated in the creation of Rule 3.202, Fla.R.Crim.P. This is especially true in light of this Court's decisions in Campbell v. State, 571

So.2d 415 (Fla. 1990), and Nibert v. State, 574 So.2d 1059 (Fla. 1990), wherein it has become imperative that the State be given a fair and full opportunity to explore and rebut inaccurate or incorrect or misleading "mitigation" that may be presented. In Nibert v. State, 574 So.2d at 1062, the court observed:

> . . . Where uncontroverted evidence of a mitigating circumstance has been presented, a reasonable quantum of competent proof is required before the circumstance can be said to have been established. See Campbell. Thus, when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that 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 mitigating circumstances.' Knight v. State, 512 So.2d 922, 933 (Fla. 1987), cert. denied, 485 U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 262 (1988); Cook v. State, 542 So.2d 964, 971 (Fla. 1989) (trial court's discretion will not be disturbed if the record contains 'positive evidence' to refute evidence of the mitigating circumstance); see also Pardo v. State, 563 So.2d 77, 80 (Fla. 1990) ('This Court is not bound to accept a trial court's finding concerning mitigation if the findings are based on a misconstruction of undisputed facts or misapprehension of the law).

In Nibert, the court reversed and remanded for imposition of a life sentence where, in part, expert testimony went unrefuted. The court observed:

> In this case, there was no competent, substantial evidence in the record to refute the mitigating evidence, rather the record shows that Nibert was a child abused, chronic alcoholic who lacks substantial control over his behavior when he drinks and that he had been drinking heavily on the day of Snavely's murder.

574 So.2d at 1063.

In the instant case, it was incumbent upon the State to come forward and demonstrate that the psychological testimony presented by Elledge not go unrefuted. The State below in order to refute Dr. Schwartz' and Dr. Caddy's views concerning the future dangerousness, the ability to appreciate the criminality of his conduct, and whether Elledge was suffering from extreme emotional or mental disturbance, had the right to have Elledge examined by their own mental health expert. In so doing, the jury, as well as the trial judge, was provided relevant information regarding both sides of who Elledge was and was able assess the appropriate weight to be given the mitigation tendered.

In Dillbeck v. State, 643 So.2d 1027 (Fla. 1994), this Court, citing to State v. Hickson, 630 So.2d 172 (Fla. 1993), observed:

> At the time of sentencing in the present case, Nibert had been decided, thus obligating the State to either rebut the defendant's mitigating evidence or run the risk of having the court accept that evidence as establishing one or more mitigating circumstances. We note that Dillbeck planned to, and ultimately did, present extensive mitigating evidence in the penalty phase through defense mental health experts who had interviewed him. Under these circumstances, we cannot say that the trial court abused its discretion in striving to level the playing field by ordering Dillbeck to submit to a pre-penalty phase interview with the State's expert. See Burns. No truly objective tribunal can compel one side in a legal bout to abide by the Marquis of Queensberry's Rules, while the other fights ungloved.

643 So.2d 1030.

To the extent Elledge is also arguing that because he had "already been examined for competency and sanity" and the prosecution had access to these reports, the State was not entitled to have its own expert examine Elledge such is contrary to the spirit announced in Dillbeck that all parties play on a level playing field.

Simply because the trial court in the instant case, as in Dillbeck, used a "fairness" factor and fashioned a procedure which leveled the playing field for the State in 1993, does not mean relying on the creation of a subsequent rule to allow the State to compel the defendant to be examined by a State doctor under certain

circumstances invokes a violation of the ex post facto clause of the Florida or the United States Constitution. Additionally, as observed in Dillbeck, simply because Elledge had been previously examined in 1975, for competency and insanity, does not level the playing field when, at a fourth sentencing proceeding, 19 years hence, the State must come to a sentencing proceeding only armed with "dated" doctors reports.

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

ISSUE VII

WHETHER THE PROSECUTION WAS IMPROPERLY ALLOWED TO USE A COMPELLED MENTAL HEALTH EVALUATION TO REBUT MITIGATION NOT BASED ON A MENTAL EXAMINATION

Elledge next complains that the State was permitted to utilize evidence obtained through Dr. Stock's evaluation of Elledge, "as rebuttal to the testimony of Professor Radelet and the testimony of prison guards regarding conduct in prison and prospects in prison (R 1983-1986)." (Appellant's Brief, p. 51). Pointing to the testimony of Professor Michael Radelet, a sociology professor, who testified that Elledge lacked a future dangerousness, Elledge states, "It was improper to allow the prosecution to use a compelled mental health evaluation to rebut mitigation which is not

presented by a mental health professional and is not based on a clinical interview." (Appellant's Brief, p. 51).

Ultimately Dr. Stock's concluded that because Elledge had an anti-social personality disorder which continues through today, under the right circumstances, Elledge continues to be dangerous. (TR 2669). This conclusion clearly was proper to counter Dr. Radelet's testimony regarding studies done of inmates and how they adjust in prison. (TR 1587-1588). Radelet's example was,

> . . . It was two people who have received Executive Clemency whose sentences was commuted. One was Roswell Gilbert, the old man I think in Ft. Pierce who was convicted of mercy killing, if you will, of his aged wife. And the second was one of the women who was convicted of first degree murder for killing her husband whose sentence was commuted by Governor Chiles when new evidence that she had been the victim of battery came up.
>
> Nobody has been paroled, Judge. But those are the only two who have been released because of Clemency. There have been other people who have been released when the conviction was thrown out. But those are the only two people who are out whose convictions still stand.

(TR 1588).

The record also shows that tests performed by Dr. Schwartz, specifically, the Carlson test, a mental health test, could be used to predict future dangerousness. (TR 2659). Dr. Stock observed that upon reviewing the Carlson test performed by Dr. Schwartz,

those test results were not valid because of an incorrect analysis. (TR 2660). Dr. Stock had the responsibility and ability to negate three charges: to look at future dangerousness, to see if Elledge conformed his conduct to the requirements of law and to determine whether he was suffering from extreme mental or emotional disturbance. (TR 2482).

Elledge has cited no authority which would support his conclusion that any of Dr. Stock's testimony was improper or failed to go to an issue in mitigation presented by Elledge. Additionally, should any error be determined by this Court, that error would be harmless. The State revealed through cross-examination that Elledge had received 19 DR's over the years and all the defense witnesses either did not know about the DR's or agreed that the circumstances supporting the DR were valid. No relief is required as to this claim.

ISSUE VIII

THE TRIAL COURT DID NOT ERR IN DENYING DEFENSE COUNSEL'S REQUEST TO HAVE HIS EXPERT VIEW THE TESTIMONY OF THE PROSECUTION'S MENTAL HEALTH EXPERT

Citing to record cite (TR 2450), Elledge argues that he "requested that his expert be allowed to view the testimony of the prosecution's mental health expert in order to prepare for possible

surrebuttal." (Appellant's Brief, p. 52). Nowhere on page 2450 of the State's record is there any indication that defense counsel asked to have an expert sit in during the testimony of Dr. Stock to assist the defense.[17] Moreover, the record reflects that at the end of the State's rebuttal testimony (TR 2698), defense counsel rested and without objection and states there will be no surrebuttal. (TR 2698). Presumably, if there was some problem with the procedures undertaken and the ability of the defense to bring witnesses for surrebuttal, some objection could have been made. Having cited neither authority nor a cogent argument as to where this issue was preserved, the State would submit that no error has been demonstrated as to this claim.

ISSUE IX

WHETHER THE TRIAL COURT ERRED IN SUSTAINING THE PROSECUTION'S OBJECTION TO THE DEFENSE'S EXERCISE OF A PEREMPTORY CHALLENGE

Elledge argues that when defense counsel attempted to strike Daisy Fussell (TR 391), the court raised a State v. Neil, 457 So.2d

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[17]The discussions relating to doctors on that page and the nine pages preceding that deals with whether Dr. Lewis and her colleague Dr. Picos will come to Florida to do further testing on Elledge and possibly testify at this resentencing. The discussions following page 2450 of the record pertain to the scope of Dr. Stock's testimony and whether it will be true rebuttal of mitigating evidence as opposed to proof of aggravating circumstances.

481 (Fla. 1984), issue, arguing there was no race-neutral basis for exercising a defense's peremptory. Citing Holiday v. State, ___ So.2d ___, 21 Fla.L.Weekly D4 (Fla. 3d DCA Dec. 20, 1995), Elledge contends that an objector must do something more than merely object and request race-neutral reasons. He argues that, "the prosecution made the same bare-bones request as in Holiday. The trial court's requiring the defense to state reasons, disallowing the peremptory, and striking the panel was reversible error." (Appellant's Brief, p. 54). Relying on the fact that defense counsel had no reason to excuse black jurors, because both the defendant and the victims were white and "there was no evidence which could be seen as having any special appeal or animus to any racial group" (Appellant's Brief, p. 55-56), Elledge argues that, "there was no evidence to lead one to question these clear, race-neutral reasons." (Appellant's Brief, p. 56).

What Elledge fails to mention, however, is that 50 pages before defense counsel attempted to exercise a peremptory challenge against Ms. Fussell, defense counsel moved for a mistrial based on comments jurors made regarding to the case. The record reflects that while the State insisted on pursuing its Slappy objection (TR 422), the reason on the record the entire panel was excused, was based on the comments made among the jurors with regard to why

Elledge had been on death row for 19 years and was being sentenced another time.

> At the same time obviously many of you have questions as to how does our system work, delay injustice. I think you all vented that yesterday. At the same time this is the best system that we know of. It's very easy as I told you before for all of us to criticize our system of justice. But certainly before one life is taken by the judicial or legal process their rights have to be maintained. And for whatever reason the appellate courts have found in the past that there were flaws and as a result we are here doing it now for the fourth time.
>
> Candidly, there is some questions as to whether or not even the comments that you folks made yesterday would give rise if you did find Mr. Elledge -- in fact, recommended a sentence of death. And if I sentenced him to death of course there are questions on whether or not that would even give rise to the appellate court again saying no, it wasn't done properly. Certainly for Mr. Elledge, for the State of Florida, and for everyone concerned, everyone is entitled to a finality. And we want to start with a clean jury where those issues aren't even there to be presented.
>
> So I apologize that your time has not been well served and that you have gone through this which has been a long ordeal for you yesterday. But I think you can understand this is a unique case. I don't know of any case, I don't believe Mr. Laswell or Mr. Satz does either, where a person is here for a fourth sentencing phase.

(TR 425-426).

The trial court then excused the entire jury panel and jury selection recommenced at TR 451.

First, the reasons tendered by defense counsel to peremptorily excuse Ms. Fussell as to whether a racially neutral reason was given for her excusal were inadequate. Ms. Fussell was in the same circumstances as a number of other potential jurors who were not peremptorily challenged. Second, a more importantly, the question of whether a proper peremptory challenge had been used is of no moment in this case because the trial court removed the entire jury panel because of the comments made among the jurors as to why 19 years had passed. The jury was wrestling with what sentence ought to be imposed before they heard all the evidence. See Wilding v. State, ___ Fla.L.Weekly S___, Case No. 82, 696 (Decided May 16, 1996), wherein this Court, based on jury misconduct, granted a new trial because Wilding was deprived of a fair and impartial guilt-phase jury. The facts in Wilding reveal that after the jury reached a guilty verdict but before the commencement of the penalty phase, a court employee informed the court that a juror had contacted the clerk's office and related that several of the jurors were concerned that Wilding had access to their personal information. The court observed:

> After the jury was dismissed, defense counsel moved for a mistrial as to the guilt phase, pointing out that the inquiry revealed that in reaching a verdict the jurors may have relied on something other than the evidence presented, such as fear of or other bias against the defendant. In arguing against the motion, the State relied almost entirely on the fact that each of the jurors had stated that the discussions about the defendant having access to their personal information did not play a part in the verdict. In denying the motion for mistrial, the trial court also relied on the fact that the jurors assured the court that concerns about Wilding having access to their personal information played no part in the verdict.
>
> . . . When the juror misconduct was confirmed in the jurors interviews, Wilding was entitled to a new trial unless the State could demonstrate that there was no reasonable possibility that the misconduct affected the verdict. (Cites omitted).
>
> Here, the State failed to prove through objective facts that the misconduct was harmless beyond a reasonable doubt. As explained above, a finding that there was no reasonable possibility that the misconduct affected the verdict cannot be based on improper inquiry into the jury's decision-making process. (Cite omitted). Thus, it was an abuse of discretion for the trial court to refuse to grant Wilding a new trial. (Cite omitted).

(Slip opinion, p. 8-10).

Likewise, in the case at bar, the trial court did not err when he dismissed the panel based on comments made among the jurors.

Necessarily, to that end, Ms. Fussell would have been excused no matter whether the State's Slappy objection had been pursued or not. In the instant case, the issue is "no fair no foul" in that a completely new jury was selected which would have been the result had an improper denial of a use of peremptory challenge been found. There is no issue with regard to this point on appeal.

ISSUE X

WHETHER THE TRIAL COURT ERRED IN RESTRICTING VOIR DIRE

Citing no authority for the proposition that error occurred except for the generic statements in Lavado v. State, 492 So.2d 1322 (Fla. 1986); Johnson v. State, 590 So.2d 1110 (Fla. 2d DCA 1991), and Moses v. State, 535 So.2d 354 (Fla. 4th DCA 1988), Elledge asserts that "the right to meaningful voir dire to ferret out potential biases and to intellectually exercise both cause and peremptory challenges" should not be restricted. Elledge now argues that the court erred in failing to allow him to ask the following question, "Is it more important to you to hear about aggravating factors than it is mitigating factors?" (TR 794).

Elledge fails to accurately reflect what the record bears out following the State's objection to this question. The defense wanted the juror to "commit" without first knowing what the

aggravating factors may be. (TR 794). The trial court agreed, sustained the objection and suggested that defense counsel rephrase the question. After further discussion, the court rephrased the question as, "Do you want to ask this juror is he going to consider things in favor of the death penalty more than he is going to consider things in favor of life, I'll allow you to ask that question. I just am not going to allow you to have a juror recommit." (TR 797). After more discussion, the court opined:

> I am going to give you some latitude to try to get to this man's feelings. That's not the problem. The problem is I'm not going to allow you to have or to try to get a commitment from him one way or the other as to how he's ultimately going to respond to aggravators or mitigators. You can ask him, you know, are you looking for the good in people that would go towards life perhaps or are you looking for things that are more indicating that death is appropriate. I don't want -- I don't mind you asking that.

(TR 798).

Defense counsel then asked Mr. Brown "Alright. Mr. Brown, do you think that it would be more interesting to you to look into the aspects of the law that the judge will instruct you upon that influences for death as opposed to the aspects of the law that the judge will instruct you on that influences for life?" (TR 799). The court ordered Mr. Brown to answer the question. (TR 799).

Defense counsel asked again, "Yeah, because -- I mean this is not a trick question, alright. There is no right or wrong question, but you say that you favor the death penalty and you believe in the death penalty for punishment, alright --- well, you don't know what's appropriate. The judge will tell you, alright. But there are two potential punishments, alright. You believe in the death penalty. You're going to hear a lot of evidence and at the end of the evidence some of it is going to be evidence that will influence a finding for death, some of it will be evidence that will influence a finding for life. The question is either one of these death or life to put it in a nutshell of more interest to you?" (TR 801). Defense counsel then observed, "Do you believe in life sentence? . . . Could you recommend a life sentence for Bill Elledge?" (TR 802). Having received an affirmative answer, defense counsel continued,

> As between, Mr. Brown, a death sentence and a life sentence does one of those interest you more than the other, do you have stronger feelings about one more than the other?
>
> MR. BROWN: I don't think so not knowing the facts. I would have to say I would have to be asked a level grade not knowing the facts.

(TR 802).

Based on this colloquy, it is clear that defense counsel was able to inquire of Mr. Brown and other potential jurors their views with regard to potential biases as to the death penalty. There was no limitation of voir dire.

ISSUE XI

WHETHER THE EXTRAORDINARY DELAY IN PROVIDING A LAWFUL PENALTY PHASE SEVERELY PREJUDICE MR. ELLEDGE'S CASE FOR A LIFE SENTENCE, REQUIRING REDUCTION TO LIFE

Elledge next argues that he is entitled to a life sentence because too much time has passed from the date of his original plea on March 17, 1975. He points to the fact that the trial court made reference to the passage of time in his sentencing order and noted that many of Elledge's relatives had died since his guilty plea. Pointing to the hearing held on his motion (TR 2902-2985), Elledge called to the stand Phillip Charlesworth, the chief investigator on his case who described the difficulties in locating witnesses and talking to relatives. The record reflects, however, that albeit some relatives had died, the court was very liberal in allowing testimony from prior resentences to be read to the jury in the instant sentencing. While some relatives had died, Elledge has pointed to no set of facts that were so unique to those individuals' potential testimony that, but for their testimony, the

evidence could not presented. Absent such a showing, the delay in and of itself does not require the death penalty being reduced to life.

Elledge argues there was difficulty in the jurors understanding why everything took so long. The jurors that Elledge makes reference to were those jurors who were all excused once there was a determination that improper jury comments had been made during the voir dire process. None of the comments cited in Appellant's Brief, page 58-59, are attributed to any of the jurors who actually did sit.

Elledge breaks down this issue into two sub-points. He first argues that there has been a violation of his right to a speedy trial. Albeit, capital defendants are entitled to speedy trial considerations at sentencing, the mere passage of time based on active appellate litigation for the last 19 years is not a valid basis upon which to reduce his death sentence to life. See Hitchcock v. State, 21 Fla.L.Weekly S139, S140 (Fla. March 21, 1996), wherein this Court held:

> We reject Hitchcock's argument that the length of time which his case has taken has made his sentencing for this murder, which occurred in 1978, a violation of his constitutional rights. See Hitchcock III, 578 So.2d at 693.

Moreover, the authorities cited by Elledge, to-wit: Doggett v. United States, 112 S.Ct. 2686, ___ U.S. ___, ___ L.Ed.2d ___ (1992); Madonia v. State, 648 So.2d 260 (Fla. 5th DCA 1994), and Harris v. Champion, 15 F.3d 1540 (10th Cir. 1994), are all distinguishable with regard to ascertaining whether "the delay before trial was uncommonly long."

As to whether the government is more to blame for the delay than the defendant, the State would submit that simply because Appellant prevailed on appellate review does not suggest that the State purposefully or in any fashion attempted to not seek a lawful sentence of death at prior resentencings. See Elledge v. State, 613 So.2d 434 (Fla. 1993) (see footnote 1 for a history of litigation).

As to whether a "speedy trial right has been asserted in due course," the record reveals that without delay every time Elledge's case has been remanded for a new sentencing hearing, a new sentencing hearing was held.

Elledge finally argues that the delay has prejudiced him to "oppressive incarceration" and "anxiety." (Appellant's Brief, p. 61). It is hard to fashion how Elledge has suffered "oppressive incarceration" in that, but for being on Florida's death row for a number of years, he would have been incarcerated in the Florida

State Prison system. Moreover, the instant 1993 resentencing proceeding bears little difference from his 1985 resentencing hearing or, for that matter, the earlier resentencing hearing because those witnesses who died or were unavailable had their prior testimony read into the record and those witnesses who still were living and available were permitted to testify. To the extent that there may have been other witnesses that Elledge wanted to secure, the trial court held a hearing January 28, 1994, at which point Phillip Charlesworth was called to the stand and questioned by Elledge regarding investigations he undertook in Elledge's behalf. The record is replete with the significance or lack thereof of the witnesses Elledge personally thought Mr. Charlesworth should have located. Clearly, Elledge has not satisfied the test submitted to the court in Doggett v. United States, supra. While the delay before trial was not uncommonly long, the State has pursued sentencing Elledge with all due dispatch. Elledge's due process rights have been not been violated by the delay in ultimately getting a valid death sentence in the instant case. This Court has acknowledged same in Hitchcock, supra. All relief must be denied as to this claim.

ISSUE XII

WHETHER THE TRIAL COURT ERRED IN DENYING ELLEDGE'S MOTION TO PRECLUDE DEATH AS THE DELAY IN THIS CASE VIOLATES THE FLORIDA AND UNITED STATES CONSTITUTIONS

Based on the "torturous effects of the 'death row phenomena'" (Appellant's Brief, p. 62), Elledge argues that the psychologically devastating effects of a lengthy stay of death row constitutes cruel and unusual punishment. (Appellant's Brief, p. 62). Appellant cites no United States decision that supports his contention that it is cruel and unusual punishment due to litigation delays in carrying out a death penalty. In fact, the only thing about this case that is unusual is that there have been four sentencing hearings. Elledge has made no colorable showing that the death penalty is not appropriate in the instant case.

ISSUE XIII

WHETHER THE TRIAL COURT ERRED IN GIVING AN IMPROPER INSTRUCTION ON REASONABLE DOUBT

Citing no authority except Cage v. Louisiana, 498 U.S. 39 (1990), Elledge argues that the instruction given as to reasonable doubt (TR 2866), is strikingly similar to the one cited in Cage and therefore reversal is mandated. Such result need not obtain. First, the instruction provided is the standard jury instruction which has been found not to be wanting by this Court. More

importantly, as observed in Archer v. State, 21 Fla.L.Weekly S119, S120 (Fla. March 14, 1996), ___ So.2d ___:

> While the State must prove each element of a crime beyond a reasonable doubt, our cases have not found it fair when a jury's instructed on this standard but not given a definition of the term. See Barwick v. State, 82 So.2d 356 (Fla. 1955); Knight v. State, 60 Fla. 19, 53 So. 541 (1910) (accord, Victor v. Nebraska, 114 S.Ct. 1239, 1243, 127 L.Ed.2d 583 (1994) (stating that a trial court must instruct the jury on the necessity that the defendant's guilt be proven beyond a reasonable doubt; however the United States Constitution does not require a trial court to define reasonable doubt for the jury)). Because we find that this instruction appropriately holds the State to the burden of proving each aggravating circumstance beyond a reasonable doubt, we hold that error to define reasonable doubt to the jury in the sentencing phase of a capital trial is not fundamental error. Consequently, we reject Archer's claim.

21 Fla.L.Weekly at S120.

Where, in the instant case, a valid instruction was provided, no error exists. No relief should be forthcoming as to this issue.

ISSUE XIV

WHETHER THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON NON-STATUTORY MITIGATION

The record reflects that the jury was instructed that they could consider "any other aspect of the defendant's character or

record, and any other circumstances of the offense." (TR 2865). No specific objection was tendered to the court at the close of all the jury instructions. (TR 2875). Elledge's concerns that the jury required special jury instructions as to non-statutory mitigators does not fall within the standard jury instructions but more importantly are not required where, as here, the "catchall" mitigating instruction was provided. See Finney v. State, 660 So.2d 674 (Fla. 1995); Jones v. State, 612 So.2d 1370, 1375 (Fla. 1992) (the standard jury instruction on non-statutory mitigators is sufficient, and there is no need to give separate instructions on individual items of non-statutory mitigation); Robertson v. State, 574 So.2d 108 (Fla. 1990); Ferrell v. State, 653 So.2d 367, 370 (Fla. 1995); Walls v. State, 641 So.2d 381, 389 (Fla. 1994) (standard instructions "clearly tell jury that they may consider anything relevant"), and Gamble v. State, 659 So.2d 242, 246 (Fla. 1995). No relief should be forthcoming as to this issue.

ISSUE XV

WHETHER THE TRIAL COURT ERRED IN NOT GIVING A JURY INSTRUCTION EXPLAINING THE NATURE AND FUNCTION OF MITIGATING CIRCUMSTANCES

Elledge has raised the same argument but failed to cite the authorities cited in Point XIV, which have rejected the notion that

Elledge is entitled to explanatory instructions regarding the nature and function of mitigation. See Ferrell, supra, Fennie, supra, Gamble, supra, Walls, supra, and Robertson, supra (no reason to believe that the standard jury instructions prevents jury from considering and weighing any constitutionally relevant evidence. This court's catchall standard jury instruction on non-statutory mitigation sufficiently affords the jury guidance in this field. A specific or detailed instruction is not warranted. See Jackson v. State, 530 So.2d 269, 273 (Fla. 1988) (not error, under Lockett v. Ohio, 438 U.S. 586 (1978), for court to decline to instruct jury on written list of non-statutory mitigation prepared by the defendant or explain purpose of mitigation). Relief should equally be denied as to this claim.

ISSUE XVI

THE TRIAL COURT DID NOT GIVE AN UNCONSTITUTIONAL INSTRUCTION ON THE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL (HAC) AGGRAVATING CIRCUMSTANCE

Without acknowledging that the standard jury instruction with regard to heinous, atrocious and cruel (HAC) aggravating factor has been upheld by this Court in a number of cases, Elledge argues unpersuasively that the standard jury instruction given in this case is infirmed. See Hall v. State, 614 So.2d 473, 478 (Fla.

1993), cert. denied, ___ U.S. ___, 114 S.Ct. 109, 126 L.Ed.2d 74 (1993); Whitton v. State, 649 So.2d 861 (Fla. 1994); Merck v. State, 664 So.2d 939 (Fla. 1995); Barwick v. State, 660 So.2d 685 (Fla. 1995); Taylor v. State, 630 So.2d 1038 (Fla. 1993), and Geralds v. State, ___ So.2d ___, 21 Fla.L.Weekly S85, n.6 (Fla. 1996). All relief must be denied as to this claim.

ISSUE XVII

THE TRIAL COURT DID NOT ERR BY GIVING UNDUE WEIGHT TO THE JURY'S DEATH RECOMMENDATION

Elledge next argues that the trial court gave "virtually complete deference to the jury's death recommendation", violating "Ross v. State, 386 So.2d 1191, 1197-1198 (Fla. 1980)." (Appellant's Brief, p. 71). Such a contention is without merit.

The record reflects that on several occasions in opening instructions to the jury, the trial court informed them that "only under rare circumstances" would the trial court impose a sentence other than the one the jury recommended (TR 463). He also made the following comments during the final instructions to the jury prior to the case being given to them for their recommendation. (TR 2871). In the instant case, the trial court, in his sentencing order (TR 3748-3770), after hearing, reviewing and considering

everything presented during the penalty phase, "in memoranda, correspondence, and subsequent hearings", held:

> In summary, the court finds that there are four (4) aggravating circumstances applicable to this case which have been proven beyond and to the exclusion of every reasonable doubt.
>
> As to mitigation, the court finds a lack of significant mitigating circumstances. The court finds zero (0) statutory mitigating factors and three (3) non-statutory mitigating circumstances have been proven by a preponderance of the evidence, though entitled to little weight cumulatively.
>
> The minimal significance which attaches to the non-statutory mitigating circumstances does not approach the weight of overwhelming statutory aggravating factors which have been established.
>
> The jury recommended that this court impose the death penalty upon William Duane Elledge by a majority vote of nine (9) to three (3). This recommendation must be afforded great weight by this court in its ultimate sentencing. Tedder v. State, 322 So.2d 908 (Fla. 1975). Death is presumed to be the proper penalty when one or more aggravating circumstances are found unless they are outweighed by one or more mitigating circumstances. White v. State, 403 So.2d 331 (Fla. 1981).
>
> It is the opinion of this court that the facts and circumstances of this case demand the imposition of the death penalty and that, in fact, the aggravating circumstances clearly and convincingly outweigh the mitigating circumstances so that no reasonable person could differ.

(TR 3768-3769).

After discussing for twenty-two pages the facts and circumstances and the evidence presented, it is clear based on the sentencing order that the trial court did not give undue weight to the jury's recommendation. Rather, he premised the imposition of the death penalty on the fact that, there was four strong statutory aggravating factors found and three non-statutory mitigating factors found by a preponderance of the evidence whose weight paled in comparison to the aggravation. Based on these factors alone, the trial court properly imposed the death penalty in the instant case. The decision in Ross, 386 So.2d at 1197, is distinguishable. The trial court found compelling reasons to impose the death penalty other than the jury's recommendation; and as in King v. State, 623 So.2d 486 (Fla. 1993), independently reviewed the aggravation and mitigation and found that mitigation was wanting in light of the strong statutory aggravating factors proven beyond a reasonable doubt. There was no error in the instant case with regard to the trial court's imposing the death penalty.

ISSUE XVIII

THE TRIAL COURT DID NOT ERRONEOUSLY APPLY A PRESUMPTION OF DEATH

Elledge next argues that the trial court erroneously applied a presumption of death because, citing to White v. State, 403 So.2d 331 (Fla. 1981), he placed in his sentencing order that "death is presumed to be the proper penalty when one or more aggravating circumstances are found unless they are outweighed by one or mitigating circumstances." (TR 3769). Elledge cites to Rembert v. State, 445 So.2d 337 (Fla. 1989), and argues that the court implicitly recognized that the aggravation must be sufficiently weighty to justify death regardless of the mitigation. The State would agree but would submit that the trial court did not base the imposition of the death penalty in Elledge's case because there was one or more aggravating circumstances. Rather, the death penalty was imposed because the trial court found:

> It is the opinion of this court that the facts and circumstances of this case demand the imposition of the death penalty and that, in fact, the aggravating circumstances clearly and convincingly outweigh the mitigating circumstances so that no reasonable person could differ.

(TR 3769).

To the extent that Elledge relies on Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988), for the proposition that there is error in saying that death is presumed, the decision in Jackson is distinguishable from the fact scenario sub judice. In Jackson, the

court was concerned about a jury instruction that was given that death was presumed to be the appropriate penalty. No such instruction was given in the case at bar. Albeit, the Florida sentencing scheme includes both judge and jury, in the instant case, there was no abrogation of the trial court's responsibility. He performed the necessary weighing based on his initial determination of the aggravating and mitigating factors present and unique to this case. No error has occurred sub judice.

ISSUE XIX

THE TRIAL COURT DID NOT ERR IN FAILING TO CONSIDER OR FIND A STATUTORY MITIGATING FACTOR

Elledge next argues that the trial court erred in failing to consider and find Sec. 921.141(6)(c), Fla.Stat., that the victim was a participant in the defendant's conduct or consented to the act. Elledge argues that there is evidence in this record which would support this mitigating factor. Specifically, he points to the fact that Margaret Strack went to his apartment after they had drinks at the bar and smoked some marijuana and began to sexually tease him. Based on this "acquiescence", Elledge is contending that the facts and circumstances of Ms. Strack's murder, to-wit: she was strangled to death while Elledge admittedly raped her after Ms. Strack said no, seems hard to fathom. The specific facts

surrounding Ms. Strack's death are uncontroverted because of the taped confession by Elledge who testified that when Ms. Strack said that she wasn't going to do anything, Elledge grabbed her throat and wrists and forced himself on her. (TR 1237-1238). When she dug her fingernails into his wrists, Elledge became mad and "forced her to have intercourse." (TR 1238-1239). As he mounted her, Ms. Strack started screaming and said she would tell the police that he raped her. Elledge admitted that he grabbed her by the throat and choked off her screams. (TR 1240). He choked her with both his hands and forced her legs apart (TR 1240), and as she started struggling, he raised her up, choked her and then threw her on the floor. (TR 1241). Elledge testified he kept choking her for about fifteen minutes until she turned purple, started bleeding from the nose and went limp. (TR 1242). Elledge said he knew he killed her. (TR 1243).

The trial court did not err in failing to find that Ms. Strack participated in her rape and murder.

ISSUE XX

THE TRIAL COURT'S ORDER IS NOT MATERIALLY FLAWED IN THAT IT IS BASED PARTIALLY ON FALSE INFORMATION

In describing the reasons for rejecting the statutory mitigating factor, Sec. 921.141(6)(b), Fla.Stat., that Elledge was under the influence of extreme mental or emotional disturbance, Elledge argues that the trial court misrepresented what Dr. Caddy said that Elledge was under the influence of extreme mental or emotional disturbance, citing record cite 3579. In fact, the record cite is 3759, wherein the court observed:

> The court finds the applicability of this mitigating circumstance was rebutted by the defendant's own expert. Dr. Caddy testified, based upon his examination of the defendant, interviews of the family and friends, and, a review of the facts of this case, that it is his expert opinion was that the defendant was not under extreme mental or emotional disturbance when he committed the murder of Margaret Ann Strack.

After a lengthy cross-examination, where Dr. Caddy admitted that he disagreed in material part with much of what Dr. Schwartz diagnosis of Elledge. On redirect Dr. Caddy did state to the jury that Elledge suffered from extreme emotional and mental duress at the time of the crime:

> Okay, having had a chance to re-evaluate your position in this case through Mr. Satz' cross-examination and other things that were brought to light, may I ask you whether or not you have an opinion within a reasonable degree of psychological certainty as to whether or not the capital felony involving the death of Margaret Ann Strack was committed while

> William Elledge was under the influence of extreme mental or emotional disturbance? Do you have such an opinion?
>
> A: My opinion is the same now as it was yesterday. My view is that he was operating under extreme emotional duress at the time.

(TR 2374).

Albeit the trial court may have misstated what Dr. Caddy's views ultimately that Elledge suffered from extreme emotional or mental disturbance, the trial court's rejection of this statutory mitigating factor was not premised on that conclusion. Rather, it was premised on testimony presented by Dr. Stock as to what Elledge's tests bore out:

> . . . Dr. Stock found that the defendant was malingering, which gave rise to a deceptive result on the MMPI-II. The doctor testified that the defendant's average IQ rules out retardation, which is a primary indicator of fetal alcohol syndrome. Also, contrary to Dr. Schwartz' findings and consistent with Dr. Caddy's, Dr. Stock concluded that the defendant did not suffer from fetal alcohol syndrome and found no indications of any organicity. Also, the defendant did not suffer from any mental illness, impulse control disorder, or post-traumatic stress disorder. Dr. Stock concluded that the defendant had an anti-social personality disorder. Dr. Stock testified that this is not a mental illness, but a lifelong history of a person who makes bad choices in life and that these choices are conscious and volitional. . . .

> The evidence presented does not establish, by a preponderance of the evidence, that the defendant was under the influence of extreme mental or emotional disturbance when the murder of Margaret Ann Strack was committed. As such, the court finds that this mitigating circumstance does not apply.

(TR 3759-3760). See Romano v. Oklahoma, 512 U.S. ___, 129 L.Ed.2d 1, 114 S.Ct. ___ (1994), wherein the United States Supreme Court concluded:

> Contrary to petitioner's assertion, Johnson (v. Mississippi, 486 U.S. 578 (1988)), does not stand for the proposition that the mere admission of a relevant and prejudicial evidence requires the overturning of a death sentence.
>
> Petitioner's argument, pared down, seems to be a request that we fashion general evidentiary rules, under the guise of interpreting the Eight Amendment, which would govern the admissibility of evidence at capital sentencing proceedings. We have not done so in the past, however, and we will not do so today. The Eighth Amendment does not establish a federal code of evidence to supersede state evidentiary rules in capital sentencing proceedings. (Cites omitted). . .
>
> We believe the proper analytical framework in which to consider this claim is found in Donnelly v. DeChristoforo, 416 U.S. 637, 643, 40 L.Ed.2d 431, 94 S.Ct. 1868 (1974). There we addressed a claim that remarks made by the prosecutor during his closing arguments were so prejudicial as to violate the defendant's due process rights. We noted that the case was not one in which the State had denied a defendant the benefit of a specific

> constitutional right, such as the right to counsel, or in which the remarks to prejudiced a specific right as to amount to a denial of that right. (Cite omitted). Accordingly, we sought to determine whether the prosecutor's remarks 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' (Cite omitted). We concluded, after an 'examination of the entire proceedings,' that the remarks did not amount to a denial of constitutional due process.' (Cite omitted).

129 L.Ed.2d at 12-13.

Similarly, the State would submit that based on the totality of the sentencing order in the instant case, the trial court's misstatement with regard to his view of what the evidence reflected, specifically Dr. Caddy's conclusions, was not of such a magnitude as to give pause to the appropriateness of the death penalty. A harmless error analysis, adding this statutory mitigating factor to the equation, would still demonstrate that the aggravation outweighed mitigation.

ISSUE XXI

THE TRIAL COURT DID NOT ERR IN FAILING TO CONSIDER AND FIND NON-STATUTORY MITIGATING CIRCUMSTANCES PROPOSED BY DEFENSE COUNSEL

Pointing to non-statutory mitigating circumstances set forth in defense counsel's sentencing memorandum, Elledge now argues that the trial court erred in not specifically considering and finding

(a) Elledge's history of drug and alcohol abuse and (b) mental health problems which do not rise to the level of statutory mitigation.

Albeit the trial court referred to Elledge's alcohol and drug problems as a teenager in discussing the doctors' reports (TR 3755), the trial court specifically rejected as a mitigating factor to the Strack murder, Elledge's alcohol or drug usage. The trial court specifically found that Elledge was sober when he left the bar and as such, it did not impact Elledge's actions when Ms. Strack was murdered. (TR 3760). See Rivera v. State, 561 So.2d 536 (Fla. 1990); Randolph v. State, 562 So.2d 331 (Fla. 1990); Sochor v. State, supra; Jones v. State, 648 So.2d 669 (Fla. 1994), and Cook v. State, 542 So.2d 964, 971 (Fla. 1989). In finding that Elledge's family background, it is clear the trial court acknowledged that alcoholism had an impact on Elledge's life and to the extent that his parents were alcoholic and he suffered the physical and mental abuse brought on by those circumstances, the court found non-statutory mitigation. (TR 3761-3762).

With regard to finding mental health problems which did not rise to the level of statutory mitigation, the trial court rejected mental health problems as mitigation based on his findings that the statutory mitigators did not apply. The trial court believed that

Elledge was malingering with regard to his test results and found Dr. Stock credible when he found that Elledge suffered no mental illness but rather had an anti-social personality disorder which was not a mental illness but rather a circumstance that explained why persons made bad choices in life although those choices were the product of a conscious and volitional thought process. (TR 2759). See Davis v. State, 604 So.2d 798, 799 (Fla. 1992); Rivera, supra; Jones, supra, and Cook, supra.

While the State is not unmindful that drug and/or alcohol abuse may be a nonstatutory mitigating factor and that mental disorders may not rise to the level of statutory mitigating factors, but may be a non-statutory mitigating factor, the facts and circumstances of the instant case do not demonstrate that either exists.

Even assuming for the moment this Court finds to the contrary, adding these non-statutory mitigating factors would not change the appropriateness of the penalty imposed, the aggravation would still far outweigh mitigation in this case.

ISSUE XXII

THE TRIAL COURT DID NOT ERR FACTUALLY AND LEGALLY IN EVALUATING CHILD ABUSE AS A MITIGATOR

Elledge next argues that the trial court erred in not giving sufficient weight to the evidence of child abuse in the instant case. Specifically, he would have this court analyze the facts and assign "this . . . mitigator . . . great weight." (Appellant's Brief, p. 81). This Court has routinely rejected relitigating the weight to be given a mitigating factor. Indeed, the United State Supreme Court has found in Tuilaepa v. California, 512 U.S. ___, 129 L.Ed.2d 750, 114 S.Ct. ___ (1994), that

> . . . a capital sentencer need not be instructed how to weigh any particular fact in a capital sentencing decision. In California v. Ramos, for example, we upheld an instruction informing the jury that the Governor had the power to commute life sentences and state that 'the fact that the jury is given no specific guidance on how the commutation factor is to figure into its determination presents no constitutional problems.' (Cite omitted). Likewise, in Proffitt v. Florida, we upheld the Florida capital sentencing scheme even though 'the various factors to be considered by the sentencing authorities [did] not have a numerical weights assigned to them.' (Cite omitted). In Gregg, moreover, we 'approved Georgia's capital sentencing statute even though it clearly did not channel the jury's discretion by enumerating specific standards to guide the jury's consideration of aggravating and mitigating circumstances.' Zant (cite omitted). . . In sum, 'discretion to evaluate and weigh the circumstances relevant to the particular defendant and the crime he committed' is not impermissible in the capital sentencing process. (Cite

> omitted). 'Once the jury finds that the defendant falls within the legislative legal defined category of persons eligible for the death penalty, . . . the jury is then free to consider a myriad of factors to determine whether death is the appropriate punishment.' (Cite omitted). Indeed, the sentencer may be given 'unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty.' Zant (cite omitted); see also Barclay v. Florida (cite omitted). In contravention of those cases, petitioners' argument would force the states to adopt the kind of mandatory sentencing scheme requiring a jury to sentence a defendant to death if it found, for example, a certain kind or number of facts, or found more statutory aggravating factors than statutory mitigating factors. The states are not required to conduct a capital sentencing process in that fashion.'

129 L.Ed.2d at 764-765.

Likewise, in the instant case, this Court has always permitted the sentencer, to-wit: the trial court, to ascertain weight to be given. This Court's mandate has always been to follow Lockett v. Ohio, specifically, to consider mitigation presented and then to consider what weight it should be given. See Ellis v. State, 622 So.2d 991, 1001 (Fla. 1993); Swafford v. State, 533 So.2d at 278; Jones v. State, 648 So.2d 669 (Fla. 1994) (childhood trauma within trial discretion to give appropriate weight). Based on the foregoing, Elledge is entitled to no relief as to this claim.

ISSUE XXIII

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY AND FINDING THE AVOID ARREST AGGRAVATOR

Elledge claims the evidence is wanting with regard to proof beyond a reasonable doubt that the murder was committed to avoid arrest. The record reflects that Elledge choked Margaret Strack to death after she threatened to go to the police because he was raping her. The State agrees with Elledge that this circumstance cannot be found unless the evidence clearly shows that the elimination of a witness was the sole or dominant motive for the murder. See Scull v. State, 533 So.2d 1137 (Fla. 1988). In the instant case, Elledge's own words proves the motive for the murder, contrary to his statement in the brief that "there is no clear evidence as to what the motive for the homicide was" (Appellant's Brief, p. 86).

In Raleigh v. State, 366 So.2d 366 (Fla. 1978), this Court recognized that witness elimination of a non-law enforcement officer required strong proof that this aggravating factor was the motive for the murder. The cases cited by Elledge are all distinguishable in that in Cook v. State, 542 So.2d 964 (Fla. 1989), the court rejected this aggravator holding the fact found that the murder was not committed to avoid arrest because the

defendant distinctively shot the victim when she started screaming and there was no evidence of a calculated plan to eliminate her. In Davis v. State, 604 So.2d 798, 799 (Fla. 1992), the court rejected this aggravator holding the fact the victim knew the defendant was not enough to support this factor. Similarly, in Roberts v. State, 611 So.2d 1228 (Fla. 1993), the court rejected this factor because the evidence only revealed the defendant shot the woman because she was screaming. Similarly in Garron v. State, 528 So.2d 353 (Fla. 1988), the victim ran to the telephone booth to call the police and the Court found there was not "strong" evidence to support the avoid arrest factor.

The instant case is much closer to Routly v. State, 440 So.2d 1257, 1263 (Fla. 1983), wherein the court found witness elimination because the defendant eliminated the only witness who would apparently have testified against him with regard to the burglary and theft. Likewise, see Martin v. State, 420 So.2d 583 (Fla. 1982), (the defendant robbed the victim, a convenience store clerk, kidnaped her, raped her and drove her to a dump where she was stabbed to death and discarded.); Griffin v. State, 414 So.2d 1025 (Fla.. 1982), (the defendant abducted a bystander to a convenience store robbery and homicide, dragged him off into the woods, shot him and killed him.); Adams v. State, 412 So.2d 850 (Fla.. 1982),

the defendant abducted an 8 year-old girl, sexually assaulted her, strangled her to death, encased the body in plastic and then disposed of it in a desolate area.); Gore v. State, 475 So.2d 1205 (Fla.. 1985), (where the defendant killing one of the victims who was in the process of attempting to escape clearly evidenced this aggravating factor to prevent her from identifying him as the perpetrator of the kidnaping.); and Lightbourne v. State, 438 So.2d 308 (Fla.. 1983), (wherein the court found strong proof where the defendant admitted knowing the victim and plainly intended to avoid identification arrest by killing her).

Unlike the cases cited by Elledge where there is no clear cut intent, the facts in the instant case come from defendant's confession and speak clearly as to the motive for the instant murder. This aggravating factor has been proven beyond a reasonable doubt. See Carruthers v. State, 465 So.2d 496 (Fla.. 1985 and Hitchcock v. State, 578 So. 2d 685, 693 (Fla.. 1990).

Moreover, in Elledge v. State, 408 So.2d 1021, 1023 (Fla.. 1982), this Court concluded:

> Appellant next asserts that an aggravating circumstance, that the murder was committed to avoid arrest, found by the judge, was unsupported by the evidence. This argument is unfounded for a close examination that the record reveals that Elledge's taped confession and a transcript of that confession were

> admitted into evidence. During this confession, Elledge detailed the victims' threats to call police when he initiated the rape. **Such evidence is sufficient to support the conclusion that Elledge killed the rape victim in order to prevent her carrying out her threat.**
>
> (Emphasis added).

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

ISSUE XXIV

> THE TRIAL COURT DID NOT ERR IN FINDING THE AGGRAVATOR OF ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL (HAD) AND INSTRUCTING THE JURY ON THIS AGGRAVATOR

The record reflects that Elledge admitted choking Ms. Strack for fifteen minutes until blood came out of her nose, her eyes rolled back into her head and she went limp. (TR 1237-1243).

In Elledge v. State at 408 So.2d 1021, correctness of the heinous, atrocious and cruel factor, was not in serious contention in that it did not even merit discussion by the court. In Elledge v. State, 346 So.2d 998 (Fla.. 1977), no concern was raised with regard to said finding. Nor in Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987), did the federal court have any problem with the applicability of this aggravating factor. Moreover, this Court has consistently held that in similar circumstances, the aggravating

factor of heinous, atrocious or cruel applies. See, Capehart v. State, 583 So.2d 1009 (Fla.. 1991); Sochor v. State, 619 So.2d 285 (Fla.. 1993); Holton v. State, 573 So.2d 284, 292 (Fla.. 1990); Sanchez-Velasco v. State, 570 So.2d 908 (Fla.. 1990); Duckett v. State, 568 So.2d 891 (Fla.. 1990), and Hitchcock v. State, 578 So.2d 685, 692-693 (Fla.. 1990), wherein the court held,

> That Hitchcock might not have meant the killing to be unnecessarily torturous does not mean that it actually was not unnecessarily torturous and, not heinous, atrocious, or cruel. This aggravator pertains more to the victim's perception of the circumstances than to the perpetrators. (Cited omitted). Hitchcock stated that he kept "chokin' and chokin'" the victim, and hitting her, both inside and outside the house, until she finally lost consciousness. Fear and emotional strain can contribute to the heinousness of a killing. (Cited omitted). As Hitchcock concedes in his brief, "[s]trangulations are nearly per se heinous." See Doyle v. State, 460 So.2d 353 (Fla.. 1984); Adams; Alford v. State, 322 So.2d 533 (Fla.. 1975), cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976). The court did not error in finding this murder to have been heinous, atrocious or cruel.

578 So.2d at 692-693. In the instant case, Elledge's own confession revealed that he choked Ms. Strack for 15 minutes until her face turned purple and her eyes rolled back into her head. He choked her until she was dead. He did so in an effort to choke her screams completely. When she started fighting, and hitting her

arms against the walls, he threw her down on the floor and continued to choke her. He denied putting any cigarette burn marks on her body and smashing her face. The record reveals, however, that there was numerous bruises about the head and extremities and all bruises occurred prior to the victim's death, by strangulation, (evidenced by the fracturing of the hyoid bone and hemorrhaging of the eyelids). Beyond a doubt, murder in the instant case was heinous, atrocious and cruel. See also, Geralds v. State, ___ So.2d ___, 21 Fla.L.Weekly S85 (Fla.. February 22, 1996).

ISSUE XXV

WHETHER THE FELONY MURDER AGGRAVATING CIRCUMSTANCE FLORIDA STATUTE 921.141(5)(d), IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE.

Elledge argues that the felony murder aggravating circumstance, violates both the United States and Florida Constitutions because it fulfills fails to satisfy the functions set forth in Zant v. Stevens, 456 U.S. 410 (1983), specifically to genuinely narrow the class of persons eligible for the death penalty and justify the imposition of a more severe sentence compared to others found guilty of murder. This aggravating factor has been repeatedly upheld by this Court as well as past upon for federal constitutional review in cases like Tuilaepa v. California,

129 L.Ed.2d 750 (1994); Wainwright v. Goode, 464 U.S. 78 (1983), and Walton v. Arizona, 497 U.S. 639 (1990).

Moreover, contrary to Elledge's assertion that the evidence in this case indicates an impulsive reaction to screaming and frustration for sexual teasing rather than felony murder, the evidence supports the trial court conclusion that this aggravating factor was proven beyond a reasonable doubt. (TR 3750).

ISSUE XXVI

WHETHER ELECTROCUTION VIOLATES THE FLORIDA AND UNITED STATES CONSTITUTION

As recently as Larzelere v. State, ___ So.2d ___, 21 Fla.L.Weekly at S147, S152 (March 28, 1996), this Court found no merit to the contention that death by electrocution violated the United States or Florida Constitutions. No relief is warranted on this issue.

ISSUE XXVII

FLORIDA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

Elledge's last claim for relief proves to be a general attack to Florida' death penalty statute. Without acknowledging that all his challenges have been decided adverse to him, he presents a

cursory analysis of each. See Mendyk v. State, 545 So.2d 846, 850 (Fla.. 1989); Stano v. State, 460 So. 2d 890 (Fla.. 1984).

1. THE JURY--

a) **The argument that the jury instructions provided are arbitrary and designed to allow for the maximize discretion is not well founded**. The United States Supreme Court in Tuilaepa v. California, supra, rejected the idea that specifics are required as to the weight each factor must be given or that more explanation must be given to the jury. Additionally, the notion that jury instructions violate the cruel and unusual punishment is not viable since the entire purpose of sentencing is to provide instructions that limit possible aggravating factors and permit the open-ended consideration of the mitigation tendered.

b) Majority verdicts --

The lack of an unanimous verdict does not violate the United States Constitution. See Larzelere v. State, ___ So.2d ___, 21 Fla.L.Weekly S147, S152 (Fla.. March 28, 1996). See also Schad v. Arizona, 501 U.S. 624 (1991).

2. **THE TRIAL JUDGE** --

The trial judge under Florida capital punishment scheme pursuant to § 921.141, Fla.. Stat., is the sentencer. Albeit, the jury provides a recommendation based on the evidence presented in

aggravation and mitigation, they make no specific findings under this scheme to the trial court. The trial court independent of any recommendation must ascertain in writing whether the aggravation proven beyond a reasonable doubt outweighs any mitigation shown.

Clear there is no confession as to the judges and/or juries roles. Nor is there a constitutional need to "know" what factors the jury recommendation is based. See, Romano v. Oklahoma, supra.

3. **APPELLATE REVIEW**

The United States Supreme Court in Proffitt v. Florida, 428 U.S. 242 (1976), concluded Florida sentencing scheme including the appellate component was constitutionally valid. To date, no contrary view has occurred. See Brown v. Wainwright, 392 So.2d 1327 (Fla.. 1981); Dobbert v. State, 375 So.2d 1069 (Fla.. 1979), cert. granted, 447 U.S. 912 (1980); LeDuc v. State, 365 So.2d 149 (Fla.. 1978) and Parker v. Dugger, 111 S.Ct. 731 (1991).

4. **AGGRAVATING CIRCUMSTANCES**

Elledge's general assault as to each of the statutory aggravating factors is unfounded. This Court has determined that the aggravating factors are constitutional and provide the requisite narrowing to support a valid capital scheme. See Dixon v. State, 283 So.2d 1 (1973).

CONCLUSION

Based on the foregoing, all relief should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Richard B. Greene, 421 Third Street, 6th Floor, West Palm Beach, FL, 33401, this 21st day of May, 1996.

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