IN THE SUPREME COURT OF FLORIDA

WILLIAM DUANE ELLEDGE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 83,321

INITIAL BRIEF OF APPELLANT

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(407) 355-7600

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

Counsel for Appellant

TABLE OF CONTENTS

AUTHORITIES CITED

UNITED STATES CONSTITUTION

FLORIDA CONSTITUTION

FLORIDA STATUTES

FLORIDA RULES OF CRIMINAL PROCEDURE

OTHER AUTHORITIES

PRELIMINARY STATEMENT

William Elledge was the defendant in the Circuit Court of the Seventeenth Judicial Circuit of Florida. The following symbols will be used:

"R" Record on Appeal

"SR" Supplemental Record on Appeal

STATEMENT OF THE CASE

On March 17, 1975, Mr. Elledge pled guilty to first degree murder and rape R2000-2006. Mr. Elledge was sentenced to death; that sentence was vacated on appeal. Elledge v. State, 346 So. 2d 998 (Fla. 1977). Mr. Elledge was resentenced to death; this Court affirmed. Elledge v. State, 408 So. 2d 1021 (Fla. 1982). The Eleventh Circuit Court of Appeals reversed. Elledge v. Dugger, 823 F.2d 1439 (11th Cir.), modified 833 F.2d 250 (1987). Mr. Elledge was resentenced to death. This Court reversed. Elledge v. State, 613 So. 2d 434 (Fla. 1993).

The current penalty phase took place on November 1-19, 1993. The jury recommended death by a vote of nine to three R3580. The trial court imposed the death penalty on February 4, 1994 R3748-3776.

STATEMENT OF THE FACTS

The prosecution's case in chief consisted of two general areas. The first area consisted of relatively brief testimony concerning this homicide. The second area consisted of more extensive evidence concerning other offenses.

The defense case consisted of three general areas. The first area involved the extreme physical, emotional, and sexual abuse which Bill Elledge suffered as a child; the extreme poverty he grew up in; and his extremely dysfunctional family (both parents were alcoholics). The second area involved the testimony of two mental health profes-

sionals. Both testified that Mr. Elledge met the criteria for the statutory mitigating circumstances pursuant to Fla. Stat. 921.141(6)(b) (the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance) and (6)(f) (the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired). They testified extensively about Mr. Elledge's abusive background and the resulting pathologies including alcohol and drug abuse. The third area consisted of testimony of correctional officers who testified to Mr. Elledge's good behavior in prison and friends and family who testified to his positive changes while in prison.

The prosecution's case concerning this offense was relatively brief. Officer Charles Perone testified to his recovery of the body R1137-1138. Dr. Abdullah Fateh, associate medical examiner, testified concerning the autopsy. He stated that the cause of death was asphyxiation due to strangulation R1147. She had sperm in her vagina, which was consistent with recent sex R1150-1151. Her blood alcohol was. 06, which was consistent with having 2-3 drinks R1151. However, her blood alcohol could have been much higher earlier and could decline at the time of death R1152-1153. He did no testing for marijuana R1155-1156. He stated that she probably lost consciousness within one or two minutes and died within four or five minutes R1166.

Janet Pocis testified that on August 24, 1974, she was a bartender at McGowan's Lounge R1213-1214. She stated that William Elledge came in about 3:00 p.m. R1215-1216. She stated that the deceased came in and sat next to him R1216. She claimed that they sat together for an hour and Mr. Elledge had three drinks and the deceased

had two R1217-1218. She claimed that they left together around four and appeared to be sober R1218-1221.

The prosecution called Allen Devin of the Hollywood Police Department. He testified concerning his interrogation of Bill Elledge. He stated that he interrogated Mr. Elledge on August 27, 1974 R1171-1172. He played Bill Elledge's taped statement. Mr. Elledge stated that on Friday, August 23, 1974 he and his girlfriend had an argument and he left and drank until he closed the last bar R1205-1211. He went to a bar the next day and began drinking R1228-1229. He met Margaret Strack there and they drank together R1228-1229. He had 9 or 10 drinks and she had 4 or 5 R1230. He asked her if she wanted to smoke some marijuana and she said, "Sure." R1230. They went to his apartment and smoked marijuana together R1234. She began sexually teasing him R1234. She was rubbing his penis through his jeans R1234-1235. She then went to the bathroom and came out with her panties off of one leg and around her knee on the other R1235. She came back and rubbed her breasts against him and her vagina against his penis R1236. He began to massage her R1236. She was not wearing a bra R1236. He then inserted his finger in her vagina R1237. For the first time, she said she did not want to do anything R1237. He "couldn't hold himself back." R1237. He grabbed her and got on top of her R1238. She dug her fingernails in his wrist R1238-1239. She said, "Okay, okay" and he dropped his pants R1239. She then refused to have sex and began to scream R1240. He grabbed her throat and choked off her screams R1240. He inserted his penis and she kept struggling R1240-1242. She went limp and he realized she was dead R1242-1243.

The rest of the prosecution's case in chief consisted of detailed evidence concerning events after the death of Ms. Strack and prior

violent felonies. The State played Mr. Elledge's statement concerning the removal of Ms. Strack's body. Mr. Elledge stated that he washed her body off in a tub and then took her in a car and left the body in a church parking lot R1243-1244. He was drinking heavily and smashed the car in a fence R1252-1253.

The prosecution then played Mr. Elledge's statement concerning the killing of Edward Gaffney. He broke in a Pantry Pride after it was closed R1294-1295. A man took a swing at him with a mop R1295. He subdued the man and told him to lay down R1295. Later, the man began to raise up and he shot him twice R1295. He went through the man's pants and then broke open a donation box for money R1297-1298. He tried unsuccessfully to break into a Coca Cola machine and took a jacket and left R1299-1302.

The prosecution then called Katherine Nelson, widow of Paul Nelson, concerning the killing of Paul Nelson. She stated that in August, 1974 she and her husband ran the Beach Motel in Jacksonville Beach, Florida R1371. At 2:00 a.m. on August 26, 1974 she and her husband were asleep and someone rang the bell R1371. She let the man in and he showed her a gun R1372. He forced her to tie her husband up and then he tied her up R1372-1373. He took the motel money from the desk and then searched her husband's pants and their bedroom for money R1373-1374. Her husband made a move to get loose and Mr. Elledge threatened to kill him R1375. Mr. Elledge tied up his grandson R1376. Her husband then got loose R1377. Her husband went out with a gun and Mr. Elledge shot him R1378-1380.

The prosecution also called Dean Mabry, a retired judge from Colorado. He testified that on March 5, 1973, Mr. Elledge entered a guilty plea to the charge of menacing R2055. He was given 90 days in

jail and two years probation R2057. The prosecution then rested its case in chief.

The first area of the defense case concerned Mr. Elledge's early life and the extreme abuse which he suffered. Sharon Jennings, Bill Elledge's cousin had grown up with Bill Elledge R1402-1403. Bill was four years younger than her R1402. She saw Bill's mom beat him from the age of 3 R1402. She stated that Bill's mom hit him with a "bat, belt, skillet, shoe, anything." R1403. She first saw this when Bill was 3, but she knew it had happened before then R1403. His mother would beat him for no reason R1404. She would beat him for 15-20 minutes at a time R1408. She liked to beat him around the back of the head and neck R1408. She would be angry with him for just being there R1414. She never showed him any affection R1404. He was frequently beaten until he was bloody and bruised R1405. Bill was a blue baby R1406. He had colic until he was six months old R1406. Bill's mom tried to throw him out a car window when he was nearly one year old and his dad had to stop her R1406. Bill's mom and dad were both very heavy drinkers R1407. They went out drinking every weekend R1407. They often fought R1407-1408.

Ruby Sparks, Bill's aunt, confirmed the extensive abuse perpetrated on Bill. Bill's mother and father were musicians R1423-1424. They would travel around and play in area bars on weekends R1424. They also drank while they were playing R1424. Bill's mom resented having children because it stopped her from having the life she wanted as an entertainer R1425. She confirmed that Bill was a blue baby who had to be placed on goat's milk R1426. Bill's parents drank heavily every day R1428. It was even worse on weekends R1429. They would stay up

drinking and playing R1429. They would leave Connie, Bill's sister, in charge of the house beginning when she was six or seven.

Bill's mom would beat him with her fist or anything she got ahold of R1431. She beat him in the face, kicked him, and cursed him R1431. She moved away from Bill's family because she could not stand the abuse and could not stop it R1432. Bill lived with another aunt and uncle for awhile who also beat him R1433-1434. Bill often ran away from his parents because of the abuse, starting when he was 13 or 14 R1434-1435. Bill's mom ran away from the family two or three times R1435. Once, she came back pregnant with another man's child R1436. Bill's mom never stopped resenting the children R1441.

Daniel Elledge, Bill's brother, confirmed the horrible atmosphere they grew up in. His earliest memories were of the beatings which he and his brother and sisters suffered R1490. He described it as follows:

> It was beatings until the degree to regardless of what it was it was used or where it hit you it doesn't matter until you was curled up on the floor and then you got your guts and your face stomped out until my dad broke it up or it existed to where she just quit beating us.

R1490-1491.

This happened three to five times a week R1491. Most of the time the beatings only stopped because his father would pull his mom off R1491. Bill was treated the same way R1492. Bill's mom attacked Bill's dad several times and once tried to stab him R1492. She never showed them love or affection R1492. She always called them profane names R1492-1493. He left home at 15 to stop the beatings R1493. Bill began to run away at 11 for the same reason R1493. Bill left permanently at about age 13 or 14 for the same reason R1493.

Their parents went out to play music at bars often when they were young R1494. They left him and Bill in the care of their older sister Connie R1494-1495. He and Bill both had sex with Connie at a young age R1495. His sister had sex with them almost every weekend R1511-1512. This was instigated by their sister R1512. Their parents both drank heavily R1497. Bill started drinking very young R1497. Bill would drink to the point of staggering and falling down R1498. Bill started running away at a young age R1498. Bill began using drugs at a young age and used any drug he could find R1499-1500. Bill's mother never wanted him around R1503.

Connie Moffett, Bill Elledge's sister, also testified to the extensive mental and physical abuse which they suffered as children. Her mother would hit her with her fist, clothes hangers, electrical cord, or whatever was available R1454-1455. She was cursing the whole time R1455.

Her parents would to out and play music in bars every Friday, Saturday and Sunday R1456. They would come home at 3:00 or 4:00 in the morning and be drunk R1456. The other kids, including Bill, would be left in her care from the time she was ten R1457. Bill was a blue baby R1457. Bill was slow in walking and talking and other forms of development R1467. Her mother would tell them that she was going to be an entertainer and that having children had ruined her life R1458. She often told them that the had never wanted children R1458. Her mother also beat Bill every day R1460. He started running away at age eight or nine to get away form these beatings R1460. He ran away many, many times R1460-1461. The family moved to Los Angeles in 1955 R1461. Then, their parents began playing in bars and coming home drunk on weeknights as well as weekends R1461. Her mother would hit

them with pots, pans, and electrical cords and threw glasses at them R1463. Bill's mother sent him to live with his aunt and uncle, but they beat him as badly as she did R1465.

Her mother left once for a year and a half and came back pregnant, with her brother Danny, by another man R1468. A few years later she left for 17 months and came back pregnant with her sister by another man R1468. Her father was always changing jobs R1469. The family often had to rely on handouts from churches R1469. Bill had constant problems in school R1472.

Two psychologists testified for the defense concerning Bill's abusive background, the resulting mental disorders, and his mental state at the time of the offense. Dr. Gary Schwartz testified concerning his evaluation of Bill. He saw Bill Elledge in September, 1993 and gave him a battery of psychological tests R1541. He interviewed Mr. Elledge on six different occasions R1552. He spoke to Mr. Elledge's relatives R1552. He reviewed over one thousand pages of documents R1552.

Dr. Schwartz stated that the most striking thing about Bill's early life was severe physical abuse.

> His early childhood seemed to be one of severe emotional and physical abuse. He explained that he was quite often hit on the head by his mother, he was hit with pots and pans, he was hit with irons, he was hit with extension cords. Often with no reason or he didn't think there was any valid reason for getting hit like that. He was often beat with a belt for long periods of time beyond which, you know, when he was crying it still continued, even got worse. And then he was often told why are you crying and then he would get abuse even more for crying.

R1555-1556.

He also described the extreme poverty which Bill grew up in. He stated:

> They were very poor and they lived in what was describe by his brother as like the ghetto. Sometimes they lived in a car overnight. The parents moved around pretty often being agricultural fruit pickers, kind of wandered around from place to place. They didn't have enough clothing really. Food was limited. And the beatings were just about an every day occurrence.

R1556.

He testified that Bill had a terrible time in school R1557. He was hyperactive R1557. He had also learned violence as the only appropriate response to problems, which exacerbated the situation R1557. His problems were exacerbated in his teen years by drug and alcohol abuse R1558.

He was born a blue baby, which can indicate oxygen deprivation, which would have negative affects on neurological functioning R1558. He was also underweight, which could be due to his mother's alcohol abuse during pregnancy R1558.

His test results and Mr. Elledge's history are consistent R1560. His MMPI indicated that he is moody and unstable R1656. He also scored high on depression and impulsiveness R1658. He functions poorly under stress R1659. His test shows poor judgment and poor relationships with family R1659. He scored high for paranoia R1660. He scored high on obsessive compulsive characteristics R1661. He scored highest of all on the schizophrenia scale R1662. He had a very low self concept, was socially withdrawn, and felt threatened by the world R1666. His overall test was also highly indicative of drug and alcohol abuse R1669. The Bender Gestalt test indicates mild to moderate organic brain impairment, very poor organizational skills, and drug abuse R1671. The symbol digit test also indicates organic brain damage R1674. His results on the trail making test show organic

brain damage R1679. The results on the neuro-psychological questionnaire also show moderate neurological impairment R1682-1683.

Dr. Schwartz stated that reviewing Bill Elledge's life through the five stages of development helps explain his current mental disorders R1586. His prenatal development was very adverse due to his mother's alcoholism R1686. This can lead to organic brain damage, hyperactivity, short attention span, irritability, and learning disability R1687. There were also birth complications which can have negative effects R1688-1689. He was a blue baby, which indicates oxygen deprivation and can cause brain damage R1690. He suffered further drawbacks during infancy R1689. He was underweight and developmentally delayed R1689-1690. In infancy, he began to experience the negative effects of lack of love and affection from his mother R1690-1691. Instead of receiving love, he was being beaten.

Bill's problems were exacerbated in the childhood stage, ages two to twelve R1691. The physical and emotional abuse which began in infancy accelerated R1692. He stated:

> He's constantly told he was no good, lack of praise. Nothing, you know, never you're a good boy for anything. It was always, you know, you're a terrible person, beaten up almost on a daily basis. Those kinds of things cause the person to run away. You know, they depend on the older people to provide them with support and shelter and take care of their basic needs and that wasn't being met. So that leads to running away.
>
> And also when he got older, let's say five, six years old when he would start going to school, he didn't know how to deal with people. His whole basis of understanding interpersonal relationships was aberrant and so he got into fights with kids. So there was constant fighting.
>
> By eight years old all of this history here of being physically and emotionally abused leads him to start drinking alcohol at the age of eight years old. I thought that was quite significant. That's much earlier age than most children start experimenting or start drinking alcohol. He started drinking beers and as he got a little bit older, nine, ten years old, he drank more alcohol. Some of this

> history also leads him to start abusing drugs at a very early age.

R1692-1693.

His parents drank heavily and alcohol was easily available around the house R1694. He started doing drugs at a young age and it became more and more regular R1694. This was a way to deaden himself to the physical and emotional pain which he was feeling R1694.

Bill Elledge's life continued its downward spiral continued during his adolescence (ages 13-18).

> The drug abuse got much more severe. He started doing things like barbiturates and like a downer, what they call a downer. It shuts off everything and would increase his need for sleep. He also got into LSD, which is probably the strongest hallucinogen that there is. And he didn't take this one time, he took it approximately seventy times. And each time you take this drug, you've got probably ten to twenty hours where you're hallucinating, you're out of touch with reality, you begin to thing strange things, you're thought processes get mixed up, perceptual skills are bad, motivation can get decreased.
>
> And he did that seventy times. So you know, even taking that one time is enough to cause people to have hallucinations, act bizarrely for the rest of their life, commit suicide, do just unusual and aberrant acts.
>
> He also to other psychedelic drugs like mescaline and psilocybin. These are also drugs that cause you to have hallucinations, perceptual distortions. I imagine he took those as a way of escaping from reality for a period of time.

R1696.

Mr. Elledge's introduction to sex was also aberrant. His sister seduced him at a young age R1697. Then an older neighbor seduced him R1697-1698. This combination led to a whole host of problems in later life R1698. His problems continued in adulthood. His substance abuse increased R1700. He began to suffer from depression R1701. This led to two suicide attempts R1701. Bill began to inject himself with barbiturates and amphetamines R1703.

Dr. Schwartz stated that, at the time of the offense, Bill Elledge's capacity to conform his conduct to the requirements of law was substantially impaired R1704. He also testified that Mr. Elledge was suffering from extreme mental or emotional disturbance R1705.

Dr. Glenn Caddy, a psychologist, also testified concerning Mr. Elledge's mental health problems. Dr. Caddy first met Mr. Elledge in 1989 R2184. He conducted extensive psychological tests on Mr. Elledge as well as spending several hours examining him R2184. He reviewed background material and spoke to family members of Mr. Elledge R2186-2188. He stated that his test results were consistent with those of Dr. Schwartz R2185.

Dr. Caddy described the extreme abuse and poverty of Bill Elledge's youth.

> He had a chaotic upbringing. His, I presume that you've already heard much of -- of his early history. But it ranged from patterns of violent and chronic violence, almost daily violence by a mother who didn't seem to be able to stop. And that violence started when he was very young....
>
> Until the time that Bill Elledge left his family and started running away, he was the focal victim of the abuse. And that abuse somewhat the focus somewhat changed to Danny Elledge after William started running away and was away so much. It was a complex sort of abuse too because it wasn't abuse that involved simply physical beatings.
>
> There was chronic degradation, and there were bizarre sorts of incidents like making Bill eat a jar full of hot chilis. I don't know whether you heard this story or not, but, and then taking -- ripping his clothes off and making him stand out in the cold to be a mockery of his friends with these hot chilis somehow supposedly keeping his insides warm.
>
> It was also an abuse that was really an abuse that was independent of the violence. It was a -- it was a -- a poverty class environment. It was for a number of years a nomadic environment....
>
> A lot of movement. Through California, back, the Midwest. It was an environment where for stayed on end family members would live in a car. It was a life where for days on end he would be taken and other family members would be taken in the car, and he and his sister or he and one of the other

members would have to sit in a car all day while his father worked....

His father was a -- a substantial alcoholic. His mother was no less so. She resented each one of the children that she bore. She was often out of the house and went with other men on various occasions and came back to this husband who seemed extremely dependent, in many ways inadequate, but loved her and took her back always.

It was the sort of life that none of you would ever want to see for anybody. And he -- he learned to cope. It was also a life in which he was ultimately to become sexually involved with his older sister for a period of time. It was a life where he also became, after age 12, sexually involved with a neighbor, an adult woman.

In one of his running away, and there were a myriad of them, he was picked up by a man and sexually assaulted and then thrown over a bridge.

R2189-2191.

Dr. Caddy also described the devastating effect of his negative parental role models.

You take a history of the sort of difficulties that Bill Elledge experienced and you're going to find emotional chaos in all of the siblings, essentially all of the siblings that grow out of that experience. That's true in Bill Elledge's family and it's true in other families where substantial abuse takes place.

The other element is that you have a lack of an opportunity to learn when you have extremely poor role models. Most of us grow up, especially when we become adults, we start to realize at some level what we've learned from our parents when we think, we do something and we say, gee, that's just like my dad or my mom would have done.

When there is a level of dysfunction in a role model, the child may not want to take on the learning experience from that role model, but they tend to be relatively powerless to not learn from dysfunctional role models. And so it makes it very difficult for them to be able to be adjusted in this complex society in which we live.

That lack of adjustment then breeds a whole lot of attempts to cope in one way or another. One of the ways that he found maladjustment but duplicated some of the activity of his parents was that he started becoming an alcoholic by about age 12. He started drinking earlier than that, but his drinking was pretty much pathological from the outset. And his ability to manage his -- his, you know, his temper was no less adequate as his mother's.

> And so he was learning some things at relatively young ages that all of us would hope our children would never learn. And these parents were powerless to prevent him from leaning that because he was, in fact, learning their life.

R2192-2194.

Dr. Caddy also described how Bill Elledge attempted to escape the horrible reality of his youth with alcohol and drugs.

> Drug use kicked in for Bill in his early teen years. It was alcohol predominantly early on, but then increasingly various drugs became a part of his repertoire. He was -- he was a street kid. He was a -- and he was a kid whose life was misery.
>
> For Bill, when he was intoxicated, whether it be with alcohol or marijuana or anything else, and he tried most of them, his -- his sense of well-being changed for a period of time. He felt better. And it's not surprising then that he tried to achieve as many of those periods of time as was possible and became a chronically substance abused individual.

R2194-2195.

Dr. Caddy testified that Mr. Elledge was acting under extreme emotional or mental disturbance at the time of the homicide R2212. Fla. Stat. 921.141(b). He went on to explain diagnostically why this is true.

> This man is diagnosable on two axes in my profession. One axis is a diagnosis of profound polysubstance abuse. He was both a drug addict and alcoholic. Also on that axis is the diagnosis of impulse control disorder. That second rediagnosis was just as profound as the primary diagnosis.

R2213.

> His impulse control disorder was a product of his early life.
>
> The impulse control disorder was really a product of -- of the learning history that he grew up with. And its severity and extreme quality was a product of both the extreme dysfunction of the models to which he was exposed.

R2251.

Dr. Caddy also testified that Mr. Elledge's capacity to conform his conduct to the requirements of law was substantially impaired

R2219-2220. Fla. Stat. 921.141(6)(f). He stated that it was "profoundly impaired," which he defined as more than substantially impaired R2221.

The defense also called Ken Roach to discuss Mr. Elledge's frame of mind at the time of his interrogation. Ken Roach was a police officer in Jacksonville Beach in 1974 and interrogated Bill Elledge R2076. He stated that Bill initially refused to talk to him about the homicide R2078. He seemed very afraid R2078. Then he began to talk about it and it was a "catharsis." R2085. He described Bill Elledge's emotional state.

> He cleansed himself. He had gotten rid of a terrible burden. A very remorseful, you know, very emotional time.

R2085-2086.

Ken Roach also described Bill's call to his father after the statement.

> He said, dad, I've got something I've got to tell you. I've just killed three people. They have me in custody. And I've got to stop. And I want to cooperate and help these people because this has got to stop.
>
> What I saw happen with -- with Billy Elledge, as soon as he said that, it was like a, I would call it now a cleansing of his soul. He seemed to be a different person. It was a lot of emotion, a lot of crying.

R2082-2083.

The final area of defense witnesses consisted of witnesses who testified to Bill's positive achievements during his incarceration since 1974 and his ability to function in a prison environment. Dr. Michael Radelet, a professor of sociology at the University of Florida, testified concerning William Elledge's ability to function in a prison environment. He reviewed Bill Elledge's prison records R1576. Bill Elledge received his GED in the early 1980's R1578. Dr Radelet explained that there are two ways to predict future dangerousness, the

clinical and the actuarial (or statistical) R1582. He testified that research has shown the actuarial method to be superior R1582. This is a method that insurance companies use in predicting life expectancies R1582-1583. It is the method Dr Radelet relies on. He stated:

> I believe quite strongly that if Mr. Elledge is spared the death sentence and sentenced instead to life imprisonment, that he will be able to make a satisfactory adjustment to that prison community and not constitute any danger to fellow inmates or guards or visitors.

R1584.

Due to Mr. Elledge's other consecutive sentences of life without the possibility of parole for twenty-five years, he will spend the rest of his life in prison if given a life sentence R1591-1592.

Mr. Elledge also called several correctional officers to discuss his successful adjustment to prison and likelihood of future success in prison. Sergeant John Bradley testified that he had been an officer at Florida State Prison for 12½ years R1980. He has been supervisor of Bill Elledge's wing R1894. He testified that Mr. Elledge is not a problem inmate R1895. Ward Lasher testified that he had been a correctional officer at Florida State Prison for fifteen years R1927. He has known Mr. Elledge since 1978 R1927. He supervised Bill Elledge on the recreation yard many times R1929. He stated he has never seen Bill get upset, take a swing at anyone, or make a threatening move at anyone R1929. He has never written a disciplinary report on Bill R1931. He never saw Bill engage in assaultive or combative behavior or be loud or profane R1932. Virgil Lee stated that he had worked as a corrections officer at Florida State Prison for nine years R1636. He had never had any problems with Mr. Elledge and that he had always conducted himself in an acceptable manner R1930-1931. John Coley testified that he had worked as a correctional

officer for nine years R1940. He has known Bill Elledge the entire time. He has never had any problems with Bill Elledge and has never written a disciplinary report for him R1941-1942. Rudolph Chisholm testified that he has worked as a corrections officer for twelve years and had known Bill Elledge during that time R1944-1945. He stated that he had never written a disciplinary report for Bill Elledge or seen him involved in any fighting or assaultive behavior R1946. George Kuck stated that he had worked as a correctional officer for twelve years R2058. He has known Bill Elledge the entire time R2060. He has talked to him frequently R2060. He has seen a drastic positive change in Bill Elledge since 1985 R2060. He stated that almost all of the disciplinary reports written on Bill were before 1983 R2060. He has never seen Bill in a violent, aggressive or antagonistic mood R2061. He never heard Mr. Elledge make any threats R2062. Bill Elledge occupies his time by writing and watching television R2062. He stated that it was his opinion as a corrections officer that Mr. Elledge would function well in general population in the prison system R2066.

The last area of defense evidence was the testimony of several people who had known Bill Elledge in prison, concerning his positive achievements in prison. Arthur Schaefer testified that he had been an inmate with Mr. Elledge from 1987 to 1993 R1948-1949. Mr. Schaefer stated that he was scared and lost when he came to death row R1952. He stated that he had never seen Bill violent, assaultive, or threatening anyone R1958. He also stated that Bill had taught him not to give up and had given him a lot of support R1957.

Dr. Margaret Vandiver testified concerning William Elledge's positive accomplishments in prison. She is a professor of criminology

at Memphis State University R1907. She first began corresponding with Bill Elledge in 1977 R1909. Bill was very open about admitting his guilt and attempting to come to terms with what he had done R1910. They corresponded for 2½ years before she began visiting him R1911. She then visited him once a month for four years R1916. She has continued to write him R1917-1918. She described the positive changes Bill has made over the years.

> I think that Billy has matured from the time when I first met him over the intervening seventeen years. I have found in corresponding with him and in talking to him that within the very severe limitations of the death row environment he has done everything within his power to come to terms with his own problems and to try to better himself. He has been confined, there have not been many opportunities for him that free people would have to try to improve themselves. But I think that he has done the best under the circumstances that he could attempt to make him self a better person and to be more than he was when he first went to death row.

R1918.

Ms. Vandiver testified that in late 1986 and early 1987 her mother had terminal cancer and she could not visit Bill R1919. She stated that despite this, Bill was very supportive of her and her entire family R1919.

> He provided my family with very consistent support. I remember when my mother was actually confined to her bed at home, Billy sent us cards from the prison which he had made and we had them around the bed. He wrote to all of us, not just to me, to my father and my sister individually. He supported us in every way that he could from his prison cell as we went through this. And he wrote to my mother. After my mother died Billy wrote a poem for my father commemorating my mother's life and sent it to my father who still has it.

R1919.

She also stated that she floundered several times in graduate school R1919. Bill was the most insistent of anyone she knew that she persevere and get her doctorate R1920.

Annabelle Officer testified concerning Bill's positive achievements in prison. She is a teacher in Birmingham, England R2161. She has been corresponding with Bill since November, 1991 R2163. Bill has written poems and an article that were published in Britain R2163-2166.

Denae Nelson, Mr. Elledge's stepdaughter, testified concerning the positive impact which Bill Elledge has had on her life and the life of her mother. William Elledge and her mother are engaged R2380. Denae Nelson and Bill Elledge have corresponded regularly over the last four years R2381. Bill has given her helpful advice on personal problems R2382. He has helped her more than any other person except her mother R2382-2383. She has also visited with Bill and spoken to him on the phone R2382-2383. She stated that Bill has functioned as a father to her and that she is very happy he is marrying her mother R2384. Bill has always put her interest ahead of his and his advice has been helpful R2384-2385.

Janice Elledge, Bill's wife, testified concerning his positive conduct in prison R2387. She began corresponding with Bill Elledge in 1987 R2390. Bill helped her with a problem situation R2390-2392. They continued to correspond R2392. Originally it was once a month and then it became more frequent R2392. She stated that she was extremely skeptical, knowing that Bill was on death row R2392. She stated that Bill Elledge was "intelligent and he had a sense of humor and he had caring and empathy." R2392. He freely admitted his guilt R2393. William Elledge did paintings for her daughter R2400-2401. Bill writes her and her daughter very nice letters R2402.

She summarized her relationship with Bill Elledge as follows:

> Billy is my best friend. He's never lied to me. He's intelligent. He's humorous. I have a problem, he says talk

> to me. And I figure, no, I can handle this. He says talk to me. I talk. He listens. He helps. He understands. He's never, never laughed at me, never chastised me. Never -- Never made fun of me, never said well, you couldn't do that anyway. He has always said you can do that, you can handle that.

R2405.

The defense then rested.

The prosecution's rebuttal case consisted of the testimony of Dr. Harley Stock, a psychologist hired by the prosecution R2631-2632. He reviewed transcripts, conducted a clinical evaluation, and administered psychological tests in 1993 R2640-2642. He stated that he feels that Bill Elledge has an antisocial personality and does not have organic brain damage or mental illness R2661. He stated that he felt he was not suffering from extreme mental or emotional disturbance at the time of the homicide R2662-2663. He stated that at the time of the homicide his capacity to conform his conduct to the requirements of law was not substantially impaired R2663-2664. He stated that he felt Mr. Elledge would be dangerous in the future R2668-2669. He based his opinion on his clinical interview R2667-2669. Dr. Stock admitted that most of his professional life he has worked for law enforcement R2671-2674. Dr. Stock testified that he thought William Elledge was malingering on his MMPI even though the scores were consistent over many tests for nineteen years R2682. He admitted Mr. Elledge suffers from the disease of alcoholism R2683-2684. Both sides then rested R2696.

SUMMARY OF THE ARGUMENT

1. The trial court erred in denying Mr. Elledge's motion to withdraw his guilty plea.

2. The trial court erred in allowing the prosecution to go beyond the judgment on prior violent felonies.

3. Testimony concerning prior violent felonies improperly became a feature of the case.

4. The trial court allowed improper cross-examination, beyond the scope of direct examination, concerning inflammatory details of a prior violent felony.

5. The prosecution improperly introduced inflammatory, irrelevant evidence concerning after death activity.

6. Mr. Elledge was improperly subjected to a compelled mental evaluation.

7. The prosecution was improperly allowed to use a compelled mental evaluation to rebut mitigation that was not based on a mental examination and was not from a mental health expert.

8. The trial court erred in not allowing a defense mental health expert to view the testimony of the prosecution's mental health expert.

9. The trial court erred in sustaining a state objection to defense counsel's exercise of a peremptory challenge.

10. The lower court improperly restricted voir dire.

11. The extraordinary delay in this penalty phase prejudiced Mr. Elledge's case for life.

12. The delay in this case violates the Florida and United States Constitutions.

13. The reasonable doubt instruction is unconstitutional.

14. The trial court erred in refusing a special jury instruction on non-statutory mitigation.

15. The lower court erred in not giving a jury instruction explaining the nature and function of mitigation.

16. The jury instruction on especially heinous, atrocious or cruel aggravator is unconstitutional.

17. The trial court gave undue weight to the jury's recommendation of death.

18. The trial court erroneously applied a presumption of death.

19. The trial court erred in refusing to consider and/or find a statutory mitigator which the jury had been instructed on.

20. The lower court's sentencing order was based, in part, on false information.

21. The lower court refused to consider an/or find non-statutory mitigators proposed by the defense.

22. The trial court erred factually and legally in evaluating child abuse as a mitigator.

23. The avoid arrest aggravator is not supported by the evidence.

24. The especially heinous, atrocious or cruel aggravator is not supported by the evidence.

25. The felony murder aggravator is unconstitutional on its face and as applied.

26. Electrocution violates the Florida and United States Constitutions.

27. The death penalty statute is unconstitutional.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING MR. ELLEDGE'S MOTION TO WITHDRAW HIS GUILTY PLEA.

Mr. Elledge filed a motion to withdraw his guilty plea prior to his re-sentencing. The motion pointed out that the plea colloquy was deficient under Florida Rules of Criminal Procedure 3.170 and 3.172,

this Court's decision in Koenig v. State, 597 So. 2d 256 (Fla. 1992) and Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). The plea colloquy also revealed the possible defense of intoxication which was never explored. The serious deficiencies in the colloquy were exacerbated by the fact that the intent requirement for first degree murder was never explained. The denial of this motion denied Mr. Elledge's rights pursuant to Article I, Sections 2, 9, 16, 17, 21 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Mr. Elledge filed a motion to withdraw his guilty plea prior to his re-sentencing R3046-3047. He also filed an amended motion to withdraw his guilty plea R3077-3113. The transcript of his original plea hearing was attached as an appendix R3095-3112. The motion and amended motion were predicated on the severe deficiencies in the plea colloquy. The prosecution filed a motion to strike the defense motion and a response on the merits R3114-3124. Oral argument was held on these motions SR42-54. The trial court denied the State's motion to strike SR52. However, it denied Mr. Elledge's motion to withdraw his guilty plea SR52-54,R3135-3136.

There are two different legal standards for withdrawing a guilty plea. A motion to withdraw a guilty plea made prior to sentencing "shall upon good cause" be granted. Fla.R.Crim.P. 3.170(f); Yesnes v. State, 440 So. 2d 628, 634 (Fla. 1st DCA 1983). This rule must be liberally construed in favor of the defendant. Yesnes, supra, at 634; Adler v. State, 382 So. 2d 1298, 1300 (Fla. 3d DCA 1980).

A motion to withdraw made after sentencing must be granted if a "manifest injustice" has occurred. Williams v. State, 316 So. 2d 267, 274-275 (Fla. 1975). However, this Court has implicitly held that an

inadequate plea colloquy meets the "manifest injustice" standard. Koenig v. State, 597 So. 2d 256 (Fla. 1992).

The motion to withdraw the guilty plea in the current cause was filed prior to Mr. Elledge's re-sentencing.

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

Teffeteller v. State, 495 So. 2d 744, 745 (Fla. 1986); King v. Dugger, 555 So. 2d 355, 358 (Fla. 1990). The logic of these cases, that resentencing proceeds de novo, shows Mr. Elledge's plea withdrawal should be judged by pre-sentence standards. However, under either standard the motion to withdraw the guilty plea should have been granted. Moreover, the principles favoring withdrawal are "underscored by the severity and nature of the first degree murder charge" and sentence. Lopez v. State, 227 So. 2d 694, 696 (Fla. 3d DCA 1969). The plea colloquy is deficient under the federal constitutional standards outlined in Boykin, supra, the requirements outlined in Florida Rules of Criminal Procedure 3.170 and 3.172, and the requirements of Florida caselaw and the Florida Constitution. The United States Supreme Court has outlined the core federal constitutional concerns regarding a guilty plea.

> Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653. Second, is the right to trial by jury. Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491. Third, is the right to confront one's accusers. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923. We cannot presume a waiver of these three important federal rights from a silent record.
>
> What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which the courts are capable in canvassing the matter with the accused to make

> sure he has a full understanding of what the plea connotes and of its consequence.

Boykin, supra, 395 U.S. at 243-244.

A guilty plea taken without an express waiver of these rights is invalid. United States v. Cornelius, 999 F.2d 1293 (8th Cir. 1993).

The guilty plea in the current case was deficient concerning these core federal constitutional minimums. There is absolutely no discussion of the privilege against self-incrimination or the right to confront one's accusers R3097-3112. In Cornelius, supra, the Court found a plea to be constitutionally invalid due to the exact same deficiencies. 999 F.2d at 1295. Mr. Elledge's plea is constitutionally invalid.

Florida Rule of Criminal Procedure 3.172 covers the three areas mandated by Boykin, supra, and additionally requires that other areas be covered in the colloquy. It requires that the judge address the defendant "personally" and determine that "he or she understands":

> (3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made and that the defendant has the right to the assistance of counsel, the right to compel attendance of witnesses on his or her behalf, the right to confront and cross-examine witnesses against him or her, and the right not to be compelled to incriminate himself or herself;
>
> (4) that if the defendant pleads guilty, or nolo contendere without express reservation of the right to appeal, he or she give sup the right to appeal all matters relating to the judgment, including the issue of guilt or innocence, but does not impair the right to review by appropriate collateral attack.

Fla.R.Crim.P. 3.172(c)(3)(4).

The plea colloquy in the current case fails to address many of the required areas under the rule. The colloquy briefly mentions the right to a trial by jury but contains no explanation that there is a right to the assistance of counsel at this trial R3097-3112. There is

no discussion of the right to compulsory process of witnesses R3097-3112. There is no mention of the right to confront and cross-examine witnesses R3097-3112. There is no mention of the right to be free from self-incrimination R3097-3112. There was no mention of the waiver of the right to appeal all matters relating to the judgment R3097-3112. 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.

The complete failure to discuss the legal rights which Mr. Elledge was waiving mandates reversal. This Court's opinion in Koenig v. State, 597 So. 2d 256 (Fla. 1992) controls this case.

> Here, the transcript of the plea hearing does not affirmatively show that Koenig knowingly and intelligently entered his plea of no contest. Because a guilty, or no contest, plea has serious consequences for the accused, the taking of a plea "demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences." *Boykin*, 395 U.S. at 243-44, 89 S.Ct. at 1712. The detailed inquiry necessary when accepting a plea is absent from this case.
>
> Florida Rule of Criminal Procedure 3.172 governs the taking of pleas in criminal cases. This rule provides basic procedures designed to ensure that a defendant's rights are fully protected when he enters a plea to a criminal charge. *Hall v. State*, 316 So. 2d 279, 280 (Fla. 1975). The rule specifically provides that a trial judge should, in determining the voluntariness of a plea, inquire into the defendant's understanding of the fact that he is giving up the right to plead not guilty, the right to a trial by jury with the assistance of counsel, the right to compel the attendance of witnesses on his behalf, the right to confront and cross-examine adverse witnesses, and the right to avoid compelled self-incrimination. Fla.R.Crim.P. 3.172(c). Here, the brief colloquy between the trial court and Koenig failed even to mention any of these rights. Although the judge did ask Koenig if he understand that he was waiving "certain rights," he never explained what those rights were.
>
> Before his plea hearing, Koenig signed a form which described in detail the rights he was waiving. In response to the judge's inquiry, he said he had discussed this with his attorney. However, there is nothing in the record to demonstrate that he could understand the form he signed or

> what his attorney told him about it. The record does not reflect the extent of Koenig's education or whether he can even read. We simply cannot be assured, from the superficial plea colloquy here, that Koenig's plea was voluntary and intelligent.
>
> 597 So. 2d at 258.

The well-reasoned case of McCoy v. State, 613 So. 2d 612 (Fla. 4th DCA 1993) is also instructive here. The Court in McCoy stated:

> In our view, appellant has shown good cause for withdrawal of his plea and has established that the trial court, in taking the plea, failed to cover all the factors set forth in Florida Rule of Criminal Procedure 3.172(c). Although the trial judge did ask appellant whether he understood the change of plea form, he never personally determined whether appellant understood, *inter alia*, that he was giving up his right to trial by jury or his right to appeal all matters relating to the judgment.
>
> 613 So. 2d at 612.

The plea colloquy in the current case was equally deficient. Reversal and withdrawal is required. Koenig, supra; McCoy, supra.

There was also a serious deficiency in the factual basis for this plea. The trial court never explained the elements of first degree murder. It never explained the elements of premeditation or felony-murder R3097-3112. It is well-settled that a guilty plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." McCarthy v. United States, 394 U.S. 459, 466, 89 S.Ct. 1166, 1171, 22 L.Ed.2d 418 (1969).

The failure to explain either premeditated murder or felony murder requires reversal. This is similar to the deficiencies in the colloquy which led to reversal in Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976). In Henderson, supra, the United States Supreme Court held that a plea to second degree murder was constitutionally involuntary when there has been no explanation of the intent requirement for second degree murder. The Court reached

this result even though it assumed the prosecution had "overwhelming evidence of guilt" and that the defendant had competent counsel who properly advised him to plead guilty to second-degree murder. 426 U.S. at 645.

The federal courts of appeal have followed the rule of Henderson, supra, to invalidate guilty pleas in state court proceedings. Nash v. Israel, 707 F.2d 298 (7th Cir. 1983); Hayes v. Kinchloe, 784 F.2d 1434 (9th Cir. 1986). In Nash, supra, the Court held a guilty plea to a charge of first degree murder to be involuntary where the state trial judge had failed to explain the intent element of first degree murder. In Hayes, supra, the Court held a guilty plea to be involuntary where the state trial judge had failed to explain the intent requirement of second degree murder. In the present case, there was a complete failure to explain the elements of premeditated murder or felony murder. Henderson, Nash, and Hayes all mandate reversal.

The failure to explain the elements of premeditated murder or felony murder was prejudicial in the current case as the colloquy itself revealed a possible defense to first degree murder that went unexplored. Although Mr. Elledge stated that he killed the woman, he also made several statements which would indicate the defense of intoxication was available R3106-3110. He stated that he had "no less than ten" drinks shortly before the homicide R3106. He also stated that he smoked marijuana and "got good and loaded." He stated he was "pretty well loaded" R3110. He stated "I just kind of blew my cool.... I just kind of well, freaked out" R3108. He also stated "I just kind of blacked out and lost all control of what I was doing" R3108. Mr. Elledge made several statements during the plea colloquy which raise significant doubts as to whether he the necessary intent

for first degree murder. He also made statements which would raise the possibility of a defense of voluntary intoxication. The trial court made no attempt to explore these issues.

It is well settled that when a defendant raises a possible defense during a guilty plea, the trial court must make an extensive inquiry into the factual basis for the plea. State v. Kendrick, 336 So. 2d 353, 355 (Fla. 1976); Andrews v. State, 343 So. 2d 844, 846 (Fla. 1st DCA 1976); Davis v. State, 605 So. 2d 936 (Fla. 1st DCA 1992); Williams v. State, 534 So. 2d 929, 934 (Fla. 4th DCA 1988); United States v. Frye, 738 F.2d 196 (7th Cir. 1984); United States v. Groll, 992 F.2d 755 (7th Cir. 1993). The present case is similar to Davis, supra. In Davis, the defendant was charged with first degree murder and kidnapping. He did not contest the underlying facts, but stated that he was intoxicated at the time. The Court stated:

> Voluntary intoxication is a defense to the specific intent crime of first degree murder. *Gardner v. State*, 480 So. 2d 91, 92 (Fla. 1985); *Burch v. State*, 478 So. 2d 1050 (Fla. 1985). Therefore, appellant's statements raised the possibility of a defense, i.e., that he lacked the specific intent to commit the crime charged. At that point, the trial judge was obligated to inquire further, to determine whether a defense existed, and if so, whether appellant was aware of, and knowingly waived, such possible defense.

605 So. 2d at 938.

In the present case there was a complete failure to explain the elements of premeditated murder or felony murder. There were numerous statements raising doubts about Mr. Elledge's intent, and there were several statements raising the possibility of intoxication. None of this was clarified by the colloquy. Mr. Elledge's motion to withdraw his plea should have been granted.

The plea colloquy in the present case is completely deficient. It completely fails to address two of the three areas required by

Boykin, supra. It fails to address many of the areas required to be addressed by Fla.R.Crim.P. 3.172 and Koenig, supra. The trial court failed to explain the elements of first degree murder or rape in violation of Henderson, supra. It also failed to inquire into statements raising the defense of intoxication. This case must be reversed and Mr. Elledge must be allowed to withdraw his guilty plea.

POINT II

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE THE DETAILS OF PRIOR VIOLENT FELONY CONVICTIONS.

The trial court allowed the prosecution to introduce the details of two prior homicides, over defense objection, and despite an offer to stipulate to the validity of the prior convictions. This was error and denied Mr. Elledge's rights pursuant to Article I, Sections 2, 9, 16 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Appellant recognizes that this Court has previously held that the prosecution can introduce evidence regarding a prior violent felony beyond the judgment itself. However, in recent years this rule has proven to be unworkable. It has spawned tremendous litigation over the extent, nature, and source of evidence concerning prior violent felonies. Trawick v. State, 473 So. 2d 1235 (Fla. 1985); Stano v. State, 473 So. 2d 1282 (Fla. 1985); Tompkins v. State, 502 So. 2d 415 (Fla 1986); Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); Freeman v. State, 563 So. 2d 73 (Fla. 1990); Duncan v. State, 619 So. 2d 279 (Fla. 1993); Finney v. State, 660 So. 2d 674 (Fla. 1995). In Trawick, supra, this Court held it to be error to allow "such detailed testimony" about a prior attempted murder. 473 So. 2d at 1240. In Stano, supra, this Court found the detailed testimony and argument about the prior violent felonies to be admissible. However, this Court also

stated, "The State's argument about these other crimes approached the outermost limits of propriety." 473 So. 2d at 1289.

In Rhodes, supra, this Court began to describe the limits of testimony concerning a prior violent felony. This Court held a taped statement of a victim of a prior violent felony to be inadmissible.

> Although this Court has approved 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 that testimony is not relevant, gives rise to a violation of a defendant's confrontation rights, or the prejudicial value outweighs the probative value. Not only did the introduction of the tape recording deny Rhodes his right of cross examination, but the testimony was irrelevant and highly prejudicial to Rhodes' case. The information presented to the jury did not directly relate to the crime for which Rhodes was on trial, but instead described the physical and emotional trauma and suffering of a victim of a totally collateral crime committed by the appellant.

547 So. 2d at 1204-1205.

In Freeman, supra, this Court held the testimony of the victim's widow of a prior first degree murder should not have been introduced.

> We agree that Ms. Epps should not have been called to testify concerning her husband's death. While the details of a prior felony conviction are admissible to prove this aggravating factor, *Perri v. State*, 441 So. 2d 606 (Fla. 1983), Ms. Epps was not present when her husband was killed and, therefore, her testimony was not essential to this proof.

563 So. 2d at 76 (footnote omitted).

In Duncan, supra, this Court held the testimony of an autopsy photograph of the victim of a prior homicide was inadmissible.

> In *Rhodes v. State*, 547 So. 2d 1201, 1204-05 (Fla. 1989), we noted that evidence concerning the circumstances of a prior felony conviction involving the use or threat of violence is admissible during the penalty phase of a capital trial. However, we cautioned that there are limits on the admissibility of such evidence. We emphasized that "the line must be drawn when [evidence] is not relevant, gives rise to a violation of a defendant's confrontation rights, or the prejudicial value outweighs the probative value." *Id.* at 1205.

> We agree with Duncan that the prejudicial effect of the gruesome photograph clearly outweighed the probative value. Section 90.403, Fla.Stat. (1991). The photograph did not directly relate to the murder of Deborah Bauer but rather depicted extensive injuries suffered by that victim of a totally unrelated crime. Moreover, the photograph was in no way necessary to support the aggravating factor of conviction of a prior violent felony. A certified copy of the judgment and sentence for second-degree murder indicating that Duncan pled guilty to and was convicted of a violent felony had been introduced.
>
> 619 So. 2d at 282.

This Court's most recent discussion of the limits of testimony concerning a prior violent felony is in Finney v. State, supra.

> Although the testimony elicited here from the victim of the rape/robbery was not unduly prejudicial, we take this opportunity to point out that victims of prior violent felonies should be used to place the facts of prior convictions before the jury with caution. *Cf. Rhodes*, 547 so. 2d at 1204-05 (error to present taped statement of victim of prior violent felony to jury, where introduction of tape violated defendant's confrontation rights and the testimony was highly prejudicial). This is particularly true where there is a less prejudicial way to present the circumstances to the jury. *Cf. Freeman v. State*, 563 So. 2d 73, 76 (Fla. 1990) (surviving spouse of victim of prior violent felony should not have been permitted to testify concerning facts of prior offense during penalty phase of capital trial where testimony was not essential to proof of prior felony conviction), *cert. denied*, 501 U.S. 1259, 111 S.Ct. 2910, 115 L.Ed.2d 1073 (1991). Caution must be used because of the potential that the jury will unduly focus on the prior conviction if the underlying facts are presented by the victim of that offense.
>
> Evidence that may have been properly admitted during the trial of the violent felony may be unduly prejudicial if admitted to prove the prior conviction aggravating factor during a capital trial. This is particularly true where highly prejudicial evidence is likely to cause the jury to feel overly sympathetic towards the prior victim. *See e.g. Duncan*, 619 So. 2d 279 (error to admit gruesome photograph of victim of prior unrelated murder for which defendant had been convicted where photograph was unnecessary to support aggravating factor); *Freeman*, 563 So. 2d at 75 (error to allow surviving spouse of victim of prior violent felony to testify concerning facts of prior offense where testimony was not essential to proof of prior felony conviction).
>
> 660 So. 2d at 683.

This Court's frequent discussions of this issue have left litigants with a case by case balancing test regarding the admissibility of evidence concerning a prior violent felony. This test involves the source of the testimony, the emotional nature of the testimony, the relevance of the testimony, the necessity of the testimony, and the prejudice to the defendant from the testimony. This sort of overall balancing test gives little firm guidance to trial judges or litigants as to when this testimony is admissible.

A better rule is outlined by the Oklahoma Court of Criminal Appeals in Brewer v. State, 650 P.2d 54 (Okl.Cr. 1982). The Court in Brewer dealt with the admissibility of evidence as to an identical aggravating circumstance. 650 P.2d at 63. 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 went on to place strict limits on the introduction of evidence concerning the prior felony even in cases where the defendant refuses to stipulate.

> If the defendant refuses to so stipulate, the State shall be permitted to produce evidence sufficient to prove that the prior felonies did involve the use or threat of violence to the person. We emphasize that prosecutors and trial courts should exercise informed discretion in permitting only the minimal amount of evidence to support the aggravating circumstances. We do not today authorize the State to re-try defendants for past crimes during the sentencing stage of capital cases.

Id. at 63.

The Oklahoma procedure is far preferable to the current ill-defined limits. It sets 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.

The only arguable rationale for allowing evidence beyond the judgment in a case where the defendant stipulates to the prior violent felony is to determine the weight to be given the prior violent felony. However, this purpose can be achieved by the judgement itself. A judge and jury can clearly determine what weight is to be given to the prior offense from the nature of the conviction. For example, a jury would clearly know that a first degree murder is to be weighed more heavily than a robbery. It is relatively easy to determine the seriousness of a prior offense from the nature of the conviction.

The idea that the seriousness of a prior offense can be determined by the judgment itself is consistent with the approach taken by the sentencing guidelines. Fla.R.Crim.P. 3.701-3.703. The guidelines assign a numerical weight to each prior offense based on the seriousness of the prior conviction. Thus, all prior offenses of one type are weighed equally. This is a far more objective system than introducing testimony about the prior conviction within some ill-defined limits.

The caselaw interpreting the guidelines has also strictly limited any attempt to go beyond the judgment in attempting to give more weight to prior offenses beyond their numerical ranking. For example, although the sentencing guidelines allow adding points for victim injury for the current offense, the caselaw has strictly prohibited adding victim injury points for prior offenses. Brown v. State, 474 So. 2d 346 (Fla. 1st DCA 1985). The caselaw has also prohibited the

finding of an escalating pattern of criminal activity based upon the commission of crimes of the same degree. Lowe v. State, 641 So. 2d 937 (Fla. 4th DCA 1994). Thus, the sentencing guideline decisions have consistently held that the seriousness of a prior crime is to be determined by the nature of the prior conviction itself.

The current practice in capital sentencing of allowing evidence beyond the judgment has had several negative affects. It has resulted in persistent and increasing litigation over the precise limits of such testimony. The current procedure also increases the arbitrariness in capital sentencing. There will be extreme variation from case to case in the availability of witnesses from prior violent felonies, in the emotional nature of their testimony and in the extent to which prosecutors and judge observe the ill-defined limits on such testimony. There will inevitably be cases where the limits are exceeded. Trawick, supra; Rhodes, supra; Freeman, supra; Duncan, supra. There will be other cases in which the evidence is used for improper purposes. Finney, supra. Finally, there will be cases in which evidence is taken to the "outermost limits of propriety." Stano, supra at p.1289. All of this will lead judges and juries to different results based on an identical prior record.

POINT III

THE TRIAL COURT ERRED IN ALLOWING TESTIMONY CONCERNING PRIOR VIOLENT FELONIES TO BECOME A FEATURE OF THE CASE.

The trial court allowed the prosecution to make the details of two prior homicides a feature of the case. This was error and denied Mr. Elledge's rights pursuant to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The prejudicial

value of this evidence outweighs any probative value pursuant to Florida Statute 90.403.

Mr. Elledge has separately argued that this Court should limit evidence of prior violent felonies to the judgment. Assuming arguendo, this Court rejects this argument the trial court improperly allowed the evidence of prior violent felonies to become a feature of the case. Mr. Elledge made specific objections to the presentation of the details of two homicides as prior violent felony convictions R1108-1109. Appellant also stipulated to the validity of the judgments and specifically asked that the state be limited to the judgments R1108-1109. The trial court overruled this objection R1110. Appellant renewed his objection during the presentation of this evidence R1286. The trial judge overruled this objection and stated it recognized "a timely contemporaneous objection" R1286.

The prosecution presented relatively brief testimony concerning this homicide. The bulk of the prosecution's case concerned prior homicides. This testimony was highly emotional and prejudicial. The prosecution's testimony concerning this homicide consisted of approximately one-hundred (100) pages R1137-1143. It primarily consisted of the playing of Mr. Elledge's taped statement. It described an incident that in many respects would not be thought of as a death penalty case.

The majority of the prosecution's case-in-chief consisted of the details of two other homicides R1243-1382. This testimony was lengthier than that concerning the homicide itself. The prosecution played Mr. Elledge's statement concerning the killing of Edward Gaffney. He broke in a Pantry Pride after it was closed R1294-1295. A man took a swing at him with a mop R1295. He subdued the man and

told him to lay down R1295. The man began to raise up and he shot him twice R1295. He went through the man's pants and then broke open a donation box for money R1297-1298. He tried unsuccessfully to break into a Coca Cola machine and then took a jacket and left R1299-1302.

The prosecution called Katherine Nelson, widow of Paul Nelson, concerning the killing of Paul Nelson. She stated that in August, 1974 she and her husband ran the Beach Motel in Jacksonville Beach, Florida R1371. She stated that at 2:00 a.m. on August 26, 1974 she and her husband were asleep and someone rang the bell R1371. She let the man in and he showed her a gun R1372. He forced her to tie her husband up and then he tied her up R1372-1373. He took the motel money from the desk and then searched her husband's pants and their bedroom for money R1373-1374. Her husband made a move to get loose and Mr. Elledge threatened to kill him R1375. Mr. Elledge tied up his grandson R1376. Her husband then got loose R1377. Her husband sent out with a gun and Mr. Elledge shot him R1378-1380.

This evidence was highly inflammatory. It included completely unnecessary testimony about breaking open a donation box in one homicide R1297-1298. In the second case, all of the testimony was from the widow of the deceased. She testified about the killing of her husband, the tying up of her grandson, and the robbery of their motel. This testimony was highly inflammatory.

This Court has repeatedly held that the details of prior violent felonies must not be emphasized to the point where they became the feature of the penalty phase. Finney v. State, 660 So. 2d 674 (Fla. 1995); Duncan v. State, 619 So. 2d 279, 282 (Fla. 1993). This is precisely what occurred in the present case. The prosecution's presentation concerning the prior violent felonies was lengthier than

that concerning the homicide itself. When the prosecution's evidence concerning prior violent felonies is more extensive than that concerning the offense itself, it can only be described as a feature of the case. See Long v. State, 610 So. 2d 1276, 1280-1281 (Fla. 1993); Bell v. State, 650 So. 2d 1032, 1035 (Fla. 5th DCA 1995).

The testimony at issue here involves the testimony of a woman who was both a victim of a prior violent felony and a surviving spouse of a victim. The Court has repeatedly noted that both of these categories of witnesses should be received with great caution. Finney, supra at 683-684; Rhodes v. State, 547 So. 2d 1201, 1204-1205 (Fla. 1989); Freeman v. State, 563 So. 2d 73, 76 (Fla. 1990). In Finney, supra, this Court stated:

> Caution must be used because of the potential that the jury will unduly focus on the prior conviction if the underlying facts are presented by the victim of that offense.
>
> 660 So. 2d at 684.

The necessity for testimony concerning the details of prior violent felonies is a factor in its admissibility. Finney, supra at 684; Rhodes, supra at 1204-1205; Freeman, supra at 76. Mr. Elledge offered to stipulate to these prior violent felony convictions. This weighs heavily against the admissibility of such evidence.

The bulk of the state's case-in-chief concerned the details of prior violent felonies to which Mr. Elledge stipulated. It was highly inflammatory and involved the testimony of victims, which is strictly scrutinized. This error was highly prejudicial, given the extensive mitigation in this case.

POINT IV

THE TRIAL COURT ERRED IN ALLOWING IMPROPER CROSS-EXAMINATION OF KEN ROACH.

The trial court erred in allowing improper cross-examination of a defense witness, Ken Roach. This denied Mr. Elledge's rights pursuant to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Defense counsel called Ken Roach to testify about the interrogation of Bill Elledge R2073-2086. He was the Jacksonville Beach police officer who interrogated Mr. Elledge and took his first statement. His direct testimony was all about the interrogation of Bill Elledge and his confession R2073-2086. The prosecution then on cross-examination went completely outside the scope of the direct examination and attempted to bring out irrelevant, collateral details concerning the Nelson homicide (which was a prior violent felony). The following took place:

> Q. [Prosecutor]: Okay. Now you investigated the Nelson homicide, correct?
>
> A. [Mr. Roach]: Yes.
>
> Q. How many shots were fired in the hotel that we know of?
>
> MR. LASWELL [Defense Counsel]: Judge, I'm going to object to all of this. I think it's outside the scope of direct.
>
> THE COURT: Overruled.
>
> THE WITNESS: I found two bullet wounds in the victim. One was in Mr. Nelson's right shoulder and another was in the middle of the chest. In the autopsy it turned out to be, I believe, a through and through in the heart.
>
> Q. How many shots were fired?
>
> A. I just saw two.
>
> Q. You went to the scene of the Beacon Motel, didn't you?

A. Correct.

Q. All right. And did you see other bullet holes in the apartment there?

A. I don't recall.

Q. Okay. If there were five shots fired, would that refresh your memory? Bullet holes inside, other than Mr. Nelson, inside the apartment there where the Nelsons resided?

A. I'm -- there may have been one in the door facing --I remember receiving a projectile that was by Mr. Nelson's shoulder or head. That's all I recall about that.

Q. If it was in the police report that would be true enough, wouldn't it?

A. Yes.

Q. And you found a weapon, didn't you?

A. I don't recall.

Q. Father, didn't you find a weapon, a .38 Colt, wrapped in plastic underneath a boat?

A. Okay. It's coming back to me. It was by -- I believe it was by a guide wire. Connected to a telephone pole on a side street.

Q. Right.

A. Yes. All right.

Q. And it was near a knife that was taken from the Nelson's residence, correct? Do you remember that, sir?

A. I don't recall the knife at this time.

Q. You had a line up, didn't you? With Mrs. Nelson and David McBride, her grandson, correct?

A. Yes.

MR. LASWELL: Judge, I'm going to interpose the same objection. Just relitigating this murder here.

MR. SATZ: We're not relitigating the murder. The purpose of my questions is to establish through Father Roach, if he remembers, that he had an excellent case against William Elledge and he didn't need a statement.

THE COURT: Proceed.

BY MR. SATZ:

Q. Father, both Mr. McBride and Mrs. Nelson identified William Elledge, didn't they?

A. That's correct.

Q. And you had a very strong case against Mr. Elledge, didn't you?

A. Yes.

Q. And you didn't need a statement from Mr. Elledge in your case, did you?

A. I wouldn't say that. I did for court purposes.

Q. Okay. It would have made it stronger.

A. Yes, definitely.

Q. Also, we're aware that when William Elledge was committing the robbery in the Beacon Motel before he shot Mr. Nelson, he told him about two homicides down in Hollywood, Florida. And if they didn't believe him, to read the Hollywood newspaper. Do you remember that?

A. Yes.

MR. LASWELL: Same objection, Judge.

THE COURT: Overruled.

BY MR. SATZ:

Q. You remember that, sir?

A. Yes, I do.

Q. Okay. And you also remember that he took a live .38 round and put it in his gun while he was in the Beacon Motel?

MR. LASWELL: Excuse me, may I just have a continuing objection to all of this so I don't have to --

THE COURT: You may.

MR. LASWELL: -- keep interrupting? Thanks, Judge.

BY MR. SATZ:

Q. Is that true?

A. I don't recall.

R2094-2098.

This entire line of cross-examination was improper. Cross-examination is limited to matters opened up on direct examination and questioning designed to test the credibility of the witness. Steinhorst v. State, 412 So. 2d 332, 337 (Fla. 1982); Echols v. State, 484 So. 2d 568, 573 (Fla. 1985). This was completely outside the scope of direct examination and had nothing to do with the witness' credibility. It was also an attempt to bring out improper details of a prior violent felony. See Points II and III and cases cited therein. This evidence was highly prejudicial and reversal is required.

POINT V

THE TRIAL COURT ERRED IN ALLOWING INFLAMMATORY EVIDENCE OF AFTER DEATH ACTIVITY.

The trial court improperly allowed inflammatory evidence concerning actions after the homicide which were irrelevant to any issue in the case. This denied Mr. Elledge's rights pursuant to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eight and Fourteenth Amendments to the United States Constitution.

Mr. Elledge specifically objected to inflammatory evidence concerning actions after the homicide R1108-1109. The prosecution introduced substantial inflammatory evidence concerning after death activity. It introduced the testimony of Officer Charles Perrone who testified concerning finding the body in this case.

> Q [Prosecutor]: What did yo observe when you arrived at the Resurrection Catholic Church?
>
> A [Officer Perrone]: In the northwest corner of the parking lot, laying on the blacktop pavement, I found a body of a white female outstretched, head and hands pointing north, feet south. Ankles were bound with a white extension electrical cord. She had bruises on her face, legs, complete body.

Her left sandal -- She was wearing leather sandals -- On her left foot was partially off. Her panties were pulled down to her right ankle. She had a multi-colored blouse which was pulled up to her neck exposing her breasts.

R1138.

The prosecutor also introduced a lengthy colloquy from Mr. Elledge's statement concerning after death activities.

Q [Officer Devin]: And what did you do with her body?

A [Mr. Elledge]: I -- Well, I had taken her body to begin with I moved her from the living room into the bathroom becauew there was visual sight from both the apartment building behind through the kitchen window and also through the porch windows on my place, on the front porch. So I moved her into the bathroom and then I went out and I moved her car up to where it was even with the walkway that runs behind the Normandy apartments. I went back in and put her body, her top half of her body over the edge of the bath tub and ran some water in the tub and washed the blood off around her nose and then took and just left her sitting there.

Q. What did you use to wash the blood off?

A. There was a -- Well, I just used the water itself but there was a towel that there was some blood still that I couldn't get completely off.

Q. Off of what?

A. Off of her -- around her nose and her face because she had bled quite a bit, in fact.

Q. Where?

A. Around her nose.

Q. I mean did the blood get on the floor?

A. It had gotten on the floor when she was laying there and the time that I was moving the car. And I took and tried to clean part of it up off the floor with the, like a bath rug, and there was also a towel that I used to clean out the bath tub with....

Q. Okay, so what did you do next after you cleaned up the blood?

A. I figured it was dark enough after I had smoked about six or seven cigarettes....

So I grabbed her by the shoulders, drug her out of the bathroom into the kitchen by the door. She was too heavy for me and too limp for me to physically carry. So I pulled her up to the door and grabbed a hold of her feet and just threw her out with her feet falling first rolling her down the porch....

Q. All right, so you rolled her out the back door and she came to rest at the bottom of the stairs?

A. Yes.

Q. Then what did you do?

A. Well, I grabbed her by the shoulder and wrist, started dragging her down the walkway to where there was a board going across the end of the walkway and I left her laying there for a minute and I moved a cinder block that was sitting outside the fence holding the board against the walkway and fence....

Q. Okay, then what did you do?

A. I looked around to see if there was anybody that would be like visually in sight that could see what I was doing from the window or something like that. And I couldn't notice nobody so I proceeded to drag her out to the car. And in the process of trying to get her into the car, I put her feet in first and when I started to lift the top half of her body up into the car, her feet rolled out and I lost control of her and she fell down between the curb and the car. So I grabbed the top half of her body, put it in first and then lifted up her legs and her feet, pushed her inside the car and pushed the seat down against her.

Q. This would be in the back seat, right?

A. Yes.

Q. What happened next?

A. Well, I closed the door and I went around and cut in the driver's side. I took off and I went down to the corner going towards the beach. I made a left and went around the block and proceeded to a place where I dumped her body off.

Q. Where was that?

A. I don't know where it was.

Q. Can you describe, was it a building, a parking lot?

A. Church lot.

Q. Church lot?

A. Church parking lot....

Q. How did you get her out of the car?

A. I just grabbed a hold of her legs, dropped them outside the car and grabbed the top half of her body by the shoulders and just pulled her out and let her fall when I got her clear of the car. I closed the door.

R1244-1249.

The prosecution then proceeded to introduce other irrelevant evidence of after death activity. It introduced evidence concerning Mr. Elledge going through the woman's purse R1255. It also introduced Mr. Elledge's driving around drunk with a gun, wrecking a car, and then abandoning it R1250-1254.

All of this evidence was irrelevant to any issue in the case. This was a resentencing proceeding. The prosecution is limited to the statutory aggravators. None of the evidence was relevant to any aggravating circumstance. Actions after death are not "the kind of misconduct contemplated by the Legislature in providing for the consideration of aggravating circumstances." Halliwell v. State, 323 So. 2d 557, 561 (Fla. 1975).

This evidence was highly inflammatory. It included a blatant attempt to inflame religious feelings (the church parking lot), excruciating detail concerning the disposal of the body, and irrelevant collateral crimes. Reversal for a new penalty phase is required.

POINT VI

THE TRIAL COURT ERRED IN SUBJECTING MR. ELLEDGE TO A COMPELLED MENTAL HEALTH EXAMINATION BY A PROSECUTION EXPERT.

The trial court improperly subjected Mr. Elledge to a compelled mental health examination over his objection. This violates his rights pursuant to Article I, Sections 2, 9, 16 and 17 of the Florida

Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The prosecution filed a motion for a compelled mental evaluation by its own expert R3307-3315. Mr. Elledge filed written objections to this procedure R3317-3329. A hearing was held on this issue SR115-140. The trial court granted the prosecution's motion for a compelled mental health evaluation R3392-3395. Defense counsel was given a continuing objection R2485.

The entire concept of compelled mental health evaluations for penalty phase violates the United States and Florida Constitutions. The Texas Court of Criminal Appeals has explicitly held that ordering a compelled mental health evaluation, when a defendant seeks to introduce the testimony of a penalty phase mental health expert who has examined him, violates the Fifth and Sixth Amendments to the United States Constitution. Bradford v. State, 873 S.W.2d 15 (Tex. Cr.App. 1993), cert. denied, Texas v. Bradford, ___ U.S. ___, 115 S.Ct. 311, ___ L.Ed.2d ___ (1994). In Bradford, the defense put on no mental health testimony as to competency or sanity. 873 S.W.2d at 16. However, in the penalty phase, defense counsel intended to call a mental health expert (Dr. Wettstein) who had examined the client. Id. The trial court ruled that the defense expert could not testify to any matters which were based on his examination of the defendant, unless the defendant submitted to a compelled mental examination by the prosecution's expert (Dr. Grigson). Id. at 16-17.

The Texas Court of Criminal Appeals held this procedure to be in violation of the Fifth and Sixth Amendments to the United States Constitution. Id. at 20. The Court stated:

> The Fifth Amendment to the United States Constitution provides, among other things, that "[n]o person ... shall

> be compelled in any criminal case to be a witness against himself[.]" U.S. Const. amend V. It is very well-settled that this protection applies to defendants facing examinations seeking to elicit evidence to prove future dangerousness under Texas capital sentencing procedures. *Estelle v. Smith, supra.* Thus, if appellant's statements made during the Grigson examination were compelled, then the above-quoted Fifth Amendment protection would have been violated in admitting into evidence Dr. Grigson's testimony based upon such statements....
>
> We conclude that the trial court's action in making the admissibility of portions of Dr. Wettstein's proffered testimony contingent upon appellant submitting to an examination by a State-selected expert was erroneous and such violated the Sixth Amendment to the United States Constitution. And under these circumstances the admission of Dr. Grigson's testimony based upon his examination of appellant violated appellant's Fifth Amendment right against self-incrimination.

Id. at 19-20.

The Texas Court of Criminal Appeals also explicitly rejected the State's claim that by introducing mental health testimony at the penalty phase, Mr. Bradford had waived his Fifth Amendment privilege.

> The State also cites *Powell*, apparently based upon its language suggesting that "it m[ight] be unfair to the State to permit a defendant to use psychiatric testimony without allowing the State a means to rebut that testimony[.]" *Powell v. Texas*, 492 U.S. at 685, 109 S.Ct. at 3149, 106 L.Ed.2d at 556. However, the Supreme Court was clearly speaking in the context of a defendant raising a "mental-status defense." *Id.* As noted previously, it is undisputed that the examination in the instant cause were not for the purpose of determining competency or sanity issues; thus, there was no "mental-status" defense raised and the Grigson examination was not ordered as rebuttal to such a defense.

Id. at 18-19.

Bradford correctly notes the critical distinction between the use of expert mental health testimony as to competency or sanity and its use at a penalty phase. Bradford correctly holds that conditioning use of expert mental health testimony at the penalty phase upon a compelled exam by the State's mental health expert violates the Fifth and Sixth Amendments to the United States Constitution.

Bradford's distinction between the presentation of mental mitigation and the presentation of an insanity defense is consistent with the different treatment given the insanity defense and penalty phase mitigation by the federal courts. The federal courts have consistently recognized that insanity is an affirmative defense and that the states and Congress are to be given wide leeway in the definition of insanity and the burden of proof and persuasion as to insanity. The United States Supreme Court has held that it is constitutional for a state to require a defendant to prove his insanity beyond a reasonable doubt. Leland v. Oregon, 343 U.S. 790, 72 S.Ct. 1002, 52 L.Ed.2d 1302 (1952). This has continued to be the law despite the general rule that the burden is on the prosecution to prove each element beyond a reasonable doubt. In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); see also discussion in United States v. Freeman, 804 F.2d 1574 (11th Cir. 1986). The Court in Leland also approved the right of the states to adopt different tests for insanity such as "right and wrong" or "irresistible impulse." 343 U.S. at 800. Indeed, this Court has flatly stated "there is no constitutional right" to plead insanity. Parkin v. State, 238 So. 2d 817, 822 (Fla. 1970)

Mitigating evidence in a capital case is treated differently. A defendant has a constitutional right to present evidence in mitigation of his sentence at a capital sentencing hearing. Sovereignties may not limit the introduction of evidence in mitigation of sentence at a capital sentencing hearing by way of the express wording of a statute, Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), by restricted interpretations of statutes that allow such evidence on their face, Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), by evidentiary rule, Green v. Georgia, 442 U.S.

95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979), by instructions to the jury, Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), by jury verdict form, Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988); McCoy v. North Carolina, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990), or even by failure of the sentencer to give independent weight to circumstances that are presented, Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 2069, 72 L.Ed.2d 369 (1982).

A state can put few, if any, restrictions on the presentation and consideration of mitigation. A state has far greater leeway in the restriction and definition of the insanity defense. A state can narrowly define insanity but can not so narrowly define mitigation. Compare Leland, supra with Hitchcock, supra. This supports the conclusion in Bradford, supra that a compelled mental evaluation for penalty phase violates the Fifth and Sixth Amendments.

Assuming arguendo, that a compelled mental evaluation for penalty phase is lawful in some cases, it is not in the current one. This is so for two reasons. (1) At that time of this penalty phase and at the time of the offense there was no rule or procedure which authorized a compelled mental evaluation for penalty phase. (2) In this case, Mr. Elledge had already been examined for competency and sanity. The prosecution had access to these reports. Thus, this is not a situation where only experts retained by the defense had examined the defendant.

At the time of the offense in this case there was no suggestion that a defendant could be subjected to a compelled mental health examination for penalty phase. At the time of this penalty phase, the only decision on this issue was Burns v. State, 609 So. 2d 600 (Fla. 1992). In Burns, this Court stated:

> There is no rule of criminal procedure that specifically authorizes a state's expert to examine a defendant facing the death penalty when the defendant intends to establish either statutory or non-statutory mental mitigating factors during the penalty phase of the trial.
>
> 609 So. 2d at 606, n.8.

Thus, there was no authority to compel a mental health exam. Any attempt to invoke subsequent rules or caselaw to justify this examination violates the ex post facto clauses of the Florida and United States Constitutions and Article X, Section 9 of the Florida Constitution.

Mr. Elledge had been previously examined for competency and sanity by court appointed experts. This is not a case where only defense mental health experts had examined the defendant. Thus, there was no necessity for another compelled examination, as Mr. Elledge had already been subjected to two such examinations.

POINT VII

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

The prosecution was allowed to use a compelled mental health examination to gather evidence to rebut mitigation which was not based on a mental health examination and not given by a mental health expert. This violated Mr. Elledge's rights pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution.

The prosecution filed a motion for a compelled mental health examination R3307-3315. The core of the prosecution's argument for its exam was as follows:

> In order to convince the jury to recommend and this Court to sentence the Defendant to life imprisonment, the Defen-

> dant has listed five (5) mental health experts as witnesses. These individuals have interviewed the Defendant and have formed opinions as to the Defendant's mental state at the time of the offense, based in part on the interview and testing of the Defendant. Those opinions will be used by the defendant to establish the existence of either statutory or non-statutory mental mitigating factors during the penalty phase.

R3307-3308 (emphasis supplied). Defense counsel filed written objections to this procedure R3317-3329. Defense counsel specifically pointed out the danger in his response of the prosecution using the compelled mental evaluation to obtain evidence other than the proposed rebuttal R3323. The trial court overruled Mr. Elledge's objection and ordered the examination R3396-3398. Defense counsel objected to using the compelled mental health examination as rebuttal to the testimony of Professor Radelet and the testimony of prison guards regarding conduct in prison and prospects in prison R1983-1986.

Defense counsel called Professor Michael Radelet, a sociology professor at the University of Florida, as to Mr. Elledge's lack of future dangerousness R1562,1582. Professor Radelet specifically testified that in predicting future dangerousness he used the actuarial method, which is not based on a clinical interview R1582-1584. It is based on a record review and analyzing statistical patterns R1582-1584.

The prosecution attempted to rebut Professor Radelet's testimony with the testimony of Dr. Harley Stock R2667-2669. Dr. Stock was the prosecution's mental health expert who had subjected Mr. Elledge to a compelled mental evaluation. Dr. Stock based his testimony on his clinical interview R2667-2669.

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.

This Court has implicitly recognized this in Florida Rule of Criminal Procedure 3.202. In this rule, a compelled mental evaluation is only triggered when a defendant intends to present:

> Expert testimony of a mental health professional, who has tested, evaluated, or examined the defendant, in order to establish statutory or nonstatutory mental mitigating circumstance.

Fla.R.Crim.P. 3.202(a).

Professor Radelet's testimony was not of this nature. It is improper to allow a compelled mental evaluation as a broad ranging search for rebuttal to mitigation. This was reversible error.

POINT VIII

THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S REQUEST TO HAVE HIS EXPERT VIEW THE TESTIMONY OF THE PROSECUTION'S MENTAL HEALTH EXPERT.

The trial court erred in denying defense counsel's request to have his expert view the testimony of the State's mental health expert. This denied Mr. Elledge's rights pursuant to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Mr. Elledge was subjected to a compelled mental health examination after his mental health experts testified. He then requested that his expert be allowed to view the testimony of the prosecution's mental health expert in order to prepare for possible surrebuttal R2450. This was denied. There were substantial differences in the conclusions of the prosecution and defense experts. The prosecution expert extensively criticized the methodology of defense experts R2656-2661. There was no way for the defense to properly prepare for surrebuttal without his expert viewing the testimony of the prosecu-

tion expert. Burns v. State, 609 So. 2d 600, 606 (Fla. 1992). Reversal for a new penalty phase is required.

POINT IX

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

The trial court erroneously sustained an objection to a defense peremptory challenge when the prosecution did not give any reason to suggest an inquiry. This denied Mr. Elledge his constitutional rights pursuant to Article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Defense counsel attempted to strike Daisey Fussell R391. The prosecution then made the following objection:

> Your Honor, Ms. Fussell is a Black juror. Would you inquire of defense if it's racially neutral reasons for excluding her?

R391.

The trial court ultimately forced defense counsel to state his reasons for the challenge R391. The judge rejected the reasons, disallowed the peremptory, and struck the entire panel R392,422.

The prosecution's statement was clearly inadequate to trigger an inquiry pursuant to State v. Neil, 457 So. 2d 481 (Fla. 1984). The recent well-reasoned case of Holiday v. State, ___ So. 2d ___, 21 Fla. L. Weekly D4 (Fla. 3d DCA December 20, 1995) controls the issue. In Holiday, the defense struck juror Urrutia. The prosecution then made the following objection:

> [PROSECUTOR]: Your Honor, as far as Ms. Urrutia is concerned, I ask for race and gender reason.

Id. at D4.

The trial court ordered the defense to state its reason and ultimately disallowed the challenge. Id. at D4-D5.

The Court in Holiday held that this was reversible error as the prosecution had not laid a proper basis for a Neil inquiry. The Court held:

> An objector must do *something* more than merely objecting and requesting class, race, or gender neutral reasons. A party objecting to the other side's use of peremptory challenges must affirmatively do three things to properly trigger a *Neil* inquiry: (1) make a timely objection; (2) demonstrate on the record that the challenged person is a member of a distinct racial group, cognizable class, or gender; and (3) place on the record facts which reasonably indicate that a peremptory challenge is being used impermissibly. The deficiency in the objections that run through the cases is the failure to state "why" or "how" the peremptory challenge is *being used* in a discriminatory fashion.

Id. at D5.

See also Portu v. State, 651 So. 2d 791 (Fla. 3d DCA 1995); Betancourt v. State, 650 So. 2d 1021 (Fla. 3d DCA 1995); Nickerson v. State, 971 F.2d 1125, 1134-1135 (4th Cir. 1992).

In the present case, 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.

Assuming arguendo, that this Court feels that the state articulated adequate grounds to trigger a Neil inquiry, defense counsel gave appropriate reasons to justify a peremptory challenge.

> MR. LASWELL: Ms. Fussell is in the midst of a personal anguish with a divorce that she thinks is settled, but she has got a husband who has a lawyer and she doesn't have one. She has got an interrupted service history with Southern Bell. She has got three children that are anywhere from school all the way up to a teacher in Alabama, and she's had some exposure to the longshoreman. And I don't feel that she's the kind of juror that can adequately decide this case particularly when she was twelve when it happened.

R391.

These are clearly adequate reasons. Files v. State, 613 So. 2d 1301 (Fla. 1992). In Files this Court held it to be proper to excuse a juror because she is divorced, unemployed and has five children. 613 So. 2d at 1304-1305. This is very similar to this juror who is going through a divorce, intermittently employed, and has three children R391. In the present case, there are other reasons justifying the challenge. The juror was going through a divorce. Certainly, a defendant on trial for his life has a right to exercise a peremptory challenge against a juror who is potentially distracted and/or angered by a pending divorce. This type of case requires the highest level of concentration and focus. Counsel additionally pointed out that the juror was pro se in her divorce proceeding while her husband had counsel. This could cause her to have resentment against lawyers and/or the legal system. It is clear that defense counsel articulated specific race-neutral reasons which individually and collectively justify this peremptory. Desroches v. State, 645 So. 2d 1084 (Fla. 3d DCA 1994); Taylor v. State, 491 So. 2d 1150 (Fla. 4th DCA 1986); Mitchell v. State, 622 So. 2d 1156 (Fla. 5th DCA 1993). Purkett v. Elem, ___ U.S. ___, 115 S.Ct. 1769, ___ L.Ed.2d ___ (1995).

It should also be noted that there is nothing in the surrounding circumstances which would indicate that the defense was using its peremptories in a racial manner. The defense had not previously challenged any Black jurors R391. The prosecution, however, had R392. There is nothing about the facts of the case to give the defense any reason to strike Black jurors. The defendant and victim were both White. There was no evidence which could be seen as having any special

appeal or animus to any racial group. Thus, there was no evidence to lead one to question these clear, racial-neutral reasons.

The trial court erroneously conducted a Neil inquiry, denied the defense peremptory challenge, and struck the panel. A new penalty phase is required.

POINT X

THE TRIAL COURT ERRED IN RESTRICTING VOIR DIRE.

The trial court improperly restricted defense counsel's voir dire. This denied Mr. Elledge's rights pursuant to Article I, Sections 2, 9, 16, 17, 21 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The courts have consistently upheld the right to meaningful voir dire to ferret out potential biases and to intelligently exercise both cause and peremptory challenges. Lavado v. State, 492 So. 2d 1322 (Fla. 1986); Johnson v. State, 590 So. 2d 1110 (Fla. 2d DcA 1991); Moses v. State, 535 So. 2d 350 (Fla. 4th DCA 1988). It is also clear that generalized questions concerning whether jurors could follow the law are inadequate. Morgan v. Illinois, ___ U.S. ___, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992).

In the present case defense counsel attempted to ask a juror the following question:

> Is it more important to you to hear about aggravating factors than it is mitigating factors?

R794.

He was prevented from asking this question R793-798. This was an improper restriction on voir dire.

This line of questions was necessary to see if jurors had any predispositions towards the death penalty. This was essential to

intelligently exercise cause and peremptory challenges. A new penalty phase is required.

POINT XI

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

The long delay in providing Mr. Elledge a lawful penalty phase severely prejudiced his right to present a case for life imprisonment. This denied him his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, 17, 21 and 22 of the Florida Constitution.

Appellant filed a memo to preclude the death penalty, based upon the delay in the case R3137-3143. The trial court denied this motion. In the defense sentencing memo, there was considerable discussion of the prejudice from the delay in the case R3633-3663. There was an evidentiary hearing on this issue R2902-2985. There was an additional memorandum filed on this issue R3777-3810. The trial court denied Mr. Elledge's motion to preclude the death penalty. However, in his sentencing order, the trial judge stated:

> The passage of time has obviously played a role in the defendant's difficulties of finding his past in search of evidence of mitigation.
>
> R3767.

The Court also noted that many of Mr. Elledge's relatives had died since his guilty plea R3767.

This offense occurred on August 24, 1974. Mr. Elledge made a full statement concerning his involvement to Hollywood police officers on August 27, 1974 R1173. The state could have charged him with this offense at any time after this statement. Mr. Elledge was indicted for this offense on January 8, 1975 SR272. Mr. Elledge pled guilty to first degree murder on March 17, 1975 R3095. The present penalty

phase took place on November 1-19, 1993. Mr. Elledge was sentenced to death on February 4, 1994. Both events are more than nineteen (19) years after the state possessed indisputable probable cause to charge Mr. Elledge. Both are more than eighteen (18) years after his guilty plea. The delay in this case was solely due to state action. Mr. Elledge's prior death sentences were reversed as his penalty phases were all conducted in violation of Florida law, the Florida Constitution, and/or the United States Constitution. Elledge v. State, 346 So. 2d 998 (Fla. 1977); Elledge v. Dugger, 823 F.2d 1439, modified, 833 F.2d 250 (11th Cir. 1987); Elledge v. State, 613 So. 2d 434 (Fla. 1993).

Mr. Elledge was severely prejudiced by this delay. Mr. Charlesworth, chief investigator on this case, described the difficulties in the case. He spoke to Bill's aunt who was ninety-four (94) years old and senile R2939. She had difficulty speaking and could not travel R2939. Many of the neighborhoods Bill had grown up in were completely changed R2940. Many records were gone R2940. The changes over time made the investigation of Bill's early life much more difficult R2959-2966. Both of Bill's parents had died in 1987 R1478.

Other difficulties are clearly apparent in conducting a penalty phase more than nineteen (19) years after the offense. It presented extreme problems in jury selection in this case. One juror testified that "a lot of people" discussed the delay in the case R336. He also stated that many people made comments to the effect:

Why are we going through this process a second time.

R336.

Another juror testified that there was considerable discussion about delay and the prior sentencing R350-351. She stated there was

"a lot of joking and sarcastic comments" R352. Another juror confirmed that numerous people speculated about the delay R360. She confirmed that she had heard another make a comment to the effect that "why hadn't they already fried this guy" R359-363. Another juror stated that she wondered about the delay in the case R364. Another juror confirmed that there were discussions about the delay in the case R367. Another juror stated that he had said:

> Why did they set him on that death row for nineteen years for the taxpayers to pay the money.
>
> R374.

He made these comments in the presence of other jurors R377. Another juror confirmed that she heard comments to the effect that this was a waste of taxpayers' money and he should have been executed years ago R381-382. These kinds of comments indicate the tremendously hostile atmosphere a capital defendant faces years after the offense.

The delay in the case also presents extreme problems in the presentation of mitigation. Any mental health evaluation is conducted years after the offense. This makes it difficult to establish statutory or non-statutory mitigation concerning mental state at the time of the offense. Additionally, Mr. Elledge's community has been death row. He is forced to call death row inmates as witnesses. this is far less effective than the ordinary testimony of friends, neighbors, family, co-workers, etc. All of these factors prejudiced Mr. Elledge.

1. Violation of the right to a speedy trial.

The right to speedy trial applies in capital sentencing. Moore v. Zant, 972 F.2d 318, 320 (11th Cir. 1992). In Doggett v. United States, ___ U.S. ___, 112 S.Ct. 2686, 2696, ___ L.Ed.2d ___ (1992), even though the petitioner "did indeed come up short" in showing prejudice, the delay in his case required outright dismissal of

charges. The Court restated the four relevant inquiries to determine a violation of the right to a speedy trial:

> whether delay before trial was uncommonly long, whether the government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice as the delay's result.

Doggett, 112 S.Ct. at 2690.

(a) The delay before trial was uncommonly long.

The penalty phase here was conducted over 19 years after the offense. In Doggett, the "extraordinary 8½ year time lag between Doggett's indictment and arrest clearly suffice[d] to trigger the speedy trial enquiry." Id. 2691. The Court noted that "the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year." Id. at n.1. See Madonia v. State, 648 So. 2d 260 (Fla. 5th DCA 1994) (delay of more than three years between charge and arrest "is sufficient time to make the delay 'presumptively prejudicial' and require a *Doggett* inquiry"). Compare Harris v. Champion, 15 F.3d 1540, 1560 (10th Cir. 1994) ("a two-year delay in finally adjudicating a direct criminal appeal ordinarily will give rise to a presumption of inordinate delay that will satisfy this first factor in the balancing test").

(b) The government is more to blame for the delay.

Had the government followed the law, a lawful penalty phase for Mr. Elledge would not have been so delayed. His speedy trial claim is not rendered invalid because he exercised his right to appeal. See United States v. Loud Hawk, 474 U.S. 302, 106 S.Ct. 648, 88 L.Ed.2d 640 (1986). The state cannot visit blame on Mr. Elledge for the delay when he has been proven to be correct in asserting that his prior penalty phases were conducted unlawfully.

(c) The speedy trial right has been asserted in due course.

Mr. Elledge has always sought a lawful penalty phase. He has been continuously in state custody, available for trial.

(d) The delay has prejudiced Mr. Elledge.

Extraordinary delay "threatens to produce more than one sort of harm, including 'oppressive pretrial incarceration,' 'anxiety and concern of the accused,' and 'the possibility that the [accused's] defense will be impaired' by dimming memories and loss of exculpatory evidence." Doggett, 112 S.Ct. at 2692 (citing cases). "Of these forms of prejudice, 'the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." Doggett, 112 S.Ct. at 2692. The delay in providing a penalty phase has exposed Mr. Elledge to the last, "most serious" form of prejudice. The delay fatally impaired his defense.

Mr. Elledge was subjected to "oppressive incarceration" and the "anxiety" which the Court has recognized: "when a prisoner is sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." In re Medley, 134 U.S. 160, 172, 10 S.Ct. 384, 33 L.Ed.2d 835 (1890).

2. Other constitutional violations.

Delay prejudicing the ability to present a case violates due process. United States v. MacDonald, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 691 (1982); Scott v. State, 581 So. 2d 887 (Fla. 1991); Harris v. Champion, 15 F.3d 1538 (3d Cir. 1994). In this death penalty case, the cruel and unusual punishment prohibition requiring heightened

reliability is violated by delay. Fundamental fairness and the Eighth Amendment demand that a defendant not suffer the added punishment of death when a delay prejudiced his case for life. The extent of the harm requires a life sentence be imposed.

POINT XII

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

Mr. Elledge has been continuously incarcerated since August, 1974 and has been under a sentence of death since March 18, 1975. Mr. Elledge filed a motion to preclude the death penalty based on delay in carrying out his execution R3137-3143. The trial court denied this motion. The delay in carrying out his execution violates Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The torturous effects of the "death row phenomenon" -- that is, the psychologically devastating effects of a lengthy stay on death row -- have been widely noted by jurists during the last three decades. People v. Anderson, 493 P.2d 880, 6 Cal.3d 628, 649 (Cal. 1972) ("The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to the execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the [protracted] process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture."); Soering v. United Kingdom, 11 Eur.Hum.Rts. Rep. 439 (1989) (European Court of Human Rights refused to extradite

a German national from UK to Virginia to face capital murder charges because of anticipated time that they would have to spend on death row if sentenced to death); Vatheeswaran v. State of Tamail Nadu, 2 S.C.R. 348, 353 (India 1983) (criticizing the "dehumanizing character of the delay" in carrying out an execution); Sher Singh et al. v. The State of Punjab, 2 S.C.R. 582 (India 1983) ("Prolonged delay in the execution of a death sentence is unquestionably an important consideration for determining whether the sentence should be allowed to be executed."); Catholic Comm'n for Justice & Peace in Zimbabwe v. Attorney General, No. S.C. 73/93 (Zimb. June 24, 1993) (reported in 14 Hum. Rts.L.J. 323 (1993)).

Similar views have been expressed by legal commentators and mental health experts. See e.g. Schabas, EXECUTION DELAYED, EXECUTION DENIED, 5 Crim. L. Forum 180 (1994) [available on WESTLAW]; Lambrix, THE ISOLATION OF DEATH ROW in Facing the Death Penalty 198 (M. Radelet ed. 1989); Millemann, CAPITAL POST-CONVICTION PRISONERS' RIGHT TO COUNSEL, 48 Md.L.Rev. 455, 499-500 (1989) ("There is little doubt that the consciousness of impending death can be immobilizing.... This opinion has been widely shared by [jurists], prison wardens, psychiatrists psychologists, and writers.") (citing authorities); Mello, *Facing Death Alone*, 37 AMER. L. REV. 35, 37-39 (1986) ("The physical and psychological pressure besetting capital inmates has been widely noted.... Courts and commentators have argued that the extreme psychological stress accompanying death row confinement is an eighth amendment violation in itself or is an element making the death penalty cruel and un usual punishment.") (citing authorities).

The recent landmark decision rendered by the Judicial Committee of the Privy Counsel of the United Kingdom (the "Privy Council"),

involves a similar case. Pratt & Morgan v. The Attorney General of Jamaica, Privy Council Appeal No. 10 of 1993, 3 WLR 995, 143 NLJ 1639, 2 AC 1, 4 All ER 769 (Nov. 2 1993) (en banc) (available on LEXIS).nI Pratt, an appeal by two condemned men on Jamaica's death row, the Privy Council, sitting *en banc* for the first time in five decades, unanimously held that carrying out the death sentences of the two men would be "torture," and "inhuman" and "degrading" punishment. The Privy Council did not hold that capital punishment was cruel and unusual *per se*, but instead focused on the fact that the condemned men had been on death row for a protracted period of time (fourteen years). The Privy Council stated:

> There is an instinctive revulsion against the prospect of [executing] a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity; we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time.

Id. at 16. The reasoning of Pratt & Morgan, supra, controls this case. British common law is the basis of our legal system. The delay in this case is clearly cruel and unusual under the Eighth Amendment.

In Tillman v. State, 591 So. 2d 167 (Fla. 1991), this Court noted that Article I, Section 17 of the Florida Constitution prohibits "cruel and unusual punishment." Id. at 169. This Court held that a death sentence violates this provision if it is "unusual." This case clearly is. As the trial court found:

> Clearly, the legal history of this case is unprecedented.
>
> R3767.

Of thirty-six (36) people executed under Florida's current statute, none has been on death row as long as Mr. Elledge has. Appendix. The delay in carrying out this execution violates both the Florida and United States Constitutions. A reduction to life is required.

POINT XIII

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

Mr. Elledge filed written objections to the jury instruction on reasonable doubt R3210-2221. Mr. Elledge's objection was overruled and the jury was improperly instructed on reasonable doubt R2865-2866. The giving of this instruction denied Mr. Elledge's rights pursuant to Article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

This issue is controlled by Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990). In this case, the jury was instructed as follows:

> A reasonable doubt is not a possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to find that an aggravating circumstance has not been established, if you have an abiding conviction that it has been established. On the other hand, if, after carefully considering, comparing and weighing the evidence, there is not an abiding conviction that an aggravating circumstance has been established, or, if, having a conviction, it is one which is not stable but one which wavers and vacillates, then the aggravating circumstance must is not proved beyond a reasonable doubt and you must find that the aggravating circumstance is not established because the doubt is reasonable.
>
> R2866.

In Cage, supra, the instruction stated:

> "If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty*, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt.*

> It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty*.

498 U.S. at 40.

The United States Supreme Court held this instruction to be unconstitutional.

The instruction in the current case is strikingly similar to the one condemned in Cage. Reversal for a new penalty phase is required.

POINT XIV

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

The trial court denied Mr. Elledge's request for a special jury instruction on non-statutory mitigation. This denied Mr. Elledge's rights pursuant to Article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Mr. Elledge requested a special jury instruction on non-statutory mitigators R3544-3548. It described many of the non-statutory mitigators in this case R3544-3548.

The trial court denied the instruction and gave the jury the following instruction:

> Among the mitigating circumstances you may consider, if established by the evidence, are:
>
> One, the crime for which the Defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.
>
> Two, the victim was a participant in the Defendant's conduct or consented to the act.
>
> Three, the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> Four, any other aspect of the Defendant's character or record, and any other circumstance of the offense.

R2865.

Jury instructions which are constitutional, in general, can be unconstitutional, if they do not allow the jury to properly consider and weigh mitigation. Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 934, 106 L.Ed.2d 256 (1989). Here, the instruction that the jury could consider "any other aspect of the Defendant's character or record, an any other circumstance of the offense" would not tell the jury it could consider certain aspects of this case in mitigation. For example, a jury may not understand that Mr. Elledge's alcohol and drug abuse are mitigating factors. Additionally, the jury may consider all non-statutory mitigation as one factor, thus failing to give each aspect independent mitigating weight. This error is especially egregious when combined with the failure to explain the nature and function of mitigation. See Point XV. Reversal is required.

POINT XV

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

Mr. Elledge requested special jury instructions which explained the nature and function of mitigation. The denial of one or more of these instructions denied Mr. Elledge his rights pursuant to Article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Mr. Elledge requested three special jury instructions (Special Instructions 2, 4 and 5) which explained the nature and function of mitigation R3549,3551-3554. The core element is laid out in Special Instruction 2. It states:

> A mitigating circumstance is any fact or set of facts relating to the defendant's age, character, education,

> environment, habits, mentality, propensities and record, or other aspect of the defendant's life which may be considered extenuating or reducing the moral culpability of the defendant or making the defendant less deserving of the extreme punishment of death than other persons who have committed aggravated first degree murder.
>
> R3549.

The trial court denied this and related instructions 4 and 5. The only instruction given on mitigation was:

> Should you find sufficient aggravating circumstances to exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances. Among the mitigating circumstances you may consider, if established by the evidence, are:
>
> One, the crime for which the Defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.
>
> Two, the victim was a participant in the Defendant's conduct or consented to the act.
>
> Three, the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> Four, any other aspect of the Defendant's character or record, and any other circumstance of the offense.
>
> R2865.

A jury must be told the nature and function of mitigation. Spivey v. Zant, 661 F.2d 464, 471-472 (5th Cir. 1982). The jury instructions in the present case made no attempt to do this. The jury was told it can consider "any other aspect of the Defendant's character or record, and any other circumstance of the offense" but was given no guidance as to what would make an aspect of Mr. Elledge's character or record mitigating. For example, Mr. Elledge's drug and alcohol abuse could be misinterpreted by a jury as aggravating. However, these are legally recognized mitigating factors. It was reversible error to fail to give one or more of these special jury instructions.

POINT XVI

THE TRIAL COURT GAVE AN UNCONSTITUTIONAL INSTRUCTION ON THE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL (HAC) AGGRAVATING CIRCUMSTANCE.

Over Appellant's objection, R2573, the trial court instructed the jury on HAC as follows:

> The crime for which the Defendant is to be sentenced was especially heinous, atrocious or cruel.
>
> Heinous means extremely wicked or shockingly evil.
>
> Atrocious means outrageously wicked and vile.
>
> Cruel means designed to inflict a high degree of pain with utter indifference to, or even with enjoyment of, the suffering of others.
>
> The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

R2864.

Giving this instruction was error and denied Appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, 17, 21 and 22 of the Florida Constitution.

States are required to narrow the class of death eligibles and to channel the discretion of the sentencers by clear, objective, and reviewable standards. Godfrey v. Georgia, 446 U.S. 420, 422, 432-433, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980); Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 1859, 100 L.Ed.2d 372 (1988).

The instruction that was given in this case is fatally flawed as it fails to properly limit the jury's discretion in deciding what offenses are HAC. The instruction totally fails to define "atrocious." The jury is totally left to its unbridled discretion in its evaluation whether the offense was atrocious. Further, flaws with the instruction

are readily seen by breaking it down in two parts. The first part -

> Heinous means extremely wicked or shockingly evil. Cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.

- has been directly held to be unconstitutional. Shell v. Mississippi, 481 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990).

The only difference between the unconstitutional HAC instruction in Shell and the one given in this case is the second part of this instruction:

> The kind of crime intended to be included as heinous, atrocious and cruel is one accomplished by additional acts that show the crime was conscienceless or pitiless or was unnecessarily tortuous to the victim.

T2070-2071 (emphasis added). The question is whether the second part of the instruction showing an example of the type of crime included in the kinds of HAC offenses adequately limits the jury's discretion in finding HAC. Obviously, it doesn't. The second part of the instruction merely shows an example of "the kind of crime" which is "intended to be included" and not a limitation as to what constitutes HAC. Use of the terms "kind of crime" and "included" signifies there are other crimes, besides those that are conscienceless or pitiless or unnecessarily tortuous, that the jury can consider as HAC. In addition, the "unnecessarily tortuous" and "conscienceless" language of the instruction in this case acts as a catch-all to broaden discretion.

The problem is that the instruction wholly fails to limit this provision by informing the jury as to how this provision has been construed by this Court. Without further definition, the jury will likely determine that anyone committing a first degree murder is "conscienceless." Without further definition, how can a jury distinguish between "necessarily" and "unnecessarily" tortuous crimes.

While this Court may have placed limits on the meaning of these terms in its caselaw, such limits are totally irrelevant to the jury where they are not instructed on how such terms have been "so construed" by this Court.

POINT XVII

THE TRIAL COURT ERRED BY GIVING UNDUE WEIGHT TO THE JURY'S DEATH RECOMMENDATION.

The trial judge gave virtually complete deference to the jury's death recommendation. This issue is controlled by Ross v. State, 386 So. 2d 1191, 1197-1198 (Fla. 1980). The death sentence in this case was imposed in violation of Florida Statute 921.141, the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution.

The trial judge made several comments which indicated that he gave undue weight to the jury's death recommendation. The trial court made the following statement on two occasions during his opening instructions to the jury panel.

> It is only under rare circumstances that this Court could impose a sentence other than what you, members of the jury, recommend.

R34,463.

He then followed up with the following comment in two occasions:

> As I've already told you, the Court is not bound to follow your opinion, but will do so except under rare circumstances.

R36,465.

The trial judge made the following comment during his final instructions to the jury:

> It is only under rare circumstances that this Court could impose a sentence other than what you recommend.

R2871.

This case is controlled by Ross, supra. In Ross, this Court stated:

> It appears, however, that the trial court gave undue weight to the jury's recommendation of death and did not make an independent judgment of whether or not the death penalty should be imposed. This error requires that the sentence be vacated and that the cause be remanded to the trial court for reconsideration of the sentence. Citing this Court's decisions in *Tedder v. State*, 322 So. 2d 908 (Fla. 1975) and *Thompson v. State*, 328 So. 2d 1 (Fla. 1976), which held that the trial court should give great weight and serious consideration to a jury's recommendation of life, the trial court reasoned that it was bound by the jury's recommendation of death. As appears from its "Findings of Aggravating and Mitigating Circumstances" the trial court felt compelled to impose the death penalty in this case because the jury had recommended death to be the appropriate penalty. It expressly stated, "[T]his Court finds no compelling reason to override the recommendation of the jury. Therefore, the advisory sentence of the jury should be followed."

386 So. 2d at 1197.

In Ross, supra, this Court reversed as the trial judge's statements that he found "no compelling reason" to override the jury indicated that the trial judge gave undue weight to the jury's recommendation. Here, the trial judge's comments were stronger. He stated that it is only under "rare circumstances" that he could impose a different sentence. This has no basis in law. These comments are far stronger than in Ross, supra, and indicate a lack of independent weighing of aggravating and mitigating circumstances.

This Court was recently faced with a similar issue in King v. State, 623 So. 2d 486 (Fla. 1993). This Court reversed on other grounds, so it did not have to reach the issue. Yet, it stated:

> King also argues that the trial judge deferred to the jury's death recommendation of the appropriate sentence and that the findings in support of the death sentence are not unmistakably clear. We remind the judge that, even though a jury determination is entitled to great weight, "the judge is required to make an independent determination, based on the aggravating and mitigating factors." *Grossman v. State*, 525 So. 2d 833, 840 (Fla. 1988), *cert. denied*, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989); *Rogers v.*

State, 511 So. 2d 526 (Fla. 1987), *cert. denied*, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988).

623 So. 2d at 489 (footnote omitted).

This Court has recently stressed the uniquely important role of the trial judge in the sentencing process. In Corbett v. State, 602 So. 2d 1240 (Fla. 1992), this Court noted the:

> very special and unique factfinding responsibilities of the sentencing judge in death cases. The trial judge has the single most important responsibility in the death penalty process.

Id. at 1243.

In Spencer v. State, 615 So. 2d 688 (Fla. 1993), this Court noted the importance of the judge.

> It is the circuit judge who has the principal responsibility for determining whether a death sentence should be imposed.

615 So. 2d at 690-691.

The trial court violated the principles of Ross, Dixon and Fla. Stat. 921.141. Resentencing is required.

POINT XVIII

THE TRIAL COURT ERRONEOUSLY APPLIED A PRESUMPTION OF DEATH.

The trial court erroneously presumed that death is the proper penalty when any aggravator is found unless outweighed by the mitigating circumstances in violation of Florida Statutes 921.141 and the Florida and United States Constitutions. The imposition of the death sentence in this case violates Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The trial judge made the following statement in his sentencing order:

> 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.

R3769.

This is a misstatement of Florida law, as well as an improper death presumption in violation of the Florida and United States Constitutions. Florida Statutes 921.141(3) requires the judge to find "sufficient aggravating circumstances" to justify the death penalty before he can even begin the weighing of aggravating and mitigating circumstances. There is absolutely nothing in the judge's order that indicates he performed this required first step.

This Court has implicitly recognized the importance of this initial step in Rembert v. State, 445 So. 2d 337 (Fla. 1989). In Rembert, supra, this Court reduced a sentence of death to life imprisonment even though the trial court had found no mitigating circumstances and this Court had upheld one aggravating circumstance. 445 So. 2d at 340. Thus, this Court implicitly recognized that the aggravation must be sufficiently weighty to justify death, regardless of the mitigation. See also Terry v. State, ___ So. 2d ___, 21 Fla. L. Weekly S9, 12-13 (Fla. January 4, 1996) (death disproportionate even though two aggravators and no mitigation).

The Eleventh Circuit Court of Appeals has held the use of the death presumption employed by the judge in this case to violate the Eighth Amendment. Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). In Jackson, supra, the court struck down a jury instruction identical in formulation utilized by the trial judge in this case. The court stated:

> In the present case, the terminology that death is presumed appropriate seeped into the sentencing instructions given by the trial judge. The jury was instructed:
>
> > When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided.

Jackson contends that such an instruction amounts to constitutional error. We agree....

In this case, however, the *jury* was instructed that death was presumed to be the appropriate penalty. Justice McDonald of the Florida Supreme Court has astutely pointed out the problems created when such a presumption is relied upon by the sentencing authority:

> I would also like to comment on the reference in the majority opinion in *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943 [94 S.Ct. 1950, 40 L.Ed.2d 295] (1974). I do not embraced the language from that opinion recited in this majority opinion as "when one or more of the aggravating circumstances is found death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances." If that language is restricted to the role of this Court in reviewing death sentences imposed by the trial court, it is acceptable. But I fear that it is construed by the trial judges as a directive to impose the death penalty if an aggravating factor exists that is not clearly overridden by a statutory mitigating factor. The death sentence is proper in many cases. But it is the most severe and final penalty of all and should, in my judgment, be exercised with extreme care. I am unwilling to say that a trial judge should presume death to be the proper sentence simply because a statutory aggravating factor exists that has not been overcome by a mitigating factor.

Randolph v. State, No. 54-896 (Fla. Nov. 10, 1983) (LEXIS, States Library, Fla. file) (McDonald, J., dissenting), *withdrawn*, 463 So. 2d 186 (Fla 1984), *cert. denied*, 473 U.S. 907, 105 S.Ct. 3533, 87 L.Ed.2d 6565 (1985).

Such a presumption, if employed at the level of the sentencer, vitiates the individualized sentencing determination required by the Eighth Amendment.

837 F.2d at 1473 (emphasis supplied).

The Eleventh Circuit correctly held that when the sentencer employs such a death presumption it violates the Eighth Amendment. In the Florida scheme both the judge and jury play a constitutionally significant role in sentencing. The judge employing such erroneous presumption is also constitutional error. Resentencing is required.

POINT XIX

THE TRIAL COURT ERRED IN FAILING TO CONSIDER AND/OR FIND A STATUTORY MITIGATING FACTOR.

The trial court erred in failing to consider and/or find a statutory mitigating factor which defense counsel had specifically requested and the jury had been instructed on. This denied Mr. Elledge's rights pursuant to Article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Defense counsel specifically requested that the jury be instructed on the statutory mitigator described in Fla. Stat. 921.141 (6)(c) ("The victim was a participant in the defendant's conduct or consented to the act"). The jury was instructed on this mitigating factor R2865. The trial court did not consider this statutory mitigating factor in its sentencing order R3748-3770.

> Every mitigating factor apparent in the entire record before the court at sentencing, both statutory and non-statutory, must be considered and weighed in the sentencing process.
>
> Maxwell v. State, 603 So. 2d 490, 491 (Fla. 1992).

Here, defense counsel specifically asked that the jury be instructed on this mitigator and it was so instructed. The trial court clearly had a duty to evaluate this factor.

There was evidence in the record which would support this mitigator. The only evidence concerning this homicide comes from Mr. Elledge's taped statement to the police, introduced by the prosecution. He went to a bar and began drinking R1228-1229. He met Margaret Strack there and they drank together R1228-1229. He asked her if she wanted to smoke some marijuana and she said, "Sure." R1230. They went to his apartment and smoked marijuana R1234. She began sexually teasing him R1234. She was rubbing his penis through his

jeans R1234-1235. She then went to the bathroom and came out with her panties off of one leg and around her knee on the other R1235. She came back and rubbed her breasts against him and her vagina against his penis R1236. He began to massage her R1236. She was not wearing a bra R1236. He then inserted his finger in her vagina R1237. For the first time, she said she did not want to do anything R1237. He "couldn't hold himself back." R1237. He grabbed her and got on top of her R1238. She dug her fingernails in his wrist R1238-1239. She said, "Okay, okay" and he dropped his pants R1239. She then refused to have sex and began to scream R1240. He grabbed her throat and choked off her screams R1240. He inserted his penis and she kept struggling R1240-1242. She went limp and he realized she was dead R1242-1243. This was all of the State's testimony concerning this homicide.

These facts clearly support the trial court's consideration of this statutory mitigating circumstance. Chambers v. State, 339 So. 2d 204, 209 (Fla. 1976) (opinion of Justices England, Adkins and Sundberg, concurring). Reversal for resentencing is required.

POINT XX

THE TRIAL COURT ORDER IS MATERIALLY FLAWED IN THAT IT IS BASED PARTIALLY ON FALSE INFORMATION.

The trial court improperly relied on false information in rejecting a statutory mitigating circumstance. This denied Mr. Elledge's rights pursuant to Article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Fla. Stat. 921.141.

The trial court rejected the statutory mitigator described in Fla. Stat. 921.141(6)(b) (under the influence of extreme mental or

emotional disturbance) based partially on materially false information.

> 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 with family and friends, and, a review of the facts of this case, that it is his expert opinion that the defendant was not under extreme mental or emotional disturbance when he committed the murder of Margaret Ann Strack.

R3579.

This was directly the opposite of Dr. Caddy's testimony:

> Q. [Defense Counsel]: Okay, having had a chance to reevaluate your position in this case through Mr. Satz's cross examination and the 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. [Dr. Caddy]: My opinion is the same now as it was yesterday. And my view is that he was operating under extreme emotional duress at the time.

R2374.

It is clear that both the Florida Constitution and the United States Constitution require that a death sentence be reliable. Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988); Burr v. State, 576 So. 2d 278 (Fla. 1991). A death sentence based, in part, on false information is unreliable. Johnson, supra; Burr, supra. Reversal for resentencing is required.

POINT XXI

> THE TRIAL COURT ERRED IN FAILING TO CONSIDER AND FIND NON-STATUTORY MITIGATING CIRCUMSTANCES PROPOSED BY DEFENSE COUNSEL.

The trial court erred in failing to consider and find non-statutory mitigating factors proposed by defense counsel. The error denied Mr. Elledge's rights pursuant to Article I, Sections 2, 9, 16,

17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Defense counsel's sentencing memorandum specifically laid out two non-statutory mitigating circumstances which the trial court failed to consider R3648. These are: (1) Mr. Elledge's history of drug and alcohol abuse. (2) Mental health problems which do not rise to the level of statutory mitigation. The trial court erred in failing to consider these mitigators R3648.

There was extensive, unrebutted testimony concerning Mr. Elledge's long history of drug and alcohol abuse. Bill began abusing drugs and alcohol at a very young age R1497-1499,1558,1694. The prosecution's own expert corroborated that Bill Elledge suffered from the disease of alcoholism R2683-2684. This Court has consistently held drug and/or alcohol abuse to be a non-statutory mitigating factor. Clark v. State, 609 So. 2d 513 (Fla. 1992); Scott v. State, 603 So. 2d 1275 (Fla. 1992); Holsworth v. State, 522 So. 2d 348 (Fla. 1988); Ross v. State, 474 So. 2d 1170 (Fla. 1985). The trial court erred in failing to weigh and find this as a mitigating factor.

The trial court also erred in failing to consider mental health problems other than those described in the statutory mitigators. There was extensive testimony regarding Mr. Elledge's mental problems. Although the trial court rejected them as meeting the statutory mitigators, he failed to consider them as a non-statutory mitigator. A trial court must consider mental disorders, even if they do not meet the statutory mitigating factors, as non-statutory mitigation. Foster v. State, 614 So. 2d 455, 465 (Fla. 1992). This is true even if there is a conflict in the evidence. This case must be reversed for resentencing.

POINT XXII

THE TRIAL COURT ERRED FACTUALLY AND LEGALLY IN EVALUATING CHILD ABUSE AS A MITIGATOR.

The trial court erred factually and legally in its evaluation of child abuse as a mitigating factor. This denied Mr. Elledge's rights pursuant to Article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The trial judge found that both of Mr. Elledge's parents were alcoholics and that his mother repeatedly beat him R3761-3762. However, the judge found that this severe child abuse should be given "little weight." He based this decision on the fact that one brother, Danny Elledge, and one sister, Connie Moffett, had also been severely beaten and that this "had no criminal effect on the defendant's siblings" R3762.

This analysis is both factually and legally incorrect. Danny Elledge testified that he had been arrested "two or three times" for assaulting his ex-wife R1499. He also stated that he had been arrested "three or four times" for DUI and other alcohol related offenses. Thus, it is clear that he had five to seven arrests and two or three were for violent offenses. The trial court's premise was factually incorrect.

The trial judge's analysis was also legally inaccurate. The lack of criminal actions of other siblings can not be held to dismiss severe child abuse. It leads to preposterous results. An only child would never face this allegation. The absurdity of this is shown by this case, where one sibling engaged in criminal acts and one did not. Does lead to child abuse having some weight? If they both had, would it then have great weight?

This analysis is just as flawed as that condemned by this Court in Nibert v. State, 574 So. 2d 1059 (Fla. 1990).

> Nibert produced uncontroverted evidence that he had been physically and psychologically abused in his youth for many years. The trial court found this to be "possible" mitigation, but dismissed the mitigation by pointing out that "at the time of the murder the Defendant was twenty-seven (27) years old and had not lived with his mother since he was eighteen (18)." We find that analysis inapposite. The fact that a defendant had suffered through more than a decade of psychological and physical abuse during the defendant's formative childhood and adolescent years is in no way diminished by the fact that the abuse finally came to an end. To accept that analysis would mean that a defendant's history as a victim of child abuse would never be accepted as a mitigating circumstance.
>
> 574 So. 2d at 1062.

The uncontroverted evidence is that Bill Elledge was severely, repeatedly beaten and psychologically abused by his mother throughout his youth. This caused him to do anything he could to escape the pain. He first began to run away and then emotionally deadened himself with alcohol and drugs. This is a mitigator of great weight. Resentencing is required.

POINT XXIII

> THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND FINDING THE AVOID ARREST AGGRAVATOR.

The trial court improperly instructed the jury and found the avoid arrest aggravator. This denied Mr. Elledge his rights pursuant to Article I, Sections 2, 9, 16 and 17 and of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The trial judge instructed the jury on this aggravator and found the aggravator R2864-2865, 3749-3753. Defense counsel objected to the jury being instructed on this aggravator based on a lack of factual support R2569-2572.

The only evidence concerning how this homicide occurred is Mr. Elledge's taped statement, which was introduced by the prosecution. Me. Elledge went to a bar and began drinking R1228-1229. He met Margaret Strack there and they drank together R1228-1229. He asked her if she wanted to smoke some marijuana and she said, "Sure." R1230. They went to his apartment and smoked marijuana together R1234. She began sexually teasing him R1234. She was rubbing his penis through his jeans R1234-1235. She then went to the bathroom and came out with her panties off of one leg and around he knee on the other R1235. She came back and rubbed her breasts against him and her vagina against his penis R1236. He began to massage her R1236. She was not wearing a bra R1236. He then inserted his finger in her vagina R1237. For the first time, she said she did not want to do anything R1237.

The statement continued:

> A. [Mr. Elledge]: She said that she wasn't going to do anything and I told her that she was. Said that, you know, whether she wanted to or not she was going to cause she had teased me to a point where I just couldn't hold myself back from what was happening....
>
> Q. Then what did you do?
>
> A. Well, I grab hold of her.
>
> Q. How?
>
> A. By the throat. I grabbed one hand around her throat and one hand around her wrist.
>
> Q. Now which hand grabbed her throat and which hand grabbed which wrist?
>
> A. My right hand grabbed her throat and my left hand grabbed her wrist....
>
> Q. You've got your one hand around her throat and the one hand on her wrist?
>
> A. Right.
>
> Q. Then what happened?

A. I -- She dug her fingernails into my wrist and made me mad....

Q. Okay. At this point otherwise you forced her quite obviously to have intercourse with you?

A. Yes, I did....

Q. Okay, what happened then?

A. Well, I started to mount her and she said that -- She then again said that she wasn't going to do it and she started to scream. I grabbed her by the throat again, forced myself on her.

Q. Did she say anything before she screamed or tell you that she was going to call the police or anything like that?

A. She said she was going to tell the police that I was raping her.

Q. At this time had you inserted your penis into her vagina when she said this?

A. No.

Q. Just prior to doing this?

A. She started to scream and just prior to doing it.

Q. Then what did you do?

A. I grabbed a hold of her throat and she started to scream and choked off her scream completely....

Q. All right, then what did you do with her?

A. I forced her legs apart with my knee and mounted....

Q. All right, did you insert your penis into her at this time?

A. Yes, I did.

Q. Okay, what did you do?

A. Well, she started struggling and hitting the walls so I raised up.

Q. Hitting the walls with what?

A. With her arms, fighting for air. And I raised her up while choking her, put her on the floor. Well, actually drug her on the floor.

Q. Did you pull your penis out of her at this time?

A. I really can't say whether I did or I didn't because I was totally out of control.

Q. And then you pulled her down on the floor?

A. I just basically picked her up and just threw her down on the floor.

Q. Okay, did you go on top of her?

A. Yes, I did.

Q. Were you inside of her vagina with your penis?

A. I believe I mounted her, I was still on her or something. I can't really recall this. Just raised her up and just sort of drug her.

Q. Okay, what happened then?

A. Well, I just kept on choking her.

Q. And were you having intercourse with her while you were choking her?

A. I can't recall whether I was or not. I was totally blank. All I could see was that I was choking her.

R 1237-1241.

There is nothing in this statement or anywhere else in this case to constitute proof beyond a reasonable doubt of the avoid arrest aggravator. The aggravating circumstance under Section 921.141(5)(e), Florida Statutes, is typically found in the situation where the defendant killed a law enforcement officer in an effort to avoid arrest or effectuate his escape. Mikenas v. State, 367 So. 2d 606 (Fla. 1978). When the victim is not a police officer, the aggravating circumstance cannot be found unless the evidence clearly shows that elimination of the witness was the sole or dominant motive for the murder. Scull v. State, 533 So. 2d 1137 (Fla. 1988); Perry v. State, 522 So. 2d 817 (Fla. 1988); Riley v. State, 366 So. 2d 19 (Fla. 1978). Even where the victim may know the defendant, this factor is not

applicable unless the evidence proves that witness elimination was the only or dominant motive. See Geralds v. State, 601 So. 2d 1157 (Fla. 1992); Perry v. State, supra. The mere fact that the victim knew or could identify the defendant, without more, is insufficient to prove this aggravating factor beyond a reasonable doubt. Speculation on the fact that witness elimination "might" have been the motive for the murder is not sufficient for this aggravator to apply. Floyd v. State, 497 So. 2d 1211 (Fla. 1986); Riley v. State, 366 So. 2d 19 (Fla. 1978); Bates v. State, 465 So. 2d 490 (Fla. 1985).

This Court has recognized that where the evidence shows the victim was shot or stabbed while she was screaming fails to prove a calculated plan to eliminate the person as a witness:

> Next Cook attacks the finding Mrs. Betancourt was killed to avoid arrest, arguing that his statement that he shot her "to keep her quiet because she was yelling and screaming" was insufficient to support the trial court's findings. We agree. The facts of the case indicate that Cook shot instinctively, not with a calculated plan to eliminate Mrs. Betancourt as a witness.

Cook v. State, 542 So. 2d 964, 970 (Fla. 1989) (emphasis added). Likewise, in Robertson v. State, 611 So. 2d 1228 (Fla. 1993), where a witness (C.J. Williams) testified that the defendant told him "that he had shot the woman because she was screaming," this court held that the trial court may not draw "logical inferences" to support the aggravator and the evidence did not prove avoid arrest beyond a reasonable doubt.

Similarly, in Garron v. State, 528 So. 2d 353 (Fla. 1988), the defendant shot one victim, and then a witness to the shooting ran to the telephone and called the operator and requested the police. 528 So. 2d at 354. This Court rejected the avoid arrest aggravator under those circumstances:

> The trial judge found that the offense was committed to avoid arrested based on the evidence that appellant shot Tina while she was talking on the telephone with the operator asking for the police. We have stated that when the victim of the murder is not a police officer, proof of intent to avoid arrest by murdering a possible witness must be very strong before the murder can be considered as an aggravating circumstance. Here, there is not proof as to the true motive for the shooting of Tina. Indeed, the motive appears unclear. The fact that Tina was on the telephone at the time of the shooting hardly infers any motive on the appellant's part. Thus, the second aggravating circumstance cannot stand.

528 So. 2d at 360 (citations omitted).

This Court has recognized that the fact that witness elimination may have been one of the reasons to commit the murder is not sufficient for this aggravator when the person killed is not a law enforcement officer:

> We have long held that in order to prove this aggravating factor when the victim is not a law enforcement officer, the State must show that the sole or dominant motive for the murder was the elimination of the witness.... The fact that witness elimination may have been one of the defendant's motives is not sufficient to find this aggravating circumstance. Further, the mere fact that the victim knew the assailant and could have identified him is insufficient to prove the existence of this factor.

Davis v. State, 604 So. 2d 794, 798 (Fla. 1992).

In the present case, there is no clear evidence as to what the motive for the homicide was. There are several possible motives. These include an impulsive reaction to screaming, an attempt to have sex once aroused, anger at the deceased digging her fingernails in his wrist, or anger at being sexually teased. All of these are possible motives. The only possible evidence of avoid arrest is the mention that the deceased stated she was going to call the police. However, this was in response to a leading question to a police officer. This is even weaker than the evidence this Court found insufficient in Garron, supra. In Garron, the deceased was actually

on the phone trying to reach the police. Here, it was merely mentioned. This does not prove that witness elimination is the dominant or only motive, especially where several other possible motives exist.

This error was harmful in light of the substantial mitigation in the case. This case must be reversed for a new penalty phase. Omelus v. State, 584 So. 2d 563 (Fla. 1991).

POINT XXIV

THE TRIAL COURT ERRED IN FINDING THE AGGRAVATOR OF ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL (HAC) AND IN INSTRUCTING THE JURY ON THIS AGGRAVATOR.

The trial court improperly instructed the jury on the especially heinous, atrocious, or cruel (HAC) aggravator and found this aggravator. This denied Mr. Elledge's rights pursuant to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The trial court instructed the jury on this aggravator and found it R2864-2865. The facts of this case simply do not support this aggravator. The only evidence concerning how this homicide occurred is in Mr. Elledge's taped statement, which was introduced by the prosecution. He went to a bar and began drinking R1228-1229. He met Margaret Strack there and they drank together R1228-1229. He had 9 or 10 drinks and she had 4 or 5 R1230. He asked her if she wanted to smoke some marijuana and she said, "Sure." R1230. They went to his apartment and smoked marijuana together R1234. She began sexually teasing him R1234. She was rubbing his penis through his jeans R1234-1235. She then went to the bathroom and came out with her panties off of one leg and around he knee on the other R1235. She came back and rubbed her breasts against him and her vagina against his penis R1236.

He began to massage her R1236. She was not wearing a bra R1236. He then inserted his finger in her vagina R1237. For the first time, she said she did not want to do anything R1237. He "couldn't hold himself back." R1237. He grabbed her and got on top of her R1238. She dug her fingernails in his wrist R1238-1239. She said, "Okay, okay" and he dropped his pants R1239. She then refused to have sex and began to scream R1240. He grabbed her throat and choked off her screams R1240. He inserted his penis and she kept struggling R1240-1242. She went limp and he realized she was dead R1242-1243. This was all of the State's testimony concerning this homicide.

It is well-settled that the especially HAC aggravator does not apply unless it is clear that Appellant meant to cause unnecessary and prolonged suffering. Kearse v. State, ___ So. 2d ___, 20 Fla. L. Weekly S300, 303-304 (Fla. June 22, 1995); Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990); Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991); Cheshire v. State, 568 So. 2d 908 (Fla. 1990); Mills v. State, 476 So. 2d 172, 178 (1985); Lloyd v. State, 524 So. 2d 396, 403 (Fla. 1988); Smalley v. State, 546 So. 2d 720, 722 (Fla. 1989).

For example, in Bonifay v. State, 626 So. 2d 1310 (Fla. 1993), this Court recognized that the crime was "vile and senseless" where the victim unsuccessfully begged for his life, but held that especially HAC did not apply because the record did not demonstrate that Bonifay intended to inflict a high degree of pain or to torture the victim:

> Both Bland and Tatum testified that Bonifay told them the victim begged for his life. Bonifay, himself, said this in his tape-recorded statement as did Barth in his live testimony. Even so, we find that this murder, though vile and senseless, did not rise to one that is especially cruel, atrocious, and heinous as contemplated in our discussion of

> this factor in State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). The record fails to demonstrate any intent by Bonifay to inflict a high degree of pain or to otherwise torture the victim. The fact that the victim begged for his life or that there were multiple gunshots is an inadequate basis to find this aggravating factor absent evidence that Bonifay intended to cause the victim unnecessary and prolonged suffering. Santos v. State, 591 So. 2d 160 (Fla. 1991).

Bonifay, 626 So. 2d at 1313 (emphasis added). Likewise, in Santos v. State, 591 So. 2d 160, 163 (Fla. 1991), especially HAC did not apply as there was "no substantial suggestion that Santos intended to inflict a high degree of pain or otherwise torture the victim."

The facts of this case do not necessarily show an intent to cause prolonged pain and suffering. This can be shown by analysis of State v. Hunt, 220 Neb. 707, 371 N.W.2d 708 (Neb. 1985), which deals with a far more aggravated case. In Hunt the defendant entered the victim's house and tied the victim's arms and legs. Items were stuffed down the victim's throat. The defendant then strangled the victim with a nylon stocking until she was unconscious. The defendant removed the victim's robe. The defendant did confess that after the strangulation he masturbated and ejaculated onto the victim's stomach. The Nebraska Supreme Court rejected HAC because there was "no evidence the acts were performed for the satisfaction of inflicting either mental or physical pain or that pain existed for any prolonged period of time":

> The evidence establishes that the victim was rendered unconscious within a short time of defendant's intrusion into her home. It therefore cannot be said that the murder was of the nature described in aggravating circumstance (1)(d), as specified in § 29-2523: "The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence."
>
> To be sure, forcing items into the victim's throat and the strangulation itself were cruel, but not "especially so," for any forcible killing entails some violence toward the victim. There is no evidence the acts were performed for

> the satisfaction of inflicting either mental or physical pain or that pain existed for any prolonged period of time.

Hunt, 371 N.W.2d at 721. Likewise, the similar facts in this case do not show that Appellant intended to inflict extreme or prolonged suffering to qualify this as especially HAC.

In Perry v. New Jersey, 124 N.J. 128, 590 A.2d 624 (N.J. 1991), a similar aggravating circumstance, murder involving torture, was held to be improper in a strangulation case because the evidence did not indicate that the defendant intended to cause extreme physical or mental suffering. The court went on to state that the method of killing cannot constitutionally support such an aggravator by itself:

> Our concern is that if the c(4)(c) factor could be sustained on this evidence alone [method of killing] there would be no principled way to distinguish this case, in which the death penalty was imposed from many cases in which it was not.
>
> Because factor c(4)(c) focuses on the criminal's state of mind, it cannot be supported solely by reference to the means employed to commit the murder.

590 A.2d at 646. It is only the designed intent to inflict pain and suffering which causes this aggravator to truly narrow the list of death eligibles. In the present case, there is no evidence of any intent to cause unnecessary pain or suffering. Thus, this aggravator is invalid.

This error was prejudicial as to both the judge and jury's consideration of the case. There was substantial mitigation. A new penalty phase is required. Omelus v. State, 584 So. 2d 563 (Fla. 1991).

POINT XXV

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

The felony-murder aggravating circumstance (Florida Statute 921.141(5)(d) violates both the Florida and United States Constitutions. The use of this aggravator renders Mr. Elledge' death sentence unconstitutional pursuant to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Mr. Elledge filed a motion to declare this aggravator unconstitutional R3245-3252. The jury was instructed on this as an aggravating circumstance and the trial court found it as an aggravator R2864-2865, 3749-3757.

Aggravating circumstance (5)(d) states:

> The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

Fla. Stat. 921.141.

All of the felonies listed as aggravators are also felonies which constitute felony murder in the first degree murder statute. Fla. Stat. 784.04(1)(a)2.

This aggravating circumstance violates both the United States and Florida Constitutions. The decisions of the United States Supreme Court have made clear that under the Eighth and Fourteenth Amendments an aggravating circumstance must comply with two requirements before it is constitutional. (1) It "must genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 456 U.S. 410, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1983). (2) It "must reasonably

justify the imposition of a more severe sentence compared to others found guilty of murder." Zant, supra.

It is clear that the felony murder aggravator fulfills neither of these functions. It performs no narrowing function whatsoever. Every person convicted of felony-murder qualifies for this aggravator. It also provides no reasonable method to justify the death penalty in comparison to other persons convicted of first degree murder. All persons convicted of felony murder start off with this aggravator, even if they were not the actual killer or if there was no intent to kill. However, persons convicted of premeditated murder are not automatically subject to the death penalty unless they act with "heightened premeditation." See Fla. Stat. 921.141(5)(i). Rogers v. State, 511 So. 2d 526 (Fla. 1987). It is completely irrational to make a person who does not kill and/or intend to kill automatically eligible for the death penalty whereas a person who kills someone with a premeditated design is not automatically eligible for the death penalty. This aggravating circumstance violates the Eighth and Fourteenth Amendments pursuant to Zant, supra. This aggravating circumstance also violates Article I, Sections 2, 9, 16 and 17 of the Florida Constitution.

Three different state supreme courts have held this aggravator to be improper under state law, their state constitution, and/or federal constitutional grounds. State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979); Engberg v. Meyer, 820 P.2d 70, 87-92 (Wyo. 1991); State v. Middlebrooks, 840 S.W.2d 317, 341-347 (Tenn. 1992). This Court should follow these courts and declare this aggravator unconstitutional pursuant to the Eighth Amendment to the United States Constitution and Article I, Section 17, of the Florida Constitution.

Assuming arguendo, that this Court does not hold this aggravator unconstitutional in all cases, it is unconstitutionally applied in this case. The evidence in this case clearly indicates an impulsive reaction to screaming and frustration from sexual teasing R1235-1242. Additionally, there was extensive evidence of intoxication from alcohol and marijuana R1230. Indeed, the judge's comments in finding a factual basis for first degree murder indicate that he believed that the fact that the homicide was during a sexual battery was essential to making this a first degree murder R3110-3111. It is unconstitutional to use the fact of a sexual battery to make the offense first degree murder and to also use it as an aggravator.

POINT XXVI

ELECTROCUTION VIOLATES THE FLORIDA AND UNITED STATES CONSTITUTIONS.

Mr. Elledge filed a motion attacking electrocution as punishment R3189-3193. This punishment violates the United States and Florida Constitutions. Electrocution is unconstitutional in light of evolving standards of decency and the availability of less cruel but equally effective methods of execution. Indeed, most states have abandoned electrocution. It violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, § 17 of the Florida Constitution. Many experts argue that electrocution amounts to excruciating torture. See Gardner, Executions and Indignities -- An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment. 39 OHIO STATE L.J. 96, 125 n.217 (1978). Malfunctions in the electric chair cause unspeakable torture. Buenoano v. State, 565 So. 2d 309 (Fla. 1990). It offends human dignity because it mutilates the body. Knowledge that a malfunctioning chair could cause the inmate enormous pain increases the mental anguish.

POINT XXVII

FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

Florida's capital sentencing scheme, facially and as applied to this case, is unconstitutional for the reasons set forth below.

1. The jury

a. Standard jury instructions

The jury plays a crucial role in capital sentencing. Nevertheless, the jury instructions are such as to assure arbitrariness and to maximize discretion in reaching the penalty verdict. The standard jury instruction, on felony murder, does not serve the limiting function required by the Constitution. The instruction violates the Cruel and Unusual Punishment and Due Process clauses of the state and federal constitutions.

b. Florida allows an element of the crime to be found by a majority of the jury.

Our law makes the aggravating circumstances into elements of the crime so as to make the defendant death eligible. See State v. Dixon, 283 So. 2d at 9. The lack of unanimous verdict as to any aggravating circumstance violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal constitution.

2. The trial judge

The trial court has an ambiguous role in our capital punishment system. On the one hand, it is largely bound by the jury's penalty verdict under, e.g., Tedder v. State, 322 So. 2d 908 (Fla. 1975). On the other, it is considered the ultimate sentencer so that constitutional errors in reaching the penalty verdict can be ignored under, e.g., Smalley v. State, 546 So. 2d 720 (Fla. 1989). This ambiguity and like problems prevent evenhanded application of the death penalty.

The judge has no clue of which factors the jury considered or how it applied them, and has no way of knowing whether the jury acquitted the defendant of premeditated murder (so that a sentencing order finding of cold, calculated and premeditated murder would be improper), or whether it acquitted him of felony murder (so that a finding of killing during the course of a felony would be inappropriate). Similarly, if the jury found the defendant guilty of felony murder, and not of premeditated murder, application of the felony murder aggravating circumstance would fail to serve to narrow the class of death eligible persons as required by the Eighth Amendment.

3. Appellate review

In Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (Fla. 1976), the plurality upheld Florida's capital punishment scheme in part because state law required a heightened level of appellate review. See 428 U.S. at 250-251, 252-253, 258-259. Appellant submits that what was true in 1976 is no longer true today. History shows that intractable ambiguities in our statute have prevented the evenhanded application of appellate review and the independent reweighing process envisioned in Proffitt. Hence the statute is unconstitutional.

The failure of the Florida appellate review process is highlighted by the life recommendation cases. As this Court admitted in Cochran v. State, 547 So. 2d 928, 933 (Fla. 1989), it has proven impossible to apply Tedder v. State, 322 So. 2d 908 (Fla. 1975). consistently. This frank admission strongly suggests that other legal doctrines are also arbitrarily and inconsistently applied in capital cases.

4. Aggravating circumstances

Great care is needed in construing capital aggravating factors. Cases construing our aggravating factors have not complied with this principle.

Attempts at construction have led to contrary results as to the "cold, calculated and premeditated" (CCP) and "heinous, atrocious, or cruel" (HAC) circumstances making them unconstitutional because they do not rationally narrow the class of death eligible persons, or channel discretion. The aggravators mean pretty much what one wants them to mean, so that the statute is unconstitutional. See Herring v. State, 446 So. 2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting).

As to CCP, compare Herring with Rogers v. State, 511 So. 2d 526 (Fla. 1987) (overruling Herring) with Swafford v. State, 533 So. 2d 270 (Fla. 1988) (resurrecting Herring), with Schafer v. State, 537 So. 2d 988 (Fla. 1989) (reinterpreting Herring).

As to HAC, compare Raulerson v. State, 358 So. 2d 826 (Fla. 1978) (finding HAC), with Raulerson v. State, 420 So. 2d 567 (Fla. 1982) (rejecting HAC on same facts).

Similarly, the "great risk of death to many persons" factor has been inconsistently applied and construed. Compare King v. State, 390 So. 2d 315, 320 (Fla. 1980) (aggravator found where defendant set house on fire; defendant could have "reasonably foreseen" that the fire would pose a great risk) with King v. State, 514 So. 2d 354 (Fla. 1987) (rejecting aggravator on same facts).

The "prior violent felony" circumstance has been broadly construed in violation of the rule of lenity. A strict construction in favor of the accused would be that the circumstance should apply only where the prior felony conviction (or at least the prior felony)

occurred before the killing. The cases have instead adopted a construction favorable to the state, ruling that the factor applies even to contemporaneous violent felonies. See Lucas v. State, 376 So. 2d 1149 (Fla. 1979).

The "under sentence of imprisonment" factor has similarly been construed in violation of the rule of lenity. It has been applied to persons who had been released from prison on parole. See Aldridge v. State, 351 So. 2d 942 (Fla. 1977). It has been indicated that it applies to persons in jail as a condition of probation (and therefore not "prisoners" in the strict sense of the term). See Peek v. State, 395 So. 2d 492, 499 (Fla. 1981).

The "felony murder" aggravating circumstance has been liberally construed in favor of the state by cases holding that it applies even where the murder was not premeditated. See Swafford v. State, 533 So. 2d 270 (Fla. 1988).

Although the original purpose of the "hinder government function or enforcement of law" factor was apparently to apply to political assassinations or terrorist acts,[1] it has been broadly interpreted to cover witness elimination. See White v. State, 415 So. 2d 719 (Fla. 1982).

---

[1] See Barnard, Death Penalty (1988 Survey of Florida Law), 13 Nova L. Rev. 907, 926 (1989).

CONCLUSION

For the foregoing reasons, Mr. Elledge's conviction and sentence must be reversed.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(407) 355-7600

Richard B. Greene
RICHARD B. GREENE
Assistant Public Defender
Florida Bar No. 265446

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express Next Day Delivery to CAROLYN SNURKOWSKI, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399 this 31st day of January, 1996.

Richard B. Greene
Of Counsel

A P P E N D I X

UNIVERSITY OF FLORIDA

College of Liberal Arts & Sciences
Department of Sociology

PO Box 117330
Gainesville, FL 32611-7330
(904) 392-0265
Fax: (904) 392-6568
ufsoc@nervm.nerdc.ufl.edu
TDD:FRS-1-800-955-8771

Affidavit of Michael L. Radelet

State of Florida, County of Alachua

The undersigned, Michael L. Radelet, hereby states under oath as follows:

1. I received a Ph.D. in sociology from Purdue University in 1977. After two years of postdoctoral training in Psychiatry at the University of Wisconsin Medical School, I came to the University of Florida in 1979, where I am now a tenured Full Professor in the Department of Sociology.

2. Since 1981 I have published four books and two dozen scholarly papers, in the nation's top sociology, criminology, and law journals, relating to various aspects of capital punishment. See, for example, Capital Punishment in America: An Annotated Bibliography (Garland Publishing Co., 1988); Facing the Death Penalty (Temple University Press, 1989); In Spite of Innocence: Erroneous Convictions in Capital Cases (Northeastern University Press, 1992); Executing the Mentally Ill (Sage Publications, 1993); "Choosing Those Who Will Die: Race and the Death Penalty in Florida," 43 Florida Law Review 1-34 (1991). I have also testified on issues relating to the death penalty before committees of the U.S. Senate and the U.S. House of

Representatives, and been retained by the Racial and Ethnic Bias Study Commission of the Florida Supreme Court to research patterns of death sentencing in Florida.

2. As part of my ongoing research on capital punishment, I collect data on all post-Furman death sentences handed out in Florida. Information about the trial and crime is supplied by the defendant and his/her attorney, and the information on each case is regularly updated to include all appellate decisions in the case.

3. Since 1972 there have been 36 executions in Florida.

4. The time spent on death row for these 36 defendants is as follows (ordered by date of the imposition of the death sentence):

Executions in Florida Since 1972

last name	first	sentenced to death	offense	executed	time (yr-mo-day)
SULLIVAN	ROBERT	11/12/73	04/09/73	11/30/83	10-00-18
SPENKELINK	JOHN	12/20/73	02/04/73	05/25/79	05-05-05
DARDEN	WILLIE	01/19/74	09/08/73	03/15/88	14-02-27
WITT	JOHNNY	02/22/74	10/28/73	03/06/85	11-00-12
ADAMS	JAMES	03/15/74	11/12/73	05/10/84	10-02-25
DOBBERT	ERNEST	04/12/74	04/11/72	09/07/84	10-04-25
HENRY	JAMES	06/26/74	03/23/74	09/20/84	10-02-25
FUNCHESS	DAVID	07/18/75	12/16/74	04/22/86	10-08-04
RAULERSON	JAMES	08/20/75	04/27/75	01/30/85	09-05-10
TAFERO	JESSE	05/18/76	02/20/76	05/04/90	13-11-17
FRANCIS	BOBBY	06/30/76	08/17/75	06/25/91	14-11-25
ANTONE	ANTHONY	08/27/76	10/23/75	01/26/84	07-04-30
WASHINGTON	DAVID	12/06/76	09/20/76	07/13/84	07-07-07
GOODE	ARTHUR	03/21/77	03/05/76	04/05/84	07-00-15
THOMAS	DANIEL	04/15/77	01/01/76	04/15/86	09-00-00
SHRINER	CARL	04/29/77	10/22/76	06/20/84	07-01-22
PALMES	TIMOTHY	06/22/77	10/04/76	11/08/84	07-04-16
STRAIGHT	RONALD	08/26/77	10/04/76	05/20/86	08-09-24
CLARK	RAY	09/26/77	04/27/77	11/19/90	13-01-24
MARTIN	NOLLIE	11/13/78	06/25/77	05/12/92	13-05-00
FRANCOIS	MARVIN	04/24/78	07/27/77	05/29/85	07-05-01
WHITE	BEAUFORD	04/27/78	07/27/77	08/28/87	09-04-01
ADAMS	AUBREY	01/12/79	01/23/78	05/04/89	10-04-22

STEWART	ROY	07/02/79	02/22/79	04/22/94	14-08-20
JOHNSON	LARRY	01/09/80	03/16/79	05/08/93	13-04-00
BUNDY	THEODORE	02/12/80	02/09/78	01/24/89	08-11-12
BOLENDER	BERNARD	04/25/80	01/07/80	07/18/95	15-02-22
DAUGHERTY	JEFFREY	04/27/81	03/23/76	11/07/88	07-06-10
KENNEDY	EDWARD	01/12/82	04/11/81	07/21/92	10-06-09
ATKINS	PHILLIP	02/19/82	09/23/81	12/05/95	13-09-15
HARICH	ROY	04/09/82	06/27/81	04/24/91	09-00-15
WHITE	JERRY	05/04/82	03/08/81	12/04/95	13-07-00
HENDERSON	ROBERT	11/22/82	02/02/82	04/21/93	10-05-00
BERTOLOTTI	ANTHONY	04/12/84	09/28/83	07/27/90	06-13-15
HAMBLEN	JAMES	09/21/84	04/24/84	09/21/90	06-00-00
DUROCHER	MICHAEL	03/22/91	11/30/83	08/25/93	02-05-03

FURTHER AFFIANT SAYETH NAUGHT.

Michael L Radelet
Michael L. Radelet, Ph.D.

Sworn to and subscribed before me, this 22 day of January, 1996:

Nadine G. Gillis
NOTARY PUBLIC

NOTARY PUBLIC STATE OF FLORIDA
NADINE G GILLIS
My Commission CC377309
Expires Jun. 01, 1998