IN THE SUPREME COURT OF FLORIDA

WILLIAM DUANE ELLEDGE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 83,321

REPLY BRIEF OF APPELLANT

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

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PRELIMINARY STATEMENT

The following symbols will be used:

"R" Record on Appeal

"SR" Supplemental Record on Appeal

"AB" Answer Brief of Appellee

"IB" Initial Brief of Appellant

STATEMENT OF THE CASE AND FACTS

Appellant will rely on the Statement of the Case and Statement of the Facts in his Initial Brief with the following matters in reply.

1. Appellee's Statement of the Case and Facts is in violation of Florida Rule of Appellate Procedure 9.210(c).

> **(c) Contents of Answer Brief.** The answer brief shall be prepared in the same manner as the initial brief; provided that the statement of the case and of the facts shall be omitted unless there are areas of disagreement, which should be clearly specified.

Fla.R.App.P. 9.210(c).

Appellee makes no attempt to follow this format. Instead, it utilizes its own Statement of the Case and Facts.

2. Appellee asserts that the medical examiner testified that all injuries occurred before death AB5. He actually stated that some injuries were before death and some were after death R1150.

3. Appellee asserts that Ruby Sparks stated that she did not have much to do with Bill Elledge from 1950 to 1974 AB12. Her answer was exactly the opposite:

> I had contact with him. I -- We talked and visited and wrote letters.

R1445.

4. Appellee attempts to minimize the severe mental, physical and emotional abuse which Bill Elledge suffered as a child by putting

it in footnotes and leaving out much of the testimony AB12-14. See Initial Brief for a more complete picture of the testimony.

5. Appellee attempts to minimize the extensive testimony from correctional officers and lay witnesses concerning Bill Elledge's successful adjustments to prison life and positive achievement while in prison by putting it in footnotes and leaving out much of the testimony AB17-18. See Initial Brief for a more complete picture of this evidence.

6. Appellee asserts that Ken Roach testified that he did not need Bill Elledge's confession AB19. His response was the opposite.

> Q [Prosecutor] And you didn't need a statement from Mr. Elledge in your case, did you?
>
> A [Father Roach] I wouldn't say that. I did for court purposes.

R2097.

7. Appellee asserts that Dr. Caddy performed no testing of his own AB19. He testified he performed psychological tests on Mr. Elledge, as well as lengthy record review, clinical interviews and reviewing test data and reports of other doctors R2184-2185.

ARGUMENT

FOR ALL POINTS NOT DISCUSSED BELOW, APPELLANT RELIES ON THE ARGUMENTS AND AUTHORITIES IN HIS INITIAL BRIEF.

POINT I

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

Appellee assumes that the appropriate standard for determining whether a plea should be withdrawn is the "manifest injustice" standard regarding applied to post-sentencing motions to withdraw a guilty plea. In the present case, Mr. Elledge filed his motion to withdraw his guilty plea prior to his resentencing.

> 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). Mr. Elledge's motion should be judged by pre-sentence standards.

Appellee asserts that the prior opinions in this case bar consideration of this issue. Law of the case is limited to "questions of law actually presented and considered on a former appeal." U.S. Concrete Pipe Co. v. Bould, 437 So. 2d 1061, 1063 (Fla. 1983). A court has the power to reconsider its ruling if it becomes convinced that the original ruling is erroneous. Beverly Beach Properties v. Nelson, 68 So. 2d 604, 607-608 (Fla. 1953). Intervening case law is grounds to reconsider a previous decision. United States v. Cherry, 759 F.2d 1196, 1208 (5th Cir. 1985).

Neither Elledge v. Graham, 432 So. 2d 35 (Fla. 1983); Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987); nor Elledge v. State, 613 So. 2d 434 (Fla. 1993) control this issue. Elledge v. Graham, states:

HABEAS CORPUS

> Relying on *Anderson v. State*, 420 So. 2d 574 (Fla. 1982), petitioner also urges that he now is entitled to appellate review of the trial court's denial of his motion to suppress his confessions, even though he pleaded guilty and did not raise this issue on his previous appeals. We disagree. A guilty plea cuts off any right to an appeal from court rulings that preceded the plea with the exception of a limited class of issues which occur contemporaneously with the entry of the plea: (1) the subject matter jurisdiction, (2) the illegality of the sentence, (3) the failure of the government to abide by the plea agreement, and (4) the voluntary and intelligent character of the plea. *Robinson v. State*, 373 So. 2d 898 (Fla. 1979). The petitioner's challenge falls in this later category because it is based on the assertion that he would not have pleaded guilty had the confessions been suppressed. A proper challenge to the voluntary and intelligent character of a guilty plea is presented to the trial court by a motion to withdraw the plea. A denial of such motion would be subject to review on direct appeal. *Robinson*. So far as we are aware, the petitioner has not previously sought to withdraw his guilty

> plea nor did he raise the issue on the direct appeal of his death sentence. We accorded the petitioner automatic review as we do in all death cases, and affirmed his conviction and sentence of death. *Elledge II*. § 941.141(4), Fla.Stat. (1975). Petitioner since has raised the issue of the voluntariness of his guilty plea before the trial court by means of a 3.850 motion, which we address below. We know of no other right of review to which the petitioner is entitled.
>
> 432 So. 2d at 36.

This Court went on to reject Mr. Elledge's 3.850 appeal.

> Our review of the record convinces us that the appellant's confessions and guilty plea were properly admitted and that the allegation of ineffective assistance of counsel has not been shown. *Knight v. State*, 394 So. 2d 997 (Fla. 1981); *Williams v. State*, 316 So. 2d 267 (Fla. 1975).
>
> Id. at 37.

This Court did not review this issue via direct appeal as there had not been a motion to withdraw Mr. Elledge's guilty plea. It engaged in the more limited form of review for an appeal of a 3.850 motion. See Eutzy v. State, 536 So. 2d 1014, 1015 (Fla. 1988) (3.850 motion can not be used to raise matters that could have been raised on direct appeal).

Elledge v. Graham is long before this Court's opinion in Koenig v. State, 597 So. 2d 256 (Fla. 1992). Thus, even if it can be considered a ruling in an analogous posture, it must be reconsidered in light of Koenig. Neither Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987), nor Elledge v. State, 613 So. 2d 434 (Fla. 1993) discuss this issue. Neither can be considered law of the case on this issue.

Appellee points out that Florida Rule of Criminal Procedure 3.172 was not adopted until 1977. The committee note concerning this addition states that it is based on Williams v. State, 316 So. 2d 267 (Fla. 1975). The Florida Bar Re: Florida Rules of Criminal Procedure, 343 So. 2d 1247, 1255 (Fla. 1977). Williams is based on Boykin v.

Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) and McCarthy v. United States, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969). Fla.R.Crim.P. 3.172 stems from Boykin and McCarthy.

Appellee claims that there was no harm from the trial court's failure to advise him that he was waiving his right to appeal because of the fact that there was some sort of review of Mr. Elledge's confession in Elledge v. Graham, 432 So. 2d 35 (Fla. 1983). However, this was a more limited form of review in an appeal of a 3.850 motion. Mr. Elledge was waiving the right to appeal all issues relating to the conviction, not merely the suppression issue. Appellee also makes a claim of harmless error because "based on the physical evidence," a conviction could still be obtained AB34. There is no case that applies this sort of test. In Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976), the United States Supreme Court reversed a guilty plea even though it assumed "the prosecution had overwhelming evidence of guilt available." 426 U.S. at 644.

Appellee asserts that there is no error from the failure to advise Mr. Elledge of the elements of first degree murder and the failure to inquire into the defense of intoxication due to the fact that rape is a general intent crime. There is an absolute requirement that a defendant be advised of the elements of the crime charged. Henderson; Nash v. Israel, 707 F.2d 298 (7th Cir. 1983); Hayes v. Kinchloe, 784 F.2d 1434 (9th Cir. 1986). This rule applies regardless of whether the colloquy reveals any defenses.

Here, the colloquy raised the possible defense of voluntary intoxication. Appellee makes much of the fact that voluntary intoxication may not be a defense to felony-murder based on rape as the underlying felony. Voluntary intoxication is a defense to premeditated

murder. The trial judge failed to explain the elements of premeditated murder or felony murder. The trial court had a duty to explain these elements and an additional duty to explore the potential defense of voluntary intoxication once it is raised. Davis v. State, 605 So. 2d 936, 938 (Fla. 1st DCA 1992).

The plea colloquy is severely deficient. It fails to address two of the three areas required by Boykin. It fails to address many of the areas required by Fla.R.Crim.P. 3.172 and Koenig. The trial court failed to explain the elements of first degree murder or rape in violation of Henderson. It also failed to inquire into statements raising the defense of intoxication. 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.

Appellee agrees that this issue is properly preserved but argues rejection of this issue by simply stating:

> Elledge's concerns are noteworthy but certainly not subject to reversible error.

AB39.

Appellee makes no attempt to respond to the substantive policy arguments raised in Mr. Elledge's brief nor to the well-reasoned case of Brewer v. State, 650 P.2d 54 (Okl.Cr. 1982).

This Court adopted the rule that the prosecution can introduce the details of a prior violent felony almost twenty years ago. 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). The rule in Brewer is far preferable. It provides a bright line rule as opposed to the current imprecise balancing test.

The prejudice from this evidence is clear. The majority of the prosecution's case-in-chief consisted of details of two other homicides which Mr. Elledge had offered to stipulate to R1243-1282. 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. The prosecution's presentation concerning the prior violent felonies was lengthier than that concerning the homicide itself. It became a feature of the case. Long v. State, 610 So. 2d 1276, 1280-1281 (Fla. 1992); Bell v. State, 650 So. 2d 1032, 1035 (Fla. 5th DCA 1995).

The testimony at issue 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 noted that both of these categories of witnesses should be received with great caution. Finney, at 683-684; Rhodes, at 1204-1205; Freeman, at 76. In Finney, 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 bulk of the state's case-in-chief concerned the details of prior violent felonies to which Mr. Elledge stipulated. This error was highly prejudicial, given the extensive mitigation in this case.

POINT III

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

Appellee asserts that the prior violent felonies were not a feature of the case. The only caselaw relied on by Appellee is Elledge v. State, 346 So. 2d 998 (Fla. 1977). Elledge does not control this issue for several reasons. (1) Elledge dealt only with the admissibility of any testimony beyond the conviction itself. 346 So. 2d at 1001-1002. The decision did not deal with whether the testimony had become a feature of the prosecution's case. The caselaw prohibiting a prior violent felony from becoming a feature of the case was not rendered until years after this decision. Finney; Duncan. (2) The record of the case is substantially different. The prior decision only held the testimony of Mrs. Nelson to be admissible. In this case, there was testimony of Mrs. Nelson, the playing of Mr. Elledge's statement concerning the Gaffney homicide, and the improper cross-examination of Ken Roach concerning the details of the Nelson homicide. See Point IV of Initial Brief. (3) Assuming arguendo, that the prior decision can be considered to be the law of the case on this issue, it still does not bar consideration of this issue. Intervening case law is grounds to reconsider a previous decision. United States v. Cherry, 759 F.2d 1196, 1208 (5th Cir. 1985). There has been substantial intervening caselaw. Duncan; Finney.

The prior violent felonies were a feature of the state's case. The prosecution's presentation concerning the prior violent felonies was lengthier than that concerning the homicide itself. Long v. State, 610 So. 2d 1276, 1280-1281 (Fla. 1992); Bell v. State, 650 So. 2d 1032, 1035 (Fla. 5th DCA 1995).

Appellee incorrectly claims that the bulk of the evidence concerning the prior violent felonies came out through Dr. Schwartz and Dr. Caddy. Dr. Schwartz never testified on direct examination concerning the prior violent felonies. On direct examination, Dr. Caddy testified very briefly as to Bill Elledge's mental state during the other two homicides R2201, 2220. This was only after the state had cross-examined Dr. Schwartz concerning Mr. Elledge's mental state at the time of the prior violent felonies. He never testified about any details of the prior violent felonies.

Appellee's argument that somehow the defense created this problem is strange indeed. The state introduced voluminous detail concerning the prior violent felonies over defense objection. The prosecution then cross-examined the first defense mental health expert concerning Mr. Elledge's mental state during the prior violent felonies. The defense had no choice but to respond on the issue of Mr. Elledge's mental state. Defense counsel scrupulously avoided introducing any evidence concerning the facts of the prior violent felonies. It is hard to fathom how defense counsel's briefly responding to the state's interjection of Mr. Elledge's mental state during the prior violent felonies somehow cures the prior error of the state making the details of the prior violent felonies a feature of the case. Hitchcock v. State, ___ So. 2d ___, 21 Fla. L. Weekly S139 (Fla. March 21, 1996); Lovette v. State, 12 So. 2d 168, 173-174 (Fla. 1943); Dupree v. State, 639 So. 2d 125, 127 (Fla. 1st DCA 1994), decision approved State v. Dupree, 656 So. 2d 430 (Fla. 1995); Stripling v. State, 349 So. 2d 187, 193 (Fla. 1977). Reversal is required.

POINT IV

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

Appellee incorrectly asserts that the defense somehow opened the door to the cross-examination at issue. The direct testimony involved Ken Roach's interrogation of Mr. Elledge and Mr. Elledge's remorse once he had confessed R2073-2086. Mr. Elledge did not bring out testimony concerning the facts of the prior violent felony. Appellee also claims that the state's cross was necessary to counter the impression that the state did not have a case without Mr. Elledge's confession. The defense never attempted to leave this impression. The direct examination of Ken Roach did not go into the strength or weakness of the case against Mr. Elledge R2073-2086. It dealt solely with the interrogation of Mr. Elledge and his remorse once he confessed. The cross went into tremendous detail concerning the facts of the prior homicide R2094-2098. This was prejudicial error.

POINT V

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

Appellee asserts that the prosecution is entitled to introduce any evidence at a resentencing which it could introduce in the guilt phase AB45-46. This Court has rejected this argument. Floyd v. State, 569 So. 2d 1225 (Fla. 1990).

> Floyd next contends that the state on two occasions improperly introduced evidence of his criminal record. On the first occasion, Officer Greg Totts testified that Floyd made the following statement when police booked him for forgery: "'I know that the police are mad at me for running, but I have been in jail before and I was afraid.'" The state argues that we previously determined that this testimony was admissible and the issue should not be relitigated.

> In our earlier opinion, we said that this statement was admissible during the guilt phase because it was relevant to the issue of flight. *Floyd*, 497 So. 2d at 1213. However, we did not consider its admissibility for the purposes of the penalty phase. To be admissible in the penalty phase, state evidence must relate to any of the aggravating circumstances. *Trawick v. State*, 473 So. 2d 1235, 1240-41 (Fla. 1985), *cert. denied*, 476 U.S. 1143, 1067 S.Ct. 2254, 90 L.Ed.2d 699 (1986); *Elledge v. State*, 346 So. 2d 998, 1001-02 (Fla. 1977); § 921.141(1), Fla.Stat. (1983). Flight was not an issue and it was error to admit this testimony.

569 So. 2d at 1231.

Appellee claims that Halliwell v. State, 323 So. 2d 557 (Fla. 1975) does not control this case. Halliwell holds that actions after death are not "the kind of misconduct contemplated by the Legislature in providing for the consideration of aggravating circumstances." 323 So. 2d at 561. This was reaffirmed in Blair v. State, 406 So. 2d 1103, 1108-09 (Fla. 1981). This evidence was inadmissible pursuant to Floyd. The evidence was irrelevant to any aggravating circumstance and was highly prejudicial. Reversal is required.

POINT VI

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

Appellee initially relies on three cases as authority for the concept of compelled mental health evaluations for penalty phase AB47. None of these cases are controlling. Burns v. State, 609 So. 2d 600 (Fla. 1992) supports Mr. Elledge's position on this issue. It states:

> 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.

Neither Leland v. Oregon, 343 U.S. 790, 72 L.Ed.2d 1002, 96 L.Ed. 1302 (1952) nor Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d

973 (1978) involves this issue. Appellee also relies on a series of cases at p.51-54 of its brief. All of these cases, except one, involve situations where the defendant put on a guilt phase defense involving a mental disorder. Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981) involved the use of a state expert's compelled examination at penalty phase. The Court reversed for a new penalty phase as this constituted a Fifth Amendment violation.

Appellee at times relies on Florida Rules of Criminal Procedure 3.202, but at other times disavows reliance on this rule AB47-48,50. Reliance on this rule is misplaced in two respects. (1) The state did not comply with this rule. (2) This rule did not become effective until January 1, 1996. The rule states:

> **Notice of Intent to Seek Death Penalty.** The provisions of this rule apply only in those capital cases in which the state gives written notice of its intent to seek the death penalty within 45 days from the date of arraignment.
>
> Amendments to Florida Rule of Criminal Procedure 3.220 -- Discovery 3.202 -- Expert Testimony of Mental Mitigation During Penalty Phase of Capital Trial, ___ So. 2d ___, 21 Fla. L. Weekly S192, 192-193 (Fla. May 2, 1996).

There is no showing that the state complied with this provision. The rule did not take effect until long after this penalty phase.

Appellee relies on Windom v. State, 656 So. 2d 432 (Fla. 1995) and Glendennig v. State, 536 So. 2d 212 (Fla. 1988) to argue that there would be no ex post facto violation to rely on Rule 3.202. These cases involve the application of a statute that was in effect at the time of the trial. Neither authorize the application of a statute that did not go into effect until years after the penalty phase.

Appellee claims that Fla. Stat. 916.11(b) supports a compelled mental evaluation by a state expert for penalty phase AB50-51.

> The court may appoint no more than three nor fewer than two experts to determine issues of the mental condition of the defendant in a criminal case, including the issues of competency to stand trial, insanity and involuntary hospitalization or placement.
>
> Fla. Stat. 916.11(b) (emphasis supplied).

This statute gives the court authority to appoint experts. It gives no authority to compel a mental evaluation by a state expert. This Court has recognized the distinction between court experts and experts for the parties.

> Experts appointed by the Court to ascertain mental capacity are neither prosecution nor defense witnesses, but neutral experts working for the Court.
>
> Parkin v. State, 238 So. 2d 817, 821 (Fla. 1970).

Appellee claims that Dillbeck v. State, 643 So. 2d 1027 (Fla. 1994) holds that the state is entitled to a compelled mental evaluation for penalty phase even in cases in which the defendant has been previously examined by court appointed experts for competency and sanity AB58. There is nothing in Dillbeck discussing this situation. Appellee also claims that it would somehow be at a disadvantage if it could rely only on these experts AB58. These experts were instrumental in Mr. Elledge entering his guilty plea. If they are deficient in any way, he should be allowed to withdraw his guilty plea. See Point I.

This Court should follow 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) and reject compelled mental evaluations for penalty phase. Assuming arguendo, that this Court does not reject the concept of compelled mental evaluations in toto, it must still reverse the current case. Here, there was no rule or statute authorizing this examination and there was no need for this exam as

Mr. Elledge had already been examined by court appointed experts for competency and sanity. Reversal for a new penalty phase is required.

POINT VII

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

Appellee claims that Dr. Schwartz' testimony opened the door to this evidence. Appellee based this on a comment which Dr. Stock, the prosecution's expert, made concerning use of the Carlson psychological exam to measure adjustment to prison R2659-2660. Neither Dr. Schwartz, nor Dr. Caddy, the defense mental health experts, testified concerning Mr. Elledge's lack of future dangerousness.

Appellee also claims that Professor Radelet's testimony opened the door to this rebuttal. Professor Radelet did testify as to lack of future dangerousness. However, he is not a mental health professional. He 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 record review and analyzing statistical patterns R1582-1584.

The decisions of this Court support the idea that a compelled mental evaluation can be used only to rebut testimony from a mental health professional which is based on a face to face evaluation. Fla.R.Crim.P. 3.202 states that a compelled mental evaluation for penalty phase is allowed only when the 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 non-statutory mental mitigating circumstances.

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

It also states that the examination by the state's expert:

> shall be limited to those mitigating circumstances the defendant expects to establish through expert testimony.
>
> Fla.R.Crim.P. 3.202(d).

A compelled mental evaluation for penalty phase is triggered only by introduction of testimony from a mental health professional who has examined the defendant. The examination of the state's expert is limited to rebutting this testimony.

These limits are also supported by this Court's decisions dealing with compelled mental evaluations. Dillbeck v. State, 643 So. 2d 1027 (Fla. 1994).

> We note that Dillbeck planed to, and ultimately did, present extensive mitigating evidence in the penalty phase through defense mental health experts who have interviewed him. Under these circumstances, we cannot say that the trial court abused its discretion in striving to level the playing field by ordering Dillbeck to submit to a prepenalty phase interview with the State's expert.
>
> 643 So. 2d at 1030.

Dillbeck relied on State v. Hickson, 630 So. 2d 172 (Fla. 1993):

> If Hickson decides to rely on the battered-spouse syndrome, and wished to present the testimony of an expert who has examined her, she must submit to an examination by the state's expert, whose testimony may be used to rebut her expert's testimony. On the other hand, if she chooses to have an expert, who has not examined her, testify only about the syndrome in general or to answer only hypothetical questions, the state will not be allowed to have Hickson examined by its expert, but may, if it chooses, present its own expert to testify as to generalities and hypotheticals.
>
> 630 So. 2d at 176-177.

The state is entitled to a compelled mental evaluation only to rebut a mental health professional who has examined the defendant.

The rebuttal in the current case was contrary to Fla.R.Crim.P. 3.202, Dillbeck and Hickson. Professor Radelet is not a mental health professional and did not testify based on an examination. The state

was improperly allowed to rebut his testimony with the testimony of a mental health professional who had examined Mr. Elledge.

The approval of the procedure at issue here would allow the compelled mental evaluation to become a hunting license for the state expert to rebut all the defendant's mitigation; whether from an expert or a lay witness, to obtain evidence of aggravation and even to obtain evidence of guilt for use in the event of a re-trial. In Parkin v. State, 238 So. 2d 817, 821 (Fla. 1979) this Court expressed concern that a compelled mental evaluation could become a "hunting license" to go beyond its original scope. The state's argument would lead to compelled mental evaluations whenever the defendant puts on any mitigation. This violates the Fifth, Sixth, Eighth and Fourteenth Amendments and is contrary to Dillbeck, Hickson and Rule 3.202.

This error is harmful. This evidence dealt with a critical issue in the case. Because of Mr. Elledge's two other consecutive sentences of life without parole for twenty-five years, he will spend the rest of his life in prison if given a life sentence R1591-1592. Mr. Elledge's ability to live in prison was a central question facing the jury. The defense presented the testimony of Professor Radelet concerning Mr. Elledge's ability to adjust to prison. He testified that he reviewed the complete files of Mr. Elledge at Florida State Prison R1576. Mr. Elledge had received his GED in prison R1577-1578. He had reviewed Mr. Elledge's progress reports and disciplinary reports (DRs) R1578-1579.

> 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.

Mr. Elledge also called several correctional officers to discuss his successful adjustment to prison. Sergeant John Bradley had been an officer at Florida State Prison for 12½ years R1890. He has been supervisor of Bill Elledge's wing R1894. Mr. Elledge is not a problem inmate R1895. Ward Lasher 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 R1936. He had never had any problems with Mr. Elledge and that he had always conducted himself well R1930-1931. John Coley 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 has worked as a corrections officer for twelve years and had known Bill Elledge during that time R1944-1945. He has never written a disciplinary report for Bill Elledge or seen him involved in any fighting or assaultive behavior R1946. George Kuck 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 dramatic positive change in Bill Elledge since 1985 R2060. 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. 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.

Appellee asserts that the improper rebuttal of this mitigation was harmless error due to cross examination of these witnesses concerning Mr. Elledge's DRs AB60. However, the DRs were over a period of 18 years and most of them were trivial in nature and remote in time. Professor Radelet reiterated his opinion concerning Mr. Elledge after being cross examined about DRs. He stated:

> The first criteria was the reason why I made the statement that I believe Mr. Elledge's probability of future dangerousness if assigned to life imprisonment is next to zero is based on the fact that, number one, he's never getting out.
>
> Number two, despite all these incidents that we have talked about, his institutional adjustment when compared with other prisoners I would term as actually excellent. That yelling and mouthing off are real trivial things when compared with real incidents of physical assaults that occur in prison.
>
> And the third thing that I didn't really talk about, but I would be pleased to do, is that with the pattern of criminology like Mr. Elledge's there is a lack of premeditation in the sense that his murders were not planned days or weeks in advance. Instead they were done without much forethought and most probably under the influence of alcohol and drugs. And therefore because of that instantaneous and situational nature of the premeditation they did make an even better bet for a satisfactory adjustment to prison.

R1600-1601.

Only Dr. Stock stated that Mr. Elledge would be dangerous in a prison setting. Dr. Stock testified as a forensic psychologist who had examined Mr. Elledge. This erroneous rebuttal issue was harmful.

This Court and the United States Supreme Court have recognized the crucial nature of the issue of a capital defendant's conduct in prison and his ability to live in prison if given a life sentence. Simmons v. South Carolina, 512 U.S. ___, 114 S.Ct. 2187, 2193, 129 L.Ed.2d 133 (1994) ("A defendant's future dangerousness bears on all sentencing determinations made in our criminal justice system");

Skipper v. South Carolina, 476 U.S. 1, 2, 106 S.Ct. 1669, 1671, 90 L.Ed.2d 1 (1986) (Evidence that the defendant would not pose a danger if spared, but incarcerated); Jurek v. Texas, 428 U.S. 262, 275, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976) (plurality opinion) ("Any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose"); Valle v. State, 502 So. 2d 1225 (Fla. 1987) (Finding reversible error in the exclusion of defense experts who would testify to the defendant's ability to function in prison if given a life sentence).

The harmful nature of this error is demonstrated by the treatment this Court and the United States Supreme Court have given to the erroneous exclusion of defense evidence on this issue. In Valle, the defendant was allowed to put on the testimony of a rehabilitation officer concerning the fact that he had been a model prisoner. 502 So. 2d at 1226. However, he was not allowed to put on the testimony of a psychologist and two corrections consultants concerning his probable future conduct if given a life sentence.

> Unless it is clear beyond a reasonable doubt that the erroneous exclusion of evidence did not affect the jury's recommendation of death, the defendant is entitled to a new jury recommendation on resentencing. Since we cannot say beyond a reasonable doubt that the exclusion did not affect that recommendation, we remand for a new sentencing hearing with a new jury panel.

Id. at 1226.

In Skipper, the defendant and his ex-wife were allowed to testify concerning his conduct in jail and his ability to function in prison if given a life sentence. 476 U.S. at 7-8. However, he was not allowed to call two jailers and a regular visitor on these issues. 476 U.S. at 6-8.

> It appears reasonably likely that the exclusion of evidence bearing upon petitioner's behavior in jail (and hence, upon his likely future behavior in prison) may have affected the jury's decision to impose the death sentence. Thus, under any standard, the exclusion of the evidence was sufficiently prejudicial to constitute reversible error.

Id. at 8.

In both Valle and Skipper the defendant was allowed to present evidence concerning his good conduct in jail, however, other evidence was excluded despite claims that the evidence was cumulative and its exclusion harmless. These errors are similar to the admission of erroneous rebuttal evidence in the current case. The use of Dr. Stock, with the advantage of having examined the defendant, to rebut this essential mitigation was harmful error. Reversal is required.

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.

Appellee erroneously asserts that defense counsel never requested that his expert view the state's expert's testimony to prepare for possible surrebuttal.

> DEFENSE COUNSEL: May I have my expert here to observe Dr. Stock testify in order to determine whether or not I have proper surrebuttal to present?
>
> MR. SATZ [Prosecutor]: I object to that, Your Honor, because I couldn't have my expert in here.
>
> THE COURT: No, no, it's not proper.
>
> MR. LASWELL: Why isn't it?
>
> THE COURT: You can pose whatever hypotheticals you want as a result, etcetera.
>
> MR. LASWELL: Come on, Judge, we are out on the cutting edge of this thing anyhow, let's go the extra mile, let me have my expert in here.
>
> THE COURT: No, the rules apply.

R2425-2426.

Appellant will rely on his Initial Brief as to the merits of this issue. Due to typographical error, undersigned mistakenly cited this as page 2450 in his Initial Brief. He apologizes to this Court.

POINT IX

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

Appellee claims that the trial court dismissed the jury in response to a defense motion for mistrial due to jury misconduct AB62-68. The trial court had actually denied this motion. The jury was excused on the state's motion to prohibit the defense exercise of a peremptory on Ms. Fussell.

Defense counsel had moved for mistrial based on jury misconduct R320. The trial court conducted an evidentiary hearing on this issue R320,320-328. Defense counsel renewed his motion for mistrial R387. The trial court denied the motion.

> THE COURT: The Court candidly finds that there are a couple of jurors that made comments. Those jurors particularly being Mr. Prater, juror number 966, as well as Mr. Latona jury 854. Those jurors additionally have clearly formed a determination before even hearing any evidence as to what the outcome of these proceedings should be.
>
> The other jurors, however, this Court finds have not formed any definite or fixed opinions on the merits of this case....
>
> The Court finds that the panel is not tainted, that there are two individuals who did make comments, those two individuals' comments came only to themselves. The Court is going to excuse those two individuals and the Court once again in front of the entire venire inquire whether or not there is anyone else who heard any comments that they did not raise their hands.

R388-389.

It was only after this motion had been denied, that the defense attempted to exercise a peremptory on Ms. Fussell R391. The trial court disallowed the peremptory and struck the entire panel R382,422.

> We have matters unresolved from yesterday. The first being the Slappy challenge to Ms. Fussell that Mr. Satz made.... Let's start with the Slappy objection.
>
> MR. SATZ [Prosecutor]: Your Honor, do you know if there is going to be another panel available?
>
> THE COURT: I can get another panel.
>
> MR. SATZ: You can. Well if you can, then I'll exercise my Slappy.
>
> THE COURT: Okay. Call the jury room, tell them we'll take the panel.

R422.

The trial court did make comments to the jurors concerning the delay issue along with numerous other comments R423-427. However, this is not why the jury was excused. The jury was excused on the state's objection to the defense exercise of a peremptory challenge.

Appellee never responds to the key issue, whether the state's objection was adequate to trigger an inquiry. It clearly was not. Czaja v. State, ___ So. 2d ___, 21 Fla. L. Weekly D1177 (Fla. 2d DCA May 17, 1996); Miller v. State, 664 So. 2d 1082 (Fla. 3d DCA 1995); Rivera v. State, ___ So. 2d ___, 21 Fla. L. Weekly D805 (Fla. 4th DCA April 3, 1996). Reversal is required.

POINT XVII

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

Appellee's reliance on King v. State, 623 So. 2d 486 (Fla. 1993) is misplaced. In King, this Court reversed for a jury resentencing. Thus, the Court did not have to reach the validity of the judge's order. Id. at 488-489. However, this Court was critical of the judge's deference to the jury's recommendation. Id. at 489.

Appellee correctly points out that the trial judge discussed aggravating and mitigating circumstances AB77-79. This case is still

controlled by Ross v. State, 386 So. 2d 1191 (Fla. 1980). In Ross, the trial judge made findings as to aggravating and mitigating circumstances. Id. at 1197. However, this Court reversed as the judge had stated that he found "no compelling reason to override the recommendation of the jury." Id. at 1197. Here, the trial court's comments were even stronger. The judge stated, on several occasions, that it is only under "rare circumstances" that he could impose a sentence other than that of the jury R34,36,463,465, 2871. This view distorted the entire sentencing process. Resentencing is required.

POINT XVIII

THE TRIAL COURT ERRONEOUSLY APPLIED A PRESUMPTION OF DEATH.

Appellee erroneously claims that Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988) does not control this case as it was the judge who relied on an erroneous death presumption rather than this exact same presumption appearing in the form of a jury instruction AB80-81. It is well settled that the judge and jury are co-sentencers. Espinosa v. Florida, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). In Jackson, the Court stated:

> 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).

POINT XIX

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

Appellee's entire argument is directed at the trial court's failure to find this mitigating circumstance. However, this issue is also premised on the judge's failure to consider this mitigator.

> The sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant.

Campbell v. State, 571 So. 2d 415 (Fla. 1990).

The explicit consideration of all relevant mitigating circumstances is required by the United States Constitution.

> The sentencing court must therefore explicitly discuss in its written findings all relevant mitigating circumstances, including those it finds insufficient to warrant leniency.

Smith v. McCormick, 914 F.2d 1153, 1166 (9th Cir. 1990).

This Court has consistently reversed for failure to consider mitigators proposed by the defense. Larkins v. State, 655 So. 2d 95, 100-101 (Fla. 1995); Crump v. State, 654 So. 2d 545, 546-547 (Fla. 1995); Ferrell v. State, 653 So. 2d 367, 370-371 (Fla. 1995). Defense counsel specifically requested this mitigator and the jury was instructed on it R2579,3865. Resentencing is required.

POINT XX

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

Appellee concedes that the trial judge misstated Dr. Caddy's conclusion as to whether Bill Elledge suffered from extreme mental or emotional disturbance at the time of the homicide. Fla. Stat. 921.141(6)(b); AB83-84. Dr. Caddy never wavered in his conclusion that Bill Elledge met the criteria for this statutory mitigating circumstance R2374. The judge's order is based on materially false information. It is a violation of due process to be sentenced upon false information. Townsend v. Burke, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948); United States v. Tucker, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972); Park v. United States, 832 F.2d 1244, 1246 (11th Cir. 1987). The United States Supreme Court has noted the special concerns for the accuracy of all information relied on by the trial judge in capital cases. Gardner v. Florida, 430 U.S. 349, 359, 97 S.Ct. 1197, 1205, 51 L.Ed.2d 393 (1977).

Appellee claims this was harmless error. However, a reading of the trial court's order indicates that it relied on this misstatement of Dr. Caddy's testimony in rejecting this statutory mitigating circumstance. He concluded his analysis as follows:

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

R3759-3760.

Appellee asserts that "adding this statutory mitigation factor would still demonstrate that the aggravation outweighed the mitigation" AB86. This approach is contrary to this Court's stated position that it does not reweigh aggravators and mitigators. Parker v. Dugger, 498 U.S. 308, 319, 111 S.Ct. 731, 738, 112 L.Ed.2d 812 (1991) ("The Florida Supreme Court has made it clear on several occasions that it does not reweigh the evidence of aggravating and mitigating circumstances"); Hudson v. State, 538 So. 2d 829, 831 (Fla. 1989) ("It is not within this Court's province to reweigh or reevaluate the evidence presented as to aggravating or mitigating circumstances").

This error is harmful. The trial court based its rejection of the statutory mental mitigator on a misstatement of the record. This error is akin to a trial court applying the wrong legal standard in determining whether the statutory mental mitigators exist. This Court has consistently held this to be reversible error and ordered a

resentencing. Campbell v. State, 571 So. 2d 415, 418-419 (Fla. 1990); Ferguson v. State, 417 So. 2d 631, 636-638 (Fla. 1982); Mines v. State, 390 So. 2d 332, 337 (Fla. 1980). In Ferguson, supra, this Court explained why such an error is almost always harmful:

> In our review capacity we must be able to ascertain whether the trial judge properly considered and weighed these mitigating factors. Their existence would not as a matter of law, invalidate a death sentence, for a trial judge in exercising a reasoned judgment could find that a death sentence is appropriate. It is improper for us, in our review capacity, to make such a judgement.

417 So. 2d at 638.

This Court recently reversed, in part, on a virtually identical error. Larkins v. State, 655 So. 2d 95, 100 (Fla. 1995). In Larkins, the trial court also misinterpreted a defense mental health expert's testimony concerning a statutory mental mitigator.

> The trial court concluded that Dr. Dee was not of the opinion that Larkins' condition was of such a nature that the defendant lacked the capacity to appreciate the criminality of his act or to conform his conduct to the requirements of law. In fact, Dr. Dee testified that Larkins' organic brain disorder "impairs his capacity to control that conduct whatever he appreciates it to be."

655 So. 2d at 100.

The court's misconstruction of crucial expert testimony is harmful.

POINT XXI

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

Appellee claims that the trial court considered Bill Elledge's long-term drug and alcohol abuse as a mitigating factor by stringing together disparate parts of the judge's order AB87. However, an analysis of the order reveals that the judge never considered this as a mitigating factor. Appellee first cites R3755. Here, the judge is

discussing statutory mitigating circumstance Fla. Stat. 921.141(6)(b) (under the influence of extreme mental or emotional disturbance) R3753-3766. The only mention of drugs or alcohol use in this section was "During the defendant's teenage years, he consumed alcohol and drugs" R3755. There is no analysis of long-term alcoholism and drug abuse as a non-statutory mitigating factor. Appellee next cites R3760. This section deals with the statutory mitigating circumstance Fla. Stat. 921.141(6)(f) (capacity to appreciate the criminality of your conduct or to conform it to the requirements of law). The only statement regarding drugs or alcohol had to do with the incident itself, not long-term drug and alcohol abuse.

> Janet Pocis, the bartender who served the defendant just before the murder of Ms. Strack, testified that the defendant was sober when he left the bar with his victim.

R3760.

This only involved Mr. Elledge's use of alcohol at the time of the crime as it related to this statutory mitigating circumstance. This is not consideration of Bill Elledge's long-term drug and alcohol abuse as a non-statutory mitigating circumstance.

Appellee also cites R3761-3762. This was a discussion of Bill's family background as a mitigating circumstance. The only statement about alcohol or drug abuse concerns his parents.

> The defendant's mother and father were alcoholics.

R3761.

The trial court never considered Bill Elledge's long-term drug and alcohol abuse as a non-statutory mitigating circumstance. Defense counsel proposed this as a non-statutory mitigator R3648. There was unrebutted testimony concerning Mr. Elledge's long history of drug and alcohol abuse R1497-1499,1558,1694. The prosecution's expert noted

that Bill Elledge suffered from the disease of alcoholism R2683-2684. This Court has held drug and/or alcohol abuse to be a non-statutory mitigating factor. The trial court erred in failing to weigh and find this as a mitigating factor.

Appellee's argument regarding mental health problems which do not rise to the level of the statutory mental mitigators points up the trial court's error. Appellee states:

> With regard to finding mental health problems which do not rise to the level of statutory mitigation, the trial court rejected mental health problems as mitigators based on his findings that the statutory mitigators did not apply.
>
> AB87.

This is precisely the problem. The trial court only considered mental mitigation in terms of the statutory mitigating factors and did not consider it as non-statutory mitigation. This is contrary to Florida law and the Eighth Amendment.

> It clearly would be unconstitutional for the state to restrict the trial court's consideration solely to "extreme" emotional disturbances. Under the case law, *any* emotional disturbance relevant to the crime must be considered and weighed by the sentencer, no matter what the statutes say.
>
> Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990).

In Foster v. State, 614 So. 2d 455, 464-465 (Fla. 1992), this Court reversed for a resentencing due to the trial court's limitation of its consideration of mental mitigation to the statutory mitigator.

Appellee also claims that this error is harmless as even adding these mitigating factors, "the aggravation would still far outweigh mitigation in this case" AB88. This approach is contrary to this Court's stated position that it does not reweigh aggravators and mitigators. Hudson, at 831.

These two errors are harmful, individually and cumulatively. There was unrebutted testimony concerning Mr. Elledge's history of

drug and alcohol abuse R1497-1499,1558,1694. 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 failure to weigh and find this was harmful error.

The trial court's error in failing to consider mental problems which do not meet the statutory mitigators is also harmful error. This Court reversed on this precise issue in Foster. There was extensive testimony from lay and expert witnesses concerning Bill Elledge's mental problems. The error in considering this evidence only as statutory mitigation is demonstrated by this Court's opinion in Clark v. State, 609 So. 2d 513 (Fla. 1992). In Clark, the defendant presented similar mitigation. (Growing up in an alcoholic home, victim of emotional and physical abuse, witnessed physical violence between his parents, long-term drug and alcohol abuse and emotional disturbance.) 609 So. 2d at 516. This Court relied heavily on this evidence in reducing a death sentence to life imprisonment.

> While we find no error in the trial court's rejection of this evidence as statutory mitigation, ... this evidence does constitute strong nonstatutory mitigation.
>
> 609 So. 2d at 516.

The evidence in this case is similar to that in Clark. The failure to consider this evidence as non-statutory mitigation is reversible error. This error is compounded by the trial court's complete misstatement of Dr. Caddy's testimony regarding the statutory mental mitigating circumstance of extreme mental or emotional disturbance. These errors combine to render the trial court's consideration of mental mitigation, a key area of the defense case, sorely lacking.

This Court has consistently reversed for failure to consider non-statutory mitigation in the trial court's order. Larkins v. State, 655 So. 2d 95, 100-101 (Fla. 1995); Crump v. State, 654 So. 2d 545, 546-547 (Fla. 1995); Ferrell v. State, 653 So. 2d 367, 370-371 (Fla. 1995); Farr v. State, 621 So. 2d 1368, 1369-1370 (Fla. 1993); Santos v. State, 591 So. 2d 160, 163-164 (Fla. 1991); Lucas v. State, 568 So. 2d 18, 23-24 (Fla. 1990); Campbell. Many of these cases involved the failure to consider the mitigators at issue here, long-term drug and alcohol abuse and non-statutory mental mitigation. Larkins; Crump; Ferrell; Campbell. Long-term drug and alcohol abuse and mental mitigation were key aspects of the defense case. The failure to consider this as non-statutory mitigation is reversible error.

POINT XXII

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

Appellee is correct that, in general, it is within the trial court's discretion to determine the weight to be given to a mitigator. However, the cases cited by Appellee for this proposition are all cases in which the trial court was applying the correct legal standard and had correctly recited the facts.

In the present case, the trial court's analysis was based on a factual and legal error. 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 and one sister had also been 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. 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 this 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 repeatedly beaten and abused by his mother throughout his youth. This is a mitigator of great weight. This case is akin to Nibert in its inaccurate legal analysis. Just as the defendant's age was an improper factor in denigrating child abuse as a mitigator in Nibert, whether Mr. Elledge's siblings were engaged in criminal activity was

improper to denigrate child abuse as a mitigator in this case. In this case, the trial court also based its finding on a factual error.

This case has been previously reversed, in part, for the failure to find this mitigator. Elledge v. State, 613 So. 2d 434 (Fla. 1993).

> We also agree with appellant that evidence of an abused childhood was such that this mitigating circumstance should have been found. A reasonable quantum of competent, uncontroverted evidence of child abuse was presented by Elledge's cousin, Sharon Jennings, who testified that Elledge's mother, an alcoholic, regularly beat him for fifteen minutes at a time, until she "drew blood" and for no apparent reason. Failing to find an abused childhood as a nonstatutory mitigating factor was error. *Nibert v. State*, 574 So. 2d 1059 (Fla. 1991).
>
> 613 So. 2d at 436.

The trial court again ignored the clear holding of Nibert. Resentencing is required.

POINT XXIII

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

Appellee correctly points out that this Court upheld this aggravator in its 1982 opinion. Elledge v. State, 408 So. 2d 1021, 1023 (Fla. 1982). However, this does not bar reconsideration of this issue. A court has the power to reconsider its ruling if it becomes convinced that the original ruling is erroneous. Beverly Beach Properties v. Nelson, 68 So. 2d 604, 607-608 (Fla. 1953). Intervening case law is grounds to reconsider a previous decision. United States v. Cherry, 759 F.2d 1196, 1208 (5th Cir. 1985).

Elledge and all of the cases relied on by Appellee, except one, are from 1982-1985 AB92-93. It should also be noted that one case relied on by Appellee actually strikes this aggravator. Caruthers v. State, 465 So. 2d 496, 498-499 (Fla. 1985). Many of the cases relied on by Appellee are distinguishable as they involve abducting the

victim to a remote location prior to the homicide. Martin v. State, 420 So. 2d 583 (Fla. 1982); Griffin v. State, 414 So. 2d 1025 (Fla. 1982); Adams v. State, 412 So. 2d 850 (Fla. 1982); Roulty v. State, 440 So. 2d 1257 (Fla. 1983).

This Court was applying an analysis of this aggravator during this period which it has since disavowed. This Court often relied on the fact that the victim could identify the defendant as adequate proof of this aggravator.

> *The capital felony was committed for the purpose of avoiding or preventing a lawful arrest.* § 921.141(5)(e), Fla.Stat. (1981). Once again the evidence presented at trial strongly supports this aggravating circumstance. Defendant admitted knowing the victim. Plainly the defendant killed to avoid identification and arrest. Proof of the requisite intent to avoid detection is strong in this case.
>
> Lightbourne v. State, 438 So. 2d 380, 391 (Fla. 1983).

> That the murder of Kirchaine was committed for the purpose of avoiding or preventing arrest was also adequately shown. Kirchaine was a potential witness who could have identified appellant and testified about the robbery and the murder of Lundgren.
>
> Griffin v. State, 414 So. 2d 1025, 1029 (Fla. 1982).

In Martin v. State, 420 So. 2d 583 (Fla. 1982), this Court approved the following finding of fact by the trial judge.

> The capital felony was committed for the purpose of avoiding or preventing a lawful arrest inasmuch as the defendant was destroying the chief witness in the person of his victim.
>
> 420 So. 2d at 585 n.3.

Lightbourne, Griffin, and Martin all support the application of this circumstance because the victim was a "potential witness" or "knew the victim."

This Court has subsequently rejected this reasoning. In Geralds v. State, 601 So. 2d 1157 (Fla. 1992), this Court rejected this aggravator and stated:

> The mere fact that the victim knew and could identify the defendant, without more, is insufficient to prove this aggravating factor beyond a reasonable doubt.

601 So. 2d at 1169.

This Court's stricter view of this aggravator is akin to its frank disavowal of its views from this era on the cold, calculated, and premeditated (CCP) aggravator and the life recommendation cases. Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987); Cochran v. State, 547 So. 2d 928, 933 (Fla. 1989). This Court has made the same break with its analysis of the avoid arrest aggravator. This Court should revisit its 1982 opinion on this issue.

The only case cited by Appellee which was not from this earlier era is Hitchcock v. State, 578 So. 2d 685 (Fla. 1990) AB93. However, Hitchcock is clearly distinguishable from the current case. In Hitchcock, this Court stated:

> Hitchcock admitted that he killed the victim to keep her from telling her mother.

Id. at 693.

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. This aggravator is improper.

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.

Appellee mentions the prior decisions in this case. However, none of the prior opinions in this case discuss the applicability of this aggravator. The doctrine of law of the case is limited to

"questions of law actually presented and considered on a former appeal." U.S. Concrete Pipe Co. v. Bould, 437 So. 2d 1061, 1063 (Fla. 1983). In this case, there is no discussion of the issue.

Appellee also relies on Hitchcock v. State, 578 So. 2d 685 (Fla. 1990) for the proposition that this Court upholds this aggravator in a strangulation case. However, in more recent cases this Court has imposed the requirement that the defendant have an intent to cause unnecessary suffering. Hamilton v. State, ___ So. 2d ___, 21 Fla. L. Weekly S227, 229 (Fla. May 23, 1996); Kearse v. State, 662 So. 2d 677, 686 (Fla. 1995); Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991).

Appellee's reliance on Geralds v. State, ___ So. 2d ___, 21 Fla. L. Weekly S85 (Fla. February 22, 1996) is misplaced. Geralds involved an extended beating and multiple stab wounds. Id. at 587. In the present case, the choking was an instinctive reaction to screaming. There was no intent to torture or cause unnecessary suffering. This aggravator does not apply.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to CAROLYN SNURKOWSKI, Asst. Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399 this 23rd day of July, 1996.

Richard B. Greene
Of Counsel