IN THE SUPREME COURT OF FLORIDA

MARK ANTHONY POOLE,	:	
Appellant,	:	
vs.	:	Case No.SC05-1770
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR POLK COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

STATEMENT OF THE CASE

The Polk County Grand Jury indicted the appellant, Mark Anthony Poole, on November 1, 2001, for: Count One, the first- degree premeditated murder of Noah Scott by beating him with a tire tool; Count Two, attempted first-degree premeditated or felony murder of Loretta White with the use of a weapon; Count Three, burglary of a dwelling with an assault or battery with the use of a weapon; Count Four, sexual battery of Loretta White with physical force likely to cause serious personal injury; and Count Five, robbery with a deadly weapon. The indictment alleged that each of the offenses occurred between October 12 and 13, 2001. [I R143-147] The State filed a notice of intent to seek the death penalty on December 6, 2001. [I R163] The court granted appellant's request to appoint the public defender. [II R321]

Defense counsel filed pretrial motions to bar imposition of a death sentence on the ground that Florida's capital sentencing procedure is unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002). [IV R615-638, 671-690, 697-701] The court denied the motions. [V R880, 893, 896]

Circuit Judge J. Dale Durrance conducted a jury trial on April 11-27, 2005. [VI T1] The jury found appellant guilty as charged on each of the five counts of the indictment. [V R912-916]

Judge Durrance conducted the penalty phase of trial on May 2, 2005. [XXII T2905] The jury unanimously recommended the death penalty. [VI R953]

The State filed a sentencing memorandum on May 26, 2005. [VI R956-957] Defense counsel filed a memorandum in support of a life sentence on July 15, 2005. [VI R959-987] The court conducted a Spencer hearing on July 22, 2005. [VI R988-996] The court conducted a sentencing hearing on August 25, 2005. [VI R997-1020]

The court adjudicated appellant guilty and sentenced him to death for Count One, first-degree premeditated murder, and to consecutive terms of life imprisonment for each of the other four offenses, Counts Two through Five. [VI R1024-1043] The court's findings on aggravating and mitigating circumstances are set forth at the end of the Statement of the Facts, infra. Defense counsel filed a timely notice of appeal on August 31, 2005, [VI R1044] and the court appointed the public defender to represent appellant on this appeal. [VI R1051]

STATEMENT OF THE FACTS

State Evidence

In October 2001, 18-year-old Loretta White lived with her 24- year-old fiancé, Noah Scott, in trailer 4-L at the Orangewood Villa Mobile Home Park in Lakeland. White was pregnant at that time and later gave birth to a healthy baby

boy. [XIX T2400-2402] On Friday, October 12, White and Scott went to bed between 11:30 p.m. and midnight after playing video games. [XIX T2401, 2404, 2443] Scott owned Sega Genesis, Sega Dreamcast, and Super Nintendo game systems connected to the television in the bedroom. [XIX T2438-2439] They slept unclothed on a mattress and box spring set on the floor of their bedroom. Scott's side of the bed was next to the wall. [XIX T2405-2406]

White awoke lying on her back with a pillow over her face. From the bottom of the pillow she saw a black person's arm and Scott lying on the floor at the foot of the bed. [XIX T2406-2408, 2444] A man was on top of White with his penis inside her vagina. [XIX T2410, 2444] She told him repeatedly not to hurt her, that she was pregnant. [XIX T2407, 2409, 2417] Scott kept trying to get up to stop the man, but each time the man hit him in the face with an object, and Scott fell back down. [XIX T2409, 2416-2417, 2445] When Scott tried to help White, he moaned in pain. [XIX T2419] The man was much larger than Scott. White saw only his arm. [XIX T2411, 2444] The man hit both of them repeatedly. [XIX T2412] White thought the man ejaculated inside her, but she was not sure because she kept going in and out of consciousness. [XIX T2412-2413, 2444]

The man rolled her over onto her stomach. He hit the back of her head with a hard object and kept asking her where the money was. She replied that she didn't know, that they

did not have any money. When she tried to turn her head, he stopped her and told her not to look. [XIX T2408-2409] The man left the room after the attack. White got out of bed, put on flannel boxers and a tank top, and then passed out. The man returned. He touched her vaginal area and said, “Thank you.” She did not recognize his voice, but he sounded like an older man [XIX T2413-2415, 2418] White had previously heard the voices of Trevor Campbell and Albert Lewis. Neither of them was the attacker. [XIX T2442-2442]

At times during the night White woke up and pulled Scott’s hand. He sat up, she heard him breathe, and then she threw up and passed out again. [XIX T2418] White looked at the clock at 3:30. She thought this was just before or just after the man thanked her. The next thing she knew, her alarm went off at 8:00 or 8:30. [XIX T2413-2414, 2445-2446] White got up and went into the bathroom. She fell while trying to wash her hands. She went to the living room for the cell phone. She collapsed by the bedroom doorway. [XIX T2422-2423]

White called 911 and reported that she did not know whether her fiancé was still alive, there was blood everywhere, she had a head injury, she had been raped, she could not move, and two black men had broken into the trailer. When the operator asked if they had a weapon, White replied, “All I know is one had a belt.” [XIX T2423-2433] She remained on the phone until the police and ambulances arrived. [XIX T2433-2437] White told a paramedic that two black people

broke into the trailer. [XIX T2307]

Dr. Ransom Simmons treated White at the emergency room of the hospital. She was suffering from a concussion and did not remember exactly what had happened. [XVIII T2247-2252, 2264-2267] She had multiple severe facial and scalp lacerations to the bone, her skull was fractured, and part of the ring finger of her left hand was missing. [XVIII T2253-2257, 2259-2262, 2266-2274] Her injuries were consistent with a beating with a tire iron. [XVIII T2257] She also suffered acute blood loss. [XVIII T 2257-2258] Her injuries were life threatening; she could have died. [XVIII T2258] A nurse performed a sexual assault examination and found possible semen in her vagina. [XVIII T2261; XIX T2344-2358]

The parties stipulated to the identity of the deceased, Noah Scott. [XVI T1903-1904] Dr. Stephen Nelson, the medical examiner [XIX T2458], went to the scene on October 13. [XIX T2463] He entered the trailer to observe the body at 4:20 p.m. [XXI T2655, 2753-2754] The “nonblanching lividity” of the body indicated that Scott had been dead at least 10 to 12 hours. [XX T2470-2472, 2489-2490] Dr. Nelson conducted the autopsy on October 15. [XIX T2462] He found lacerations and bruises around Scott’s eyes and on the top of the head. There were skull fractures on top of the head and at the base of the skull. These injuries were consistent with blows from a tire iron. [XX T2476-2484] Scott suffered at least 13 blows to the head. The cause of death was blunt force head trauma. [XX

T2486]

Mark Poole lived with his girlfriend, Pamela Johnson, in a trailer at 3328 North Florida Avenue. [XX T2525-2528, 2530] On Friday, October 12, Poole left the trailer on foot while it was still daylight. [XX T2528-2530] Johnson locked the door. Poole returned around midnight and knocked on the door, but Johnson refused to let him in. He left again. [XX T2538-2540] Poole returned at 4:50 a.m. [XX T2530] He said he had been helping a lady put a muffler on a car or change a tire. He went to bed. [XX T2531] At 8:32 that morning, Johnson heard sirens. Her son lived nearby. Poole went down the road to check. He returned and said her son was okay, and the ambulance did not go to his house. [XX T2531-2532, 2534] He also told her some man had been killed. [XX T2541-2542] Johnson found a game controller on the front step. She handed it to Poole, and he put it in the nightstand in the bedroom. [XX T2532-2533] Johnson had been telling Poole to move out for two weeks and repeated the demand on Saturday. When she returned from work, Poole was gone and did not return. [XX T2534, 2540] He did not take any of his belongings. [XX T2535] Later on, the police searched the trailer pursuant to a warrant. They took the game controller. [XX T2537]

Dawn Brisendine lived in trailer 4 at the Orangewood Villa Mobile Home Park. [XIX T2310-2311] Dawn Campbell lived next door in trailer 5. Trailer 4-L was behind trailer 5. Stanley Carter lived across the street from Brisendine. [XIX

T2311-2313] Brisendine had met Mark Poole and identified him in court. [XIX T2314-2315] She stepped outside her trailer around 11:30 p.m. on October 12 and saw Poole at the end of Campbell's trailer, walking towards trailer 4-L. [XIX T2316-2317, 2322-2324] The next day, she told the police that she had seen Poole near the trailer. [XIX T2318-2321]

Officer Doris Diaz went to trailer 5-L at the Orangewood Mobile Home Park at 3506 North Florida Avenue at 11:22 p.m. on October 12. She spoke to Dawn Campbell regarding a burglary call that had made earlier in the day. Diaz left the trailer at 11:30 p.m. [XVIII T2153, 2155-2157, 2160-2161]

Officers Diaz and Michael Hammersla responded to a suspicious person call at the Orangewood Mobile Home Park at 11:55 p.m. on October 12. Diaz said they first went to trailer 3-L, but Hammersla could not recall going to 3-L. [XVIII T2157-2159, 2161-2162, 2165, 2167-2168, 2170] The man at 3-L said he saw a black male walking between the trailers while Diaz was at trailer 5-L. [XVIII T2163] Diaz and Hammersla drove around the trailer park and encountered Stanley Carter at 113 Glenwood Drive, across the street from the trailer park. [XVIII T2163-2164, 2168-2169, 2171, 2180-2181] Carter told them he saw a black male coming out of the trailer park. The man was about six feet tall and wore a plaid shirt and dark shorts. [XVIII T 2168]

Carter testified that he drove past trailer 3-L around 10:30 p.m. and saw a man walking away from the front door.

[XVIII T2182-2184, 2198, 2200] Carter turned his car around and saw the man looking behind trailer 4-L. [XVIII T2183-2185] Carter left the trailer park. He returned home around 11:30 p.m. and saw a police cruiser turn in and park near a church. [XVIII T2186-2188] Carter began looking around the trailer park and saw a black male in dark clothing and shorts looking around at the trailers. [XVIII T2190-2191, 2200, 2202-2203] He thought it was probably the same man he had seen earlier because the clothes seemed to be the same. [XVIII T2203-2204] The man was about six feet tall and weighed about 200 pounds. [XVIII T2204] The man went past Carter's house and then went past trailer 1, the trailer park office, and a camper RV around 11:45 to 11:50. Carter called the police to report a prowler. [XVIII T2191-2195] Two cruisers came, and Carter spoke to Officer Hammersla. [XVIII T 2196]

Officer Diaz spoke to Dawn Campbell again, and then walked around the trailer park. She did not see anything suspicious, so she left at 12:11 a.m. [XVIII T2164-2165, 2169] Hammersla drove around the trailer park and left at 12:20 p.m. [XVIII T 2171-2172] Hammersla returned to the trailer park at 1:27 a.m. and parked beside trailer 3-L. He left at 2:32 a.m. [XVIII T 2172-2173]

Ventura Rico lived in a trailer park just off of North Florida Avenue. On the night of October 12, his friend Melissa Nixon was visiting him. [XVIII T2211-2214; XX T2594-2595, 2604] Rico and Nixon were on his front porch around

midnight or 12:30 a.m. when a black man walked up and sold Rico some video games in a plastic bag for $50. The man left after making the sale. [XVIII T2213-2216, 2224-2226; XX T2595-2596, 2604-2610, 2618] Nixon's son opened the plastic bag the next morning and found blood on the games. [XVIII T2215-2216, 2218, 2226-2227; XX T2597, 2612] Rico gave Nixon's son one of the games, and Nixon put it in the trunk of her car. [XVIII T2219, 2227; XX T2598, 2612]

Crime scene technicians processed White's trailer beginning on October 13 and found a shoeprint on a vinyl notebook near Scott's feet. [XVI T1904-1906; XVII T1913, 1923, 2050-2052, 2094-2095; XVIII T2096] They found a locked safe on the bedroom floor. [XVII T2091-2093, 2103-2104]

Detective Bradley Grice spoke to White at the hospital on October 13. She could not identify the man who attacked her. [XX T2619, 2626-2627] Grice spoke to Dawn Brisendine and Stan Carter at the mobile home park. [XX T2630] Another detective found Mark Poole at his residence. Poole agreed to go to the police department. He was not arrested, but he was handcuffed. Grice spoke to Poole shortly after 5:30 p.m. [XX T2636-2637] Poole consented to a search of his residence and signed a consent form. [XX T2639-2640] Poole also consented to give the police a DNA sample. [XX T2641] Grice and Sgt. Charles Smith took Poole back to his trailer to conduct the search. [XIX T2363-2366; XX T2637, 2641] Poole allowed the officers to take a pair of his shoes and a blue shirt. [XIX

T2367; XX T2645-2646]

Karen Gaugh was Noah Scott's aunt. A few days after Scott was killed, her boyfriend's daughter told her that one of her friends said a black man came to her house with a video game system with blood on it. Gaugh reported this to Detective Grice. [XIX T 2332-2335]

On October 17, Officer Alex Gomez went to Rico's trailer at 3345 North Florida Avenue, Lot No. 1, and asked about the video games. Rico and Nixon gave him the games, which were in three plastic bags that he did not open. Two black bags were recovered from the trailer, and one white bag was recovered from the trunk of Nixon's car. [XVIII T2216-2217; XIX T2335-2343; XX T2598-2599, 2601, 2613] When a crime scene technician opened the plastic bags to process the games for fingerprints, she found a small child's belt in one of the black bags. [XVIII T2146-2147]

Detective Grice showed a photo pack to Rico and Nixon. [XVIII T2218; XX T2619-2620] Rico could not make a positive identification; he chose two photos, Mark Poole and another man, and said one of them could have been the man who sold him the video games. [XVIII T2228-2229; XX T2650] Nixon identified a photo of Mark Poole. [XX T2600, 2614, 2620-2623] Trevor Campbell was included in the photo pack. [XX T2622]

Sgt. Smith and Detective Grice knew that Albert Lewis, Trevor Campbell, and Dawn Campbell were arrested for drugs at the Orangewood mobile home park on Wednesday night prior to

the murder. [XIX T2371-2373; XXI T2652] Noah Scott's mother told another detective that people in the park had a beef with Scott because of the arrests. [XXI T2652-2653] Smith and Grice determined that Mrs. Campbell was released on Thursday, Mr. Campbell was released Friday evening, and Lewis was released from the jail around 3:00 or 4:00 a.m. on October 13. [XIX T2373-2374; XX T2649]

On October 19, a police officer found a tire iron underneath a motor home at the Orangewood mobile home park. [XVIII T2118-2123; XIX T2395-2399] The tire iron was covered in blood and hair and was sent to FDLE for DNA testing. The crime scene technician did not attempt to find any fingerprints on the tire iron due to its rough surface and to avoid disturbing the blood and hair. [XVIII T2147-2149] FDLE Analyst Susan Komar, a tool mark identification expert, examined the tire iron and pry marks on the safe found in White's bedroom. [XX T2584, 2587, 2589] She determined that the tire iron, and no other tool, made the pry mark on the upper corner of the safe. [XX T2591]

On October 23, Detective Grice obtained an arrest warrant for Poole. [XX 2647] Detective Ivan Navarro found Poole in Orlando on November 6 and arrested him pursuant to the warrant. [XX T2550, 2555, 2559-2560] Navarro raised Poole's shirt to determine that he had tattoos that Pamela Johnson had described. [XX T2559-2560]

Dena Weiss, a fingerprint examiner for the Lakeland

Police, examined a total of 55 latent prints submitted by the officers investigating this case. [XX T2566-2569] She determined that 22 of the prints were of value for comparison to the known prints of Noah Scott, Loretta White, and Mark Poole. She identified 11 of the latent prints as those of Scott or White. [XX T2568-2569, 2573] None of the prints were made by Poole. [XX T2573, 2582-2583]

Mary Bryrie, an FDLE footwear examiner, determined that one shoeprint found on the vinyl notebook was positively made by Poole's left shoe. Another shoeprint on the notebook could have been made by Poole's left shoe. [XX T2496-2523]

Robyn Ragsdale, an FDLE DNA expert [XXI T2656-2659], determined that the vaginal swab from the rape kit contained epithelial (skin) cells from the vaginal canal with a DNA profile that matched the DNA profile of a known sample of Loretta White's blood at all 13 loci. [XXI T2685-2689] The sperm from the vaginal swab contained a mixture of White's DNA and male DNA. The male DNA matched Mark Poole's known DNA sample at 8 STR loci and at amelogenin. Poole was not excluded at the other loci. The frequency of this match was one in 350 trillion Caucasians, one in 84 trillion African-Americans, and one in 550 trillion Southeastern Hispanics. [XXI T2697-2702, 2710]

Ragsdale tested six stains from Poole's blue polo shirt. [XXI T2707-2709] Stain 4C from the shirt matched White's profile at 7 STR loci and at amelogenin, the sex

determination. The frequency of this match was one in 7.4 million Caucasians, one in 40 million African-Americans, and one in 9.3 million Southeastern Hispanics. [XXI T2689-2690, 2708-2709] Stain 4A contained a partial male profile, but it did not match the profiles of either Poole or Noah Scott. [XXI T2707-2708] Stains 4B, 4D, 4E, and 4F contained either no DNA or insufficient DNA for testing. [XXI T2708-2709]

Swabs of possible bloodstains on Scott's video games matched Scott's profile at 11 STR loci and at amelogenin. The frequency of this match was one in 1.6 trillion Caucasians, one in 50 trillion African-Americans, and one in 1.7 trillion Southeastern Hispanics. [XXI T2691-2694, 2792]

Ragsdale tested three stains from the tire iron. Stain 2C contained a mixture of DNA. She could not determine the profile of the minor contributor. The profile of the major contributor matched Scott at 5 STR loci and amelogenin. The frequency of this match was one in 21 thousand Caucasians, one in 134 thousand African-Americans, and one in 11 thousand Southeastern Hispanics. [XXI T2694-2697, 2713-2714] She did not obtain any DNA result from stain 2A. From 2B she obtained a partial profile of a mixture from which she could not exclude Scott or White as possible contributors. [XXI T2714]

Ragsdale did not find any DNA in White's fingernail scrapings that was consistent with Poole. [XXI T2711] Ragsdale found possible blood on Poole's shoe, but did not obtain any DNA results. [XXI T2714-2715] Multiple stains on

Poole's jeans were consistent with Poole's profile. [XXI T2715]

Defense Evidence

Mark Poole chose to exercise his right to remain silent and declined to testify. [XXI T 2724-2727]

Dawn Campbell lived in the Orangewood Village Mobile Home Park in October 2001. [XXI T2744-2745] She was arrested on drug charges on the Wednesday night preceding the murder along with Albert Lewis and her husband, Trevor Campbell. [XXI T2746] Mrs. Campbell was released Thursday evening. When she returned home, she discovered that her trailer had been burglarized. She called the police to report the burglary. Friday evening, Mrs. Campbell called the police with additional information. Officer Diaz came to her trailer to talk to her. [XXI T2747-2748] Trevor Campbell was released from jail Friday night. A friend picked him up and drove him home. They arrived around midnight. [XXI T2748-2749] Mr. and Mrs. Campbell had an argument. Trevor went to sleep in the back bedroom. Dawn fell asleep on the sofa in the living room. On Saturday they went to the Lakeland Police Department. Dawn gave a recorded statement to Detective Grice in which she said Trevor woke her up between 3:00 and 4:00 p.m. Saturday morning. [XXI T2750-2751]

Closing Argument

In closing argument, defense counsel conceded that Poole

acknowledged he was guilty of burglary, sexual battery, and robbery, but Poole denied that he inflicted the severe injuries on Loretta White and killed Noah Scott. [XXI T2795] Defense counsel argued that the investigators ignored evidence that two people were involved in the crimes committed against White and Scott because it did not fit their theory that Poole was solely responsible. He argued that there was evidence suggesting White's next-door neighbor, Trevor Campbell, had a motive and opportunity to enter the trailer and attack Scott and White after Poole had departed to sell the video games. [XXI T2795-2824]

In rebuttal, the prosecutor argued that defense counsel's argument came from "Fantasy Land." He asserted that "there is no evidence in this case that at any time, either in this trial or anywhere else, Mr. Poole ever acknowledged that he did anything." [XXI T2835] The prosecutor stated,

> Now, talk about a coincidence that boggles the imagination. Some other person had a reason of some sort to attack Noah Scott and Loretta White on the exact same night that Mr. Poole decided to go steal their video games and rape the woman?
>
> No, that didn't happen unless you are in Mickey Mouse Land.

[XXII T2839] He continued by asserting that there was no evidence that another man was involved and then said,

> Mr. Dimmig [defense counsel] is arguing all these things, but there is absolutely no evidence that Mr. Poole ever said, hey, somebody else was there before me and these people's heads were bashed in. There is no evidence of that.

> And there's no evidence that Mr. Poole ever said, well, I went in there and raped her and left her and then somebody else came in and beat their heads in. There's no evidence of that either. That's argument. But when you look at what the testimony is and what the physical evidence is and what the photographs are, there is no evidence to support that theory.

[XXII T2840-2841] Finally, the prosecutor asserted, "And if Mr. Poole wants to tell the state and Detective Grice that somebody helped him commit this crime, then let him come forward because -- " [XXII T2841]

Defense counsel objected to the prosecutor's comment on the right to remain silent and asked for a mistrial. [XXII T2841-2842] The court told both counsel to approach the bench and directed the prosecutor to respond. The prosecutor said he would rephrase his argument and not take the matter any further. He argued that defense counsel's argument opened the door to his remarks in rebuttal. The court ruled, "Okay. I'll deny the motion for mistrial." [XXII T2842]

Penalty Phase

Defense counsel moved to exclude evidence of appellant's prior criminal activity or history as nonstatutory aggravating circumstances because appellant was not seeking to establish the mitigating circumstance of no significant history of prior criminal activity. [V R933-934; XXII T2939] The prosecutor agreed that this motion should be granted. The court ruled that the motion was granted by stipulation. [XXII T2939]

Dr. Nelson, the medical examiner, testified that all of the injuries suffered by Noah Scott occurred before he died. [XXII T2977-2978] Ms. White's testimony that Scott kept getting up indicated that he remained conscious and able to feel pain. [XXII T2978-2979] Scott had aspirated blood in his lungs. He had to be alive to inhale blood. [XXII T2979]

The prosecutor read victim impact statements prepared by Loretta White, Noah's father Charles Scott, Noah's mother Cindy Scott, his aunt Grace Donley, and his daughter Brianna. [XXII T2981-2986]

Hattie Poole, Mark Poole's mother, testified about Poole's background, including having spinal meningitis as a child, having a seven-year-old son, being a good student until he dropped out, attending church, having friends who died, doing construction work, having a motorcycle accident and head injury, playing sports and boxing in tournaments, calling her, being involved in drugs, praying, and asking for a Bible. [XXII T2987-3019] Defense counsel asked her if Poole ever apologized to her on the phone when he was in jail. She answered that "he was sorry for anything that he'd done to hurt me – because he know I wanted him to finish at least high school, and he didn't do that." [XXII T3018] On cross-examination, the prosecutor asked, "Did he ever apologize for murdering a boy?" Mrs. Poole answered, "No." The prosecutor asked, "Did he ever apologize for raping a pregnant girl?" Again she answered, "No." [XXIII T3028]

Carolyn Moody, Poole's older sister, testified about Poole's love of hunting and fishing, that he dropped out of school and worked for Jarue Bryant, Sr., became a subcontractor with his own crew, had close friends and family relationships, suffered head injuries, began drinking and using drugs, went to a rehabilitation program, and went to church. [XXIII T3030-3063] On cross-examination, the prosecutor asked Mrs. Moody whether Poole ever expressed any remorse for killing Noah Scott when she saw him in jail during the preceding week. [XXIII T3071] She replied, "He said he didn't kill him." The prosecutor asked again, and she said, "You know, I'm thinking in my mind we're saying, no, he didn't do it, but I don't think he's ever said anything to us to that fact." [XXIII T3072] The prosecutor asked whether, when Mrs. Moody visited Poole in jail in July, he said anything about being sorry for what he had done. She replied, "No. We didn't talk about it, no." [XXIII T3073-3074]

Arry Moody, Poole's nephew, testified that Poole played with him, worked out with him, encouraged him in sports, took him hunting and fishing, was hit in the head while boxing, was religious and attended church, taught him about the concrete business, and had many friends. [XXIII T3079-3088] On cross-examination, the prosecutor established that Moody spoke to Poole once at the jail. He then asked, "did he ever express any remorse for killing the guy that he beat to death?" Arry answered, "No." The prosecutor asked, "Did he ever express any

remorse for raping the pregnant girl that he raped?" Arry again answered, "No." [XXIII T3091]

Following a recess taken after Arry Moody's testimony [XXIII T3098, 3101, 3105], defense counsel objected to the prosecutor's questions about remorse on the ground that the defense was not going to present any evidence of remorse as a mitigating circumstance. [XXIII T3106] The prosecutor responded that the defense had not objected to the questions and argued that he had asked the questions in anticipatory rehabilitation. [XXIII T3106-3107] The prosecutor conceded, "I think the case law's clear, the state can't argue that unless the defense brings it up and says now he's remorseful . . . ." [XXIII T3107] The prosecutor said he would quit asking about remorse as long as defense counsel did not raise it. The court responded, "Okay. Sounds like y'all talked your way into a stipulation." [XXIII T3108]

Mark Poole's older brother, Joe Poole, Jr., testified about the deaths of the uncles with whom Mark liked to fish, his work with Jarue Bryant until Bryant's death, having his own business, having a bicycle accident and a motorcycle accident, Mark's son, the death of a cousin, the death of Mark's friend Nicky Bryant, Mark's drinking and use of drugs, and his kindness. [XXIII T3149-3185] On cross-examination, the prosecutor asked if Joe knew that this was not the first time Mark had been arrested. [XXIII T 3185-3186] When Joe replied that it was not the first time, the prosecutor

asserted, “He got arrested in Georgia, South Carolina, Texas.” Defense counsel immediately objected to the improper impeachment. [XXIII T3186] The court overruled the objection. [XXIII T3187-3189]

As the prosecutor continued with his cross-examination of Poole’s brother, he asked if Joe knew that Mark had tattoos on his body, and Joe answered yes. [XXIII T3201] Defense counsel objected to the relevance of this line of questioning and moved for a mistrial if the prosecutor continued. [XXIII T3201-3202] The prosecutor responded that the defense was “trying to paint this man as an angel,” Poole had “A Thug Life” tattooed on his body, and this showed the other side to this man. [XXIII T3202] The court ruled that the question was proper cross-examination because it concerned the witness’s credibility. [XXIII T3202-3203] Defense counsel objected to any mention of the content of the tattoos as irrelevant and that the prejudice outweighed the probative value. [XXIII T3203] The prosecutor stated that he did intend to ask what the tattoo said. The court overruled the defense objections on the ground that the defense opened the door. [XXIII T3203-3204]

The prosecutor asked if Joe knew how many tattoos Mark had. Joe replied that he did not, he only knew of one tattoo that said, “MP.” The prosecutor asked, “Well, doesn’t he have a tattoo that says Thug Life right across his abdomen?” Joe answered, “I haven’t looked at his stomach, sir.” The

prosecutor asked, “So although you know him as well as you told this jury, you didn’t know he had that?” Joe answered, “No. I haven’t examined his body.” [XXIII T3204]

Defense counsel objected that the prosecutor was testifying to the jury that Poole had a thug tattoo. He moved for a mistrial, especially in light of the other prosecutorial conduct that had occurred in the penalty phase. The prosecutor argued that he hadn’t heard any prior objections to prosecutorial misconduct, and the question was fair and within the court’s ruling. The court denied the motion and overruled the objection. [XXIII T3205] Defense counsel clarified that he was referring to the other issues raised by prior objections. [XXIII T3205; XXIV T3206] The court again ruled that the defense had opened the door to this line of questioning on the credibility issue. [XXIV T3206]

Defense counsel presented additional testimony about Poole’s background and family relationships by his nephew DMarcus Moody [XXIII T3109-3120], his brother-in-law Arry Day Moody [XXIII T3121-3139], his former pastor Clarence Bryant [XXIII T3140-3145], his nephew Romaine Poole [XXIV T3213-3220], the mother of his child Deshon Williams [XXIV T3221-3242], and his father Joe Poole, Sr. [XXIV T3244-3250]

Clinical psychologist Dr. William Kremper had interviewed and tested Poole. [XXIV T3252-3262] In Dr. Kremper’s opinion, Poole had a severe substance abuse problem with both alcohol and cocaine. [XXIV T3292-3293] As a result, Poole was under

extreme emotional or mental distress at the time of the offenses. [XXIV T3292] Cocaine abuse causes paranoia and emotional and behavioral overreactivity. The user becomes very impulsive, motor active, and agitated, displaying very poor judgment. The cocaine use does not cause crime, but the user's "brain is not equipped to but on the brakes." [XXIV T 3298-3300] Poole appeared to be a type II alcoholic. [XXIV T3313-3314] Type II alcoholics have a serotonin deficit that causes them to be impulsive and not to care about the impact of their behavior on others. Their behavior while under the influence is radically different from their behavior while sober. [XXIV T3312-3313] Poole's intelligence was borderline, between low average and mildly retarded, with a verbal IQ of 78, a performance IQ of 74, and a full scale IQ of 74. [XXIV T3317-3320, 3325-3326] His reading ability was at the sixth grade level. [XXIV T3326] Poole's short-term memory was average and his delayed memory was borderline. [XXIV T3328-3329] He also had a learning disability, and the results of a visual motor gestalt test showed serious distortions. [XXIV T3327, 3330-3331] Poole does not have antisocial personality disorder. [XXIV T3337-3340, 3384-3385] Poole's low IQ, learning disability, and substance abuse substantially impaired his ability to conform his conduct to the requirements of law. His ability to stop what he was doing was seriously compromised. [XXIV T3343-3345, 3371; XXV T3391-3392]

Neuropsychologist Dr. Joseph Sesta performed neurological testing to determine the functional integrity of Poole's brain and whether he suffered from brain damage. [XXV T3401-3407] In Dr. Sesta's opinion, there was unequivocal evidence of brain dysfunction, a moderate impairment of the right side of Poole's brain. [XXV T3419] The front of Poole's brain was also damaged, causing Poole to lose the ability to smell. [XXV T3419-3435] Poole has borderline intelligence with an IQ of 76. [XXV T3435-3436, 3459] Testing showed that Poole suffered from traumatic dementia caused by head injury. His verbal and visual memory was really bad. [XXV T3439-3441] Poole could not have faked his neurological impairment. [XXV T3441-3442] Dementia is a major psychiatric disorder. [XXV T3446] Poole does not have a character disorder, but he does have some traits of antisocial personality disorder, including a lack of compassion and empathy with people other than his family. [XXV T3446-3448] Poole has emotional lability, rapid mood swings resulting from brain damage and dementia. [XXV T3449-3453] In Dr. Sesta's opinion, Poole's organic brain damage was caused by head trauma and not by cocaine or alcohol use. [XXV T3453-3455] Poole has difficulty putting the brakes on and conforming his behavior to the law because of his brain damage. [XXV T3477, 3482]

Penalty Phase Closing Argument

During the prosecutor's penalty phase closing argument,

he asserted,

> What sets this crime apart so much from other crimes that the death penalty is the only conclusion you can come to? The fourth aggravating factor, heinous, atrocious and cruel.
>
> * * *
>
> I submit to you that it is an overwhelming aggravating circumstance that can never be overcome in a case like this.

[XXV T3512] The prosecutor further asserted,

> So now what weighs against that? I say to you that that scale is so far down here that there is nothing – and the judge will tell you once you find that sufficient aggravating circumstances exists [sic] to warrant the death penalty, unless you find that the mitigating circumstances outweigh them . . . unless something is going to push this scale back down, then your vote has got to be for the death penalty. I tell you that has to be twelve to nothing again.

[XXV T3514-3515]

The prosecutor continued his argument:

> This is what you saw. A picture of a church, isn't that nice. When did he go to church? When he was like 12, 16, 19. He is 39 years old when he murdered this boy. 39. Does it matter what he looked like in this picture? Was Ted Bundy okay in the fourth grade. I don't care, and I think you shouldn't care what he was doing in the fourth grade. A nice little picture in the fourth grade.

[XXV T3515]

The prosecutor stated, "You – you are free to reject it if you want and say I don't think brain damage mitigates against the death penalty." [XXV T3517]

The prosecutor urged the jury:

> This is about heinous, atrocious and cruel. And this is about a robbery, and this is about a rape, and this about [sic] a burglary, and this is about whether a man with a limited IQ should pay the ultimate price for what he did. That's what this is all about.
>
> I don't think when you look at it from that perspective that this decision is any more difficult than the other. I'm only thinking that when you go back in that room and make that vote and you head for your car this afternoon, you're not going to find yourself feeling the same way. *You're just going to find that you did your job just like you promised to do when you raised your right hand and swore to that oath.* [Emphasis added.]

[XXV T3519] Defense counsel immediately objected and moved for a mistrial on the ground that the prosecutor argued it was the jury's job and their duty to convict. [XXV T3519-2520]

The prosecutor responded,

> All I asked them to do is follow their oath, and their oath was to judge things just the way I told them. If that's wrong, let the Appeals Court tell me it's wrong, that's exactly what this argument is all about.

[XXV T3520] The trial court denied the motion for mistrial. [XXV T3520]

After the denial of the motion for mistrial, the prosecutor continued:

> This is about . . . whether you can do the job that you promised this court that would you do. [sic] Because I submit to you that if you do that job and don't get swayed by a bunch of family members . . . .
>
> . . . But don't let the fact that they love their son, brother, or cousin, or

> whoever he is, sway you from following the oath that you took. The oath that you took was to follow those instructions, and they lead you to an inescapable conviction.

[XXV T3520-3521]

Aggravating Circumstances

The trial court found that the State proved two aggravating circumstances beyond a reasonable doubt:

1. Mark Poole was previously (contemporaneously) convicted of felonies involving the use or threat of violence to the person: the attempted first-degree murder of Loretta White, the sexual battery of Loretta White, the armed burglary of the dwelling of Noah Scott and/or Loretta White, and the armed robbery of Noah Scott and/or Loretta White (great weight). [VI R1026]

2. The capital felony was especially heinous, atrocious, or cruel (great weight). [VI R1026-1027]

Mitigating Circumstances

The trial court found that the evidence established seventeen mitigating circumstances:

1. The crime was committed while Poole was under the influence of extreme mental or emotional disturbance (moderate weight). [VI R1027]

2. Poole’s capacity to conform his conduct to the requirements of law was substantially impaired (moderate weight). [VI R1027-1028]

3. Poole has no significant history of prior criminal activity (little weight). [VI R1028]

4. Poole is of borderline intelligence (some weight). [VI R1028]

5. Poole received a head injury, which created mental dementia (little weight). [VI R1028]

6. Poole's age of 38 at the time of the crime linked with mental deficiency and lack of serious criminal history (moderate weight). [VI 1028]

7. Poole dropped out of school in the 10th grade due to his low intelligence and learning disabilities (little weight). [VI R1029]

8. Poole lost Mr. Bryant, who was his best friend, father figure, and employer, which had an emotional effect on Poole and led to his drug use (some weight). [VI R1029]

9. Poole sought help for his drug problem in the past (little weight). [VI R1029]

10. Poole had an alcohol abuse problem at the time of the crime (little weight). [VI R1029]

11. Poole had a drug abuse problem at the time of the crime (little weight). [VI R1029]

12. Poole did not have an antisocial personality disorder and was not psychopathic (little weight). [VI R1029]

13. Poole has and can continue a relationship with his son (minimum weight). [VI R1029-1030]

14. Poole has a strong work ethic (little weight). [VI

R1030]

15. Poole has a close relationship with his family (moderate weight). [VI R1030]

16. Poole is a religious person (little weight). [VI R1030]

17. The murder and rape were impulsive acts and not premeditated (little weight). [VI R1031]

SUMMARY OF THE ARGUMENT

The prosecutor violated Mark Poole's constitutional right to a fair trial by engaging in misconduct during his closing argument in the guilt or innocence phase of trial, his cross-examination of defense witnesses in the penalty phase, and his closing argument in the penalty phase. In his guilt/innocence phase closing, the prosecutor repeatedly and deliberately commented on Poole's exercise of his right to remain silent, both by not testifying at trial and by not making incriminating statements to the police following his arrest. When defense counsel moved for a mistrial, the prosecutor claimed that defense counsel's closing argument was not supported by the evidence and opened the door to his remarks on silence. However, the defense argument was based on evidence admitted at trial and did not open the door to the prosecutor's constitutional violation. The court abused its discretion by denying Poole's motion for mistrial. This Court must reverse and remand for a new trial.

During the penalty phase, the prosecutor improperly cross-examined defense witnesses about nonstatutory aggravating circumstances, Poole's prior arrests in other states and lack of remorse. The prosecutor made unproven allegations about the prior arrests and the substance of a tattoo, improperly informing the jury of unproven and prejudicial facts. In the penalty phase closing argument, the

prosecutor repeatedly misstated the law governing the jurors' responsibilities in determining the sentence to be recommended. The trial court erred in overruling objections to the prosecutor's misconduct and abused its discretion in denying defense motions for mistrial. The death sentence must be reversed, and this case must be remanded for a new penalty phase trial with a new jury.

The Florida death penalty statute is unconstitutional. It violates the Sixth Amendment right to jury trial because it does not require express, unanimous jury findings of the aggravating circumstances necessary for the imposition of the death penalty. In the absence of a valid death penalty statute, the State of Florida has no authority to execute anyone, so the death sentence must be reversed for a life sentence.

ARGUMENT

ISSUE I

THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING APPELLANT'S MOTION FOR MISTRIAL WHEN THE PROSECUTOR REPEATEDLY COMMENTED DURING CLOSING ARGUMENT ON APPELLANT'S FAILURE TO TESTIFY AT TRIAL AND HIS SILENCE AFTER HIS ARREST.

The Fifth Amendment to the United States Constitution provides, "No person . . . shall be compelled in any criminal case to be a witness against himself[.]" Article I, section 9 of the Florida Constitution provides, "No person shall . . . be compelled in any criminal matter to be a witness against oneself." These constitutional prohibitions of compelled self-incrimination guarantee that the accused has the right to remain silent and decline to testify at trial. Griffin v. California, 380 U.S. 609, 614 (1965); Dessaure v. State, 891 So.2d 455, 465 (Fla. 2004); Fla. R. Crim. P. 3.250. Moreover, Article I, section 9 of the Florida Constitution prohibits prosecutorial comment on the defendant's post-arrest silence, whether before or after Miranda[1] warnings. State v. Hoggins, 718 So.2d 761, 768 (Fla. 1998); Robbins v. State, 891 So.2d 1102, 1106 (Fla. 5th DCA 2004).

Mark Poole chose to exercise his right to remain silent and declined to testify at his trial in this case. [XXI T2724-2727] The State presented no evidence that Poole made any self-

incriminating statements after his arrest. [XIX T2363-2391; XX

(..continued)
[1] Miranda v. Arizona, 384 U.S. (1966).

T2550-2561, 2618-2650; XXI T2651-2656]

In closing argument, defense counsel stated that Poole acknowledged he was guilty of burglary, sexual battery, and robbery, but Poole denied that he inflicted the severe injuries on Loretta White and killed Noah Scott. [XXI T2795] Defense counsel argued that the police ignored evidence that two people were involved in the crimes committed against White and Scott because it did not fit their theory that Poole was solely responsible. He argued that there was evidence suggesting White's next-door neighbor, Trevor Campbell, had a motive and opportunity to enter the trailer and attack Scott and White after Poole had departed to sell Scott's video games. [XXI T2795-2824]

In rebuttal, the prosecutor asserted that defense counsel's argument came from "Fantasy Land." He argued that "there is no evidence in this case that at any time, either in this trial or anywhere else, Mr. Poole ever acknowledged that he did anything." [XXI T2835] The prosecutor continued,

> Mr. Poole talked to the police. And Mr. Poole – so that there's this other guy that was involved. Well, there's no evidence. Keep in mind what's evidence and what's argument. Mr. Dimmig [defense counsel] is arguing all these things, but there is absolutely no evidence that Mr. Poole ever said, hey, somebody else was there before me and these people's heads were bashed in. There is no evidence of that.
>
> And there's no evidence that Mr. Poole ever said, well, I went in there and raped her and left her and then somebody else came in and beat their heads in. There's no evidence of that either. That's argument. But when you look at what the

> testimony is and what the physical evidence is and what the photographs are, there is no evidence to support that theory.

[XXII T2840-2841] Finally, the prosecutor argued, "And if Mr. Poole wants to tell the state and Detective Grice that somebody helped him commit this crime, then let him come forward . . . ." [XXII T2841]

Defense counsel objected to the prosecutor's comment on the right to remain silent and moved for a mistrial. [XXII T2841-2842] The court told both counsel to approach the bench and directed the prosecutor to respond. The prosecutor said he would rephrase his argument and not take the matter any further. He argued that defense counsel's argument opened the door to his remarks in rebuttal. The court ruled, "Okay. I'll deny the motion for mistrial." [XXII T2842]

The standard of review for the denial of a motion for mistrial is abuse of discretion. Dessaure v. State, 891 So.2d at 464. A mistrial is required when the error "is so prejudicial as to vitiate the entire trial, making a mistrial necessary to ensure that the defendant receives a fair trial." Id., at 464-465; Cole v. State, 701 So.2d 845, 853 (Fla. 1997).

> Comments on silence are high risk errors because there is a substantial likelihood that such comments will vitiate the right to a fair trial. Unless the state can show harmless error, a comment on the defendant's exercise of the right to remain silent warrants reversal.

Elisha v. State, 32 Fla. L. Weekly D409, 2007 WL 397318 (Fla.

4th DCA Feb. 7, 2007); accord DiGuilio v. State, 491 So.2d 1129, 1136 (Fla. 1986).

"Any comment on, or which is fairly susceptible of being interpreted as referring to, a defendant's failure to testify is error and is strongly discouraged." State v. Marshall, 476 So.2d 150, 153 (Fla. 1985); Dessaure v. State, 891 So.2d at 465. This "fairly susceptible" test is a "very liberal rule." Id.; State v. DiGuilio, 491 So.2d at 1135.

In this case there can be no doubt that the prosecutor's comments satisfied the "fairly susceptible" test and were, in fact, deliberate comments upon Poole's failure to testify and his silence after arrest. There is no other legitimate interpretation of the prosecutor's statement that "there is no evidence in this case that at any time, either in this trial or anywhere else, Mr. Poole ever acknowledged that he did anything." [XXI T2835] That statement encompassed both Poole's failure to testify at trial and his silence after arrest. The prosecutor directly commented on Poole's silence after arrest by saying, "Mr. Poole talked to the police. . . . that there's this other guy involved. Well, there's no evidence." [XXII T2840] Again he commented on both the failure to testify and silence after arrest by saying, "there is absolutely no evidence that Mr. Poole ever said, hey, somebody else was there before me and these people's heads were bashed in." [XXII T2840] And yet again he said, "there's no evidence that Mr. Poole ever said, well, I went in there

and raped her and left her and then somebody else came in and beat their heads in." [XXII T2840] Finally, the prosecutor commented on both the failure to testify and silence after arrest by saying, "And if Mr. Poole wants to tell the state and Detective Grice that somebody helped him commit this crime, then let him come forward . . . ." [XXII T2841]

The prosecutor in this case, like most Assistant State Attorneys assigned to try capital cases, is one of the most skilled and experienced prosecutors in his judicial circuit. It is inconceivable that he did not know the law prohibiting comments on the defendant's exercise of his constitutional right to remain silent. It is extremely unlikely that his rebuttal remarks were inadvertent. He implicitly admitted the deliberate nature of the remarks by arguing that defense counsel's argument opened the door to such comments.

Assistant State Attorneys are sworn to uphold the constitutions and laws of the United States and the State of Florida. A prosecutor's deliberate violation of the constitutional rights to silence and a fair trial is inexcusable.

> Under our system of jurisprudence, prosecuting officers are clothed with quasi judicial powers and it is consonant with the oath they take to conduct a fair and impartial trial. The trial of one charged with crime is the last place to parade prejudicial emotions or exhibit punitive or vindictive exhibitions of temperament.

Stewart v. State, 51 So.2d 494, 495 (Fla. 1951).

"While prosecutors should be encouraged to prosecute cases with earnestness and vigor, they should not be at liberty to strike 'foul blows.'" Gore v. State, 719 So.2d 1197, 1202 (Fla. 1998). "It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295 U.S. 78, 88 (1935). "We expect prosecutors, as representatives of the State, to refrain from inflammatory and abusive argument, maintain their objectivity, and behave in a professional manner." Gore v. State, 719 So.2d at 1202.

The prosecutor's only excuse for his comments on Poole's silence was that defense counsel's argument opened the door to his rebuttal [XXII T2842], apparently thinking that he could comment on Poole's silence in order to argue that there was no evidence to support defense counsel's argument. However, his claim that there was no evidence to support defense counsel's argument was false. Defense counsel's argument was based on evidence that had been admitted at trial.

Defense counsel discussed Loretta White's conversation with the 911 operator [XIX T2424-2433; XXI T2795-2797], particularly her statement that there were two people who broke into her trailer. [XIX T2430-2431; XXI T2797] Counsel also pointed out that White told the paramedic two people broke in. [XIX T2307; XXI T2797] White said the men had a belt. [XIX T2433; XXI T2798-2799] A belt was found in one of

the bags obtained from Ventura Rico. [XVIII T2146-2147; XXI T2799] White testified that she lost consciousness when penetrated, and kept going in and out of consciousness. [XIX T2444; XXI T2807] One of the men was still in her trailer just before or just after 3:30; he touched her vaginal area and thanked her. [XIX T2413-2414, 2445-2446; XXI T2799, 2807-08]

Defense counsel said Mr. Carter and Mrs. Brisendine reported seeing a prowler in the trailer park between 10:30 and midnight on October 12, and Mrs. Brisendine identified Poole as the prowler. [XVIII T2182-2185, 2191-2196, 2198, 2200; XIX T2314-2324, XX T2630; XXI T2799-2800, 2808] Officer Diaz was at the trailer park between 11:22 and 11:30 to investigate Mrs. Campbell's burglary report. [XVIII T2154-2157, 2160-2161; XXI T2808] Officers Diaz and Hammersla responded to Carter's report at 11:55, looked around the park, and saw nothing suspicious. Hammersla returned to the park from 1:27 to 2:32 to observe Mrs. Campbell's trailer. [XVIII T2157-2174; XXI T2809]

Defense counsel said Poole was taken to the police station in handcuffs. [XIX T2366, 2383; XX T2636-2637; XXI T2800] Poole's DNA was consistent with the DNA of sperm identified from the vaginal swab, so there was evidence he was at the scene of the offenses and committed the sexual battery. [XXI T2697-2702, 2710, 2801]

Noah Scott's mother told Detective Newsome there was a

beef with Scott about the drug raid Wednesday night. [XXI T2652-2653, 2803] Sgt. Smith and Detective Grice had knowledge of the arrests and release times of Mr. and Mrs. Campbell and Albert Lewis. [XIX T2372-2374; XX T2649-2650; XXI T2652, 2803-2805] Mrs. Campbell testified that she told Grice her husband woke her up sometime between 3:00 and 4:00 Saturday morning. [XXI T2751-2752, 2805] White testified that she had heard Mr. Campbell's voice when Scott spoke with him about their air conditioner. [XIX T2441-2442; XXI T2806]

Defense counsel said Sgt. Smith and Detective Grice spoke to Poole at the police station and obtained his consent to search his trailer. [XIX T2363-2366; XX T2636-2641; XXI T2806] Smith recovered a wet Tommy Hilfiger shirt from Poole's closet. [XIX T2367; XXI T2806] On cross-examination, Smith conceded that there was a leak and everything on the closet floor was wet. [XIX T2385-2386; XXI T2806-2807]

Defense counsel discussed the evidence about the time of Scott's death [XX T2470-2472, 2489-2490; XXI T2655, 2753-2754, 2809-2810], superficial injuries suffered by both White and Scott that he argued were not consistent with blows from a tire iron [XVIII T2267-2274; XX T2490-2493; XXI T2809-2812], White's testimony about the rapist hitting Scott in the face [XIX T2409, 2445; XXI T2811], the testimony of a blood spatter expert [XVII T1982-2038; XXI T2812-13, 2816-2817], the small amount of blood on Poole's shirt [XXI T2707-2709, 2814], Poole's shoes and the matching footprints on the notebook

[XVII T1923; XX T2645-2646; XX T2499-2500, 2522-2523; XXI T2814-2815, 2817], the fingerprint evidence [XX T2566-2583; XXI T2815-2816], and hairs found on a bed sheet that were not submitted for analysis. [XX T2549; XXI T2828]

Virtually every detail of defense counsel's argument was based directly upon evidence that had been presented at trial. Thus, defense counsel's argument complied with this Court's direction in Bertolotti v. State, 476 So.2d 130, 134 (Fla. 1985): "The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence." In contrast, by falsely asserting that there was no evidence to support defense counsel's closing argument and by repeatedly commenting upon Poole's exercise of his constitutional right to remain silent, the prosecutor violated this Court's admonition that closing argument "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence . . . ." Id.

Although defense counsel waited until the prosecutor had made several comments on Poole's failure to testify and silence after arrest before he objected and moved for a mistrial, his objection and motion were sufficiently timely to call the trial court's attention to the error to preserve all the improper comments for review on appeal, especially since the trial court denied the motion, apparently accepting the

remarks as proper. In Robbins v. State, 891 So.2d 1102 (Fla. 5th DCA 2004), the prosecutor repeatedly commented on the defendant's silence during closing, and defense counsel failed to immediately object. The Fifth District rejected the State's argument on appeal that the defense objection was untimely:

> As to the fact that Robbins failed to immediately object to those remarks, when the objection was made the trial court overruled the objection based on its conclusion that the remarks were proper. Therefore, an earlier objection would not have secured a different outcome and the improper comments would still have been presented to the jury.

Id., at 1107. Based upon both improper testimony about Robbins' silence and the improper comments in closing, the Fifth District concluded that he was denied a fair trial and that the trial court abused its discretion in denying his motion for mistrial. Id.

Even if this Court were to determine that defense counsel's objection and motion for mistrial were timely only with regard to the prosecutor's last comment on Poole's silence, this Court should consider the previous comments in determining the harmfulness of the prosecutor's misconduct in closing argument. In Ruiz v. State, 743 So.2d 1, 7 (Fla. 1999), this Court rejected the State's argument that Ruiz was barred from raising the issue of prosecutorial misconduct on appeal because defense counsel failed to object to several of the prosecutor's improper remarks:

> When the properly preserved comments are combined with additional acts of prosecutorial overreaching . . . we find that the integrity of the judicial process has been compromised and the resulting convictions and sentences irreparably tainted.

While improper comments upon the defendant's failure to testify at trial and his silence after arrest are subject to harmless error review pursuant to Chapman v. California, 386 U.S. 18, 24 (1967), and State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986), this Court has emphasized that the harmless error test is not satisfied by legally sufficient or even overwhelming evidence of the defendant's guilt. Id., at 1139; Knowles v. State, 848 So.2d 1055, 1057 (Fla. 2003). See also, State v. Lee, 531 So.2d 133, 136 (Fla. 1988), in which this Court "decline[d] to modify the DiGuilio test to require only a showing that the permissible evidence would support the conviction in order to find the erroneous admission of improper collateral crime evidence harmless." Id., at 136.

In DiGuilio, this Court held that an erroneous comment on the defendant's right to remain silent requires reversal and remand for a new trial unless the appellate court can conclude beyond a reasonable doubt that the error did not affect the verdict. State v. DiGuilio, 491 So.2d at 1135, 1139. The DiGuilio harmless error rule "stands for the proposition 'that a defendant has a *constitutional right* to a fair trial free of harmful error.'" Goodwin v. State, 751 So.2d 537, 541 (Fla.

2000).

In Munoz-Perez v. State, 942 So.2d 1025 (Fla. 4th DCA 2006), the defendant relied upon an insanity defense to charges of burglary and aggravated battery with a knife. The defendant testified at trial that he had been depressed, did not know what he was doing, and thought someone was trying to kill him. On cross-examination the prosecutor's first question was, "We've never spoken before, have we?" The defendant answered negatively, and his counsel objected to the comment on his silence and moved for a mistrial. The trial court denied the motion and gave a curative instruction. The prosecutor again commented upon the defendant's silence prior to trial in his closing argument, and defense counsel objected again. The Fourth District found the comments on the defendant's silence to be reversible error, explaining:

> The major issue is this case was whether appellant was sane at the time he committed the crimes . . . . The improper comments directly undercut that defense, and the trial court's instruction made appellant's choice to follow his attorney's advice sound rational and sane rather than insane.

Id., at 1027.

Similarly, the prosecutor's repeated comments on Poole's failure to testify and silence following his arrest were not harmless because they were designed to cause the jury to disregard Poole's sole theory of defense at trial. The prosecutor essentially told the jury to disbelieve defense

counsel's closing argument because Poole had not taken the stand to testify and had not told the arresting officers that he had not inflicted the serious injuries suffered by Loretta White or the fatal injuries suffered by Noah Scott, nor that some other person must have been responsible. While he couched his remarks in terms of a lack of evidence to support defense counsel's argument, that argument was based on evidence actually presented at trial, as shown above. Thus, the prosecutor told the jury that they should violate Poole's constitutional right to silence in order to find him guilty of the attempted murder of White and the first-degree murder of Scott. The prosecutor's argument violated Poole's constitutional right to a fair trial as well as his right to remain silent. The convictions and sentences must be reversed, and this case must be remanded for a new trial.

ISSUE II

THE PROSECUTOR VIOLATED APPELLANT'S RIGHT TO A FAIR PENALTY PHASE TRIAL BY CROSS-EXAMINING DEFENSE WITNESSES ABOUT UNPROVEN PRIOR ARRESTS, THE UNPROVEN CONTENT OF A TATTOO, AND LACK OF REMORSE.

The prosecutor has a duty in the penalty phase proceedings of a capital trial "to seek justice and not merely 'win' a death recommendation[.]" Garron v. State, 528 So.2d 353, 359 (Fla. 1988), citing, ABA Standards for Criminal Justice 3-5.8 (1980); Bertolotti v. State, 476 So.2d 130, 133

(Fla. 1985). The prosecutor in this case violated this duty by engaging in misconduct during his cross-examination of defense witnesses by asking questions which insinuated the existence of unproven facts concerning the nonstatutory aggravating circumstance of prior arrests and the alleged content of a tattoo on Poole's abdomen and by eliciting testimony about the nonstatutory aggravating circumstance of lack of remorse. The cumulative effects of the prosecutor's misconduct violated Poole's right to a fair penalty phase trial.

It is well-established that the aggravating circumstances to be considered by the judge and jurors in the penalty phase of a Florida capital trial are restricted by law to those enumerated in the Florida death penalty statute, section 921.141(5), Florida Statutes (2000). See Perry v. State, 801 So.2d 78, 90 (Fla. 2001); Geralds v. State, 601 So.2d 1157, 1162 (Fla. 1992). Section 921.141(5) expressly provides, "Aggravating circumstances shall be limited to the following . . . ." None of the enumerated aggravating circumstances includes prior arrests with no evidence of conviction, the verbal content of tattoos, or the lack of remorse. § 921.151(5)(a)-(n), Fla. Stat. (2000).

At the beginning of the penalty phase, defense counsel moved to exclude evidence of appellant's prior criminal activity or history as nonstatutory aggravating circumstances because appellant was not seeking to establish the mitigating

circumstance of no significant history of prior criminal activity. [V R933-934; XXII T2939] The prosecutor agreed that this motion should be granted. The court ruled that the motion was granted by stipulation. [XXII T2939]

Mark Poole's older brother, Joe Poole, Jr., testified about the deaths of the uncles with whom Mark liked to fish, his work with Jarue Bryant until Bryant's death, having his own business, having a bicycle accident and a motorcycle accident, Mark's son, the death of a cousin, the death of Mark's friend Nicky Bryant, Mark's drinking and use of drugs, and his kindness. [XXIII T3149-3185] On cross-examination, the prosecutor asked if Joe knew that this was not the first time Mark had been arrested. [XXIII T 3185-3186] When Joe replied that it was not the first time, the prosecutor asserted, "He got arrested in Georgia, South Carolina, Texas." Defense counsel immediately objected to the improper impeachment, pointing out that the defense never claimed that he had not gotten into trouble before. The prosecutor claimed his line of inquiry was "entirely appropriate" because the defense was putting on "his entire reputation." [XXIII T3186] Defense counsel responded that the defense had not brought up Poole's prior history and that the motion in limine specifically stated that they did not intend to do so. [XXIII T3187] The court ruled that credibility is always in issue with any witness, and the defense had opened the door. [XXIII T3187-3188] The prosecutor assured the court that he was not

going to go into any details of any particular crimes; he wanted to ask the question so he could argue it. Defense counsel objected to the prosecutor arguing the matter in closing. The court overruled the objection, but told the prosecutor not to go into any details. [XXIII T3188-3189]

The court's legal error in overruling defense counsel's objections is subject to review for harmless error. Dessaure v. State, 891 So.2d 455, 465 n.5 (Fla. 2004). While a ruling on the admissibility of evidence is subject to review for abuse of discretion, id., at 466, the error here is not the admission of improper evidence, but the court's ruling on the defense objection to the prosecutor's assertion of unproven facts – that Mark Poole had been arrested in Georgia, South Carolina, and Texas.

This remark was made in violation of the prosecutor's earlier stipulation that he would not present evidence of Poole's prior criminal history. That stipulation was made because the law bars the State from presenting evidence of prior nonviolent crimes when the defense expressly waives the statutory mitigating circumstance of no significant history of prior criminal activity provided by section 921.141(6)(a), Florida Statutes (2000), as the defense had done with its motion in limine. Maggard v. State, 399 So.2d 973, 977-978 (Fla.), cert. denied, 454 U.S. 1059 (1981). Also, the State "is not permitted to present evidence of a defendant's criminal history, which constitutes inadmissible nonstatutory

aggravation, under the pretense that it is being admitted for some other purpose." Hitchcock v. State, 673 So.2d 859, 861 (Fla. 1996).

In Geralds v. State, 601 So.2d at 1162, this Court explained that a prosecutor is not allowed to present inadmissible information regarding the defendant's criminal history as a form of impeachment, especially in the penalty phase of a capital trial:

> The State is not permitted to present otherwise inadmissible information regarding a defendant's criminal history under the guise of witness impeachment. This rule is of particular force and effect during the penalty phase of a capital murder trial where the jury is determining whether to recommend the death penalty for the criminal accused. Improperly receiving vague and unverified information regarding a defendant's prior felonies clearly has the effect of unfairly prejudicing the defendant in the eyes of the jury and creates the risk that the jury will give undue weight to such information in recommending the penalty of death.

The prosecutor's assertion that Poole had been arrested in three other states was all the more egregious because he never even attempted to present any actual evidence to support it. "It is impermissible for the state to insinuate impeaching facts while questioning a defense witness without evidence to back up those facts." Shimko v. State, 883 So.2d 341, 343 (Fla. 4th DCA 2004). This rule has been applied most often when the State seeks to impeach a witness by questioning him about criminal convictions even though it does not have

proof of the convictions, but its application has not been limited to this context. Id. In State v. Castillo, 486 So.2d 565, 566 (Fla. 1986), this Court agreed with the Third District that it was reversible error for the prosecutor to infer an illegal act on the part of a defense witness without any apparent factual basis. In Poole's case, the prosecutor's comment influenced the trial court to include in its sentencing order the waived mitigating circumstance of no significant history of prior criminal activity as provided by section 921.141(6)(a), but to give the circumstance diminished weight due to the prosecutor's unproven assertion that Poole had been arrested in other states. [VI R1028]

As the prosecutor continued with his cross-examination of Poole's brother, he asked if Joe knew that Mark had tattoos on his body, and Joe answered yes. [XXIII T3201] Defense counsel objected to the relevance of this line of questioning and moved for a mistrial if the prosecutor continued. [XXIII T3201-3202] The prosecutor responded that the defense was "trying to paint this man as an angel," Poole had "A Thug Life" tattooed on his body, and this showed the other side to this man. [XXIII T3202] The court ruled that the question was proper cross-examination because it concerned the witness's credibility. [XXIII T3202-3203] Defense counsel objected to any mention of the content of the tattoos as irrelevant and that the prejudice outweighed the probative value. [XXIII T3203] The prosecutor stated that he did intend to ask what

the tattoo said. The court overruled the defense objections on the ground that the defense opened the door. [XXIII T3203-3204]

The prosecutor asked if Joe knew how many tattoos Mark had. Joe replied that he did not, he only knew of one tattoo that said, "MP." The prosecutor asked, "Well, doesn't he have a tattoo that says Thug Life right across his abdomen?" Joe answered, "I haven't looked at his stomach, sir." The prosecutor asked, "So although you know him as well as you told this jury, you didn't know he had that?" Joe answered, "No. I haven't examined his body." [XXIII T3204]

Defense counsel objected that the prosecutor was testifying to the jury that Poole had a thug tattoo. He moved for a mistrial, especially in light of the other prosecutorial conduct that had occurred in the penalty phase. The prosecutor argued that he hadn't heard any prior objections to prosecutorial misconduct, and the question was fair and within the court's ruling. The court denied the motion and overruled the objection. [XXIII T3205] Defense counsel clarified that he was referring to the other issues raised by prior objections. [XXIII T3205; XXIV T3206] The court again ruled that the defense had opened the door to this line of questioning on the credibility issue. [XXIV T3206]

The court's ruling was incorrect. As argued above, the State is not permitted to present otherwise inadmissible evidence, especially regarding nonststutory aggravation, under

the guise of impeachment in the penalty phase of a capital trial. Hitchcock v. State, 673 So.2d at 861; Geralds v. State, 601 So.2d at 1162. Nor is the State permitted to insinuate the existence of prejudicial information that it has not proved under the guise of impeachment. Shimko v. State, 883 So.2d at 343.

The court's ruling on the defense motion for mistrial is subject to review for abuse of discretion. Dessaure v. State, 891 So.2d at 464. A mistrial is required when the error "is so prejudicial as to vitiate the entire trial, making a mistrial necessary to ensure that the defendant receives a fair trial." Id., at 464-465. The court abused its discretion in denying the motion for mistrial because the prosecutor violated Poole's right to a fair penalty phase trial by commenting on the nonstatutory aggravating circumstance of Poole's unproven prior arrests as well as the unproven existence of a "Thug Life" tattoo on his abdomen. Moreover, the prosecutor had repeatedly questioned defense witnesses about another nonstatutory aggravating circumstance, lack of remorse.

Hattie Poole, Mark Poole's mother, testified about Poole's background, including having spinal meningitis as a child, having a seven-year-old son, being a good student until he dropped out, attending church, having friends who died, doing construction work, having a motorcycle accident and head injury, playing sports and boxing in tournaments, calling her,

being involved in drugs, praying, and asking for a Bible. [XXII T2987-3019] Defense counsel asked her if Poole ever apologized to her on the phone when he was in jail. She answered that "he was sorry for anything that he'd done to hurt me – because he know I wanted him to finish at least high school, and he didn't do that." [XXII T3018] On cross-examination, the prosecutor asked, "Did he ever apologize for murdering a boy?" Mrs. Poole answered, "No." The prosecutor asked, "Did he ever apologize for raping a pregnant girl?" Again she answered, "No." [XXIII T3028] These questions were not invited by defense counsel's inquiry about Poole's actual apology to his mother regarding his failure to finish high school, which had nothing to do with remorse for the crimes of murder and rape.

Carolyn Moody, Poole's older sister, testified about Poole's love of hunting and fishing, that he dropped out of school and worked for Jarue Bryant, Sr., became a subcontractor with his own crew, had close friends and family relationships, suffered head injuries, began drinking and using drugs, went to a rehabilitation program, and went to church. [XXIII T3030-3063] On cross-examination, the prosecutor asked Mrs. Moody whether Poole ever expressed any remorse for killing Noah Scott when she saw him in jail during the preceding week. [XXIII T3071] She replied, "He said he didn't kill him." The prosecutor asked again, and she said, "You know, I'm thinking in my mind we're saying, no, he didn't

do it, but I don't think he's ever said anything to us to that fact." [XXIII T3072] The prosecutor asked whether, when Mrs. Moody visited Poole in jail in July, he said anything about being sorry for what he had done. She replied, "No. We didn't talk about it, no." [XXIII T3073-3074] Again, the prosecutor's questions about lack of remorse were not invited by the subject matter of Mrs. Moody's testimony and impermissibly referred to a nonstatutory aggravating circumstance.

Arry Moody, Poole's nephew, testified that Poole played with him, worked out with him, encouraged him in sports, took him hunting and fishing, was hit in the head while boxing, was religious and attended church, taught him about the concrete business, and had many friends. [XXIII T3079-3088] On cross-examination, the prosecutor established that Moody spoke to Poole once at the jail. He then asked, "did he ever express any remorse for killing the guy that he beat to death?" Arry answered, "No." The prosecutor asked, "Did he ever express any remorse for raping the pregnant girl that he raped?" Arry again answered, "No." [XXIII T3091] Again the improper questions about lack of remorse were not invited.

Following a recess taken after Arry Moody's testimony [XXIII T3098, 3101, 3105], defense counsel objected to the prosecutor's questions about remorse on the ground that the defense was not going to present any evidence of remorse as a mitigating circumstance. [XXIII T3106] The prosecutor

responded that the defense had not objected to the questions and argued that he had asked the questions in anticipatory rehabilitation. [XXIII T3106-3107] The prosecutor conceded, "I think the case law's clear, the state can't argue that unless the defense brings it up and says now he's remorseful . . . ." [XXIII T3107] The prosecutor said he would quit asking about remorse as long as defense counsel did not raise it. The court responded, "Okay. Sounds like y'all talked your way into a stipulation." [XXIII T3108]

Thus, the prosecutor knew that he was asking improper questions about lack of remorse, since the defense had not presented any testimony that Poole was remorseful. Lack of remorse is a nonstatutory aggravating circumstance that cannot be considered in capital sentencing. Smithers v. State, 826 So.2d 916, 930 (Fla. 2002), cert. denied, 537 U.S. 1203 (2003); Patterson v. State, 513 So.2d 1257, 1263 (Fla. 1987). Evidence of lack of remorse is admissible only to rebut evidence of remorse or other related mitigation such as rehabilitation. Singleton v. State, 783 So.2d 970, 978 (Fla. 2001); Kormondy v. State, 703 So.2d 454, 462 (Fla. 1997).

Although defense counsel failed to immediately object when the prosecutor questioned Mrs. Poole and Mrs. Moody about Poole's lack of remorse, the trial court's lack of concern about this misconduct when defense counsel did object following Arry Moody's testimony, other than to say that the parties had reached a stipulation, indicates that any prior

objection to the questions would have been fruitless. Moreover, the objection came soon enough that the trial court could have taken corrective action if the court had deemed it necessary. Thus, the objection should be considered timely pursuant to Robbins v. State, 891 So.2d 1102, 1107 (Fla. 5th DCA 2004).

However, even if this Court finds the objection untimely as to Mrs. Poole's and Mrs. Moody's lack of remorse testimony, this Court should consider the harm caused by their testimony in addition to the harm caused by the questions and answers with timely objections to determine whether Poole's right to a fair penalty phase trial was violated. Ruiz v. State, 743 So.2d 1, 7 (Fla. 1999). This Court should also consider the prosecutor's misconduct in his penalty phase closing argument, as set forth under Issue III, *infra,* in making this decision.

Pursuant to State v. DiGuilio, 491 So.2d 1129, 1135, 1139 (Fla. 1986), this Court must determine whether there is a reasonable possibility that the prosecutor's improper questions, comments, and testimony about Poole's unproven prior arrests, the unproven content of his tattoo, and his lack of remorse affected the jury's decision to recommend a death sentence. The test is not whether the jury could have recommended death in the absence of the prosecutor's misconduct, but whether it affected their decision in such a way that the reliability of the death recommendation is called

into question. Unless this Court can say beyond a reasonable doubt that the jury's recommendation was not affected by the prosecutor's cumulative misconduct, this Court must reverse the death sentence and remand this case for a new penalty phase trial with a new jury.

ISSUE III

THE PROSECUTOR VIOLATED APPELLANT'S RIGHT TO A FAIR PENALTY PHASE TRIAL BY MISLEADING THE JURORS ABOUT THEIR RESPONSIBILITIES IN RECOMMENDING A SENTENCE.

It is improper for the prosecutor to mislead the jury by misstating the law regarding the jury's sentencing recommendation in the penalty phase of a capital murder trial. See Brooks v. State, 762 So.2d 879, 902 (Fla. 2000). Near the end of the prosecutor's penalty phase closing argument in this case, the prosecutor suggested that the jurors had a sworn duty to recommend a death sentence:

> This is about heinous, atrocious and cruel. And this is about a robbery, and this is about a rape, and this about [sic] a burglary, and this is about whether a man with a limited IQ should pay the ultimate price for what he did. That's what this is all about.
>
> I don't think when you look at it from that perspective that this decision is any more difficult than the other. I'm only thinking that when you go back in that room and make that vote and you head for your car this afternoon, you're not going to

> find yourself feeling the same way. *You're just going to find that you did your job just like you promised to do when you raised your right hand and swore to that oath.* [Emphasis added.]

[XXV T3519] Defense counsel immediately objected and moved for a mistrial on the ground that the prosecutor argued it was the jury's job and their duty to convict. [XXV T3519-2520] In context, it is obvious that counsel meant duty to recommend death rather than convict.

The prosecutor responded,

> All I asked them to do is follow their oath, and their oath was to judge things just the way I told them. If that's wrong, let the Appeals Court tell me it's wrong, that's exactly what this argument is all about.

[XXV T3520] The trial court denied the motion for mistrial. [XXV T3520]

After the denial of the motion for mistrial, the prosecutor continued to improperly instruct the jurors about their job and oaths:

> This is about . . . whether you can do the job that you promised this court that would you do. [sic] Because I submit to you that if you do that job and don't get swayed by a bunch of family members . . . .
> . . . But don't let the fact that they love their son, brother, or cousin, or whoever he is, sway you from following the oath that you took. The oath that you took was to follow those instructions, and they lead you to an inescapable conviction.

[XXV T3520-3521] These remarks plainly and improperly suggested that the jurors promised and took an oath to do the

job of recommending the death penalty. That is not the law.

Contrary to the prosecutor's argument, it was not the jurors' job or sworn duty to "judge things just the way [he] told them," nor to recommend death. In Garron v. State, 528 So.2d 353, 359 & n.10 (Fla. 1988), this Court found that the prosecutor improperly misstated the law when he told the jurors that it was their sworn duty to determine that the defendant should die for his actions. Similarly, in Urbin v. State, 714 So.2d 411, 421 (Fla. 1998), this Court found the prosecutor's argument imploring the jurors to do their duty and not to vote for life was an improper misstatement of the law.

The court's denial of the defense motion for mistrial is subject to review for abuse of discretion. Dessaure v. State, 891 So.2d 455, 465 (Fla. 2004). The court was required to grant the motion if a mistrial was necessary to protect Poole's right to a fair penalty phase trial. Id. In determining whether the prosecutor's misconduct violated Poole's right to a fair penalty phase trial, this Court should consider not only the comment preserved by timely objection, but the prosecutor's other misconduct in the penalty phase that was not preserved by timely objection. Ruiz v. State, 743 So.2d 1, 7 (Fla. 1999). This Court should also consider the cumulative effects of the prosecutor's misconduct during cross-examination of defense witnesses as set forth under

Issue II, *supra.*

The prosecutor also misled the jury by misstating the law concerning the weighing of aggravating and mitigating circumstances. He argued,

> What sets this crime apart so much from other crimes that the death penalty is the only conclusion you can come to? The fourth aggravating factor, heinous, atrocious and cruel.
>
> * * *
>
> I submit to you that it is an overwhelming aggravating circumstance that can never be overcome in a case like this.

[XXV T3512] The prosecutor further asserted,

> So now what weighs against that? I say to you that that scale is so far down here that there is nothing – and the judge will tell you once you find that sufficient aggravating circumstances exists [sic] to warrant the death penalty, unless you find that the mitigating circumstances outweigh them . . . unless something is going to push this scale back down, then your vote has got to be for the death penalty. I tell you that has to be twelve to nothing again.

[XXV T3514-3515] This was improper argument because "a jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors." Brooks v. State, 762 So.2d at 902 (quoting Henyard v. State, 689 So.2d 239, 249-250 (Fla. 1996).

The prosecutor continued his argument by belittling evidence presented in mitigation and commenting on matters not in evidence:

> This is what you saw. A picture of a church, isn't that nice. When did he go to

> church? When he was like 12, 16, 19. He is 39 years old when he murdered this boy. 39. Does it matter what he looked like in this picture? Was Ted Bundy okay in the fourth grade. I don't care, and I think you shouldn't care what he was doing in the fourth grade. A nice little picture in the fourth grade.

[XXV T3515] This argument was improper because "the role of counsel in closing argument is to assist the jury in analyzing [the] evidence, not to obscure the jury's view with personal opinion, emotion, and nonrecord evidence." Ruiz v. State, 743 So.2d at 4. Also, denigration of the defense case in mitigation is improper. Brooks v. State, 762 So.2d at 904.

The prosecutor misstated the law concerning brain damage as a mitigating circumstance, "You – you are free to reject it if you want and say I don't think brain damage mitigates against the death penalty." [XXV T3517] This was improper because this Court has recognized that uncontroverted expert testimony establishing brain damage and its connection to the crime, in this case, the major psychiatric disorder of dementia and impairment of Poole's ability to conform his conduct to the requirements of law [XXV T3419, 3441, 3443-3444, 3446, 3449-3450, 3452-3453, 3465, 3475-3477, 3481, 3494-3495], is mitigating as a matter of law. Coday v. State, 946 So.2d 988, 1002 (Fla. 2006); Crook v. State, 813 So.2d 68, 75-76 (Fla. 2002). The failure to find and weigh such mitigation violates the Eighth Amendment. Eddings v. Oklahoma, 455 U.S. 104 (1982).

The prosecutor's misconduct in closing argument requires reversal for a new penalty phase trial unless this Court can find beyond a reasonable doubt that the misconduct did not affect the jury's sentencing recommendation. See State v. DiGuilio, 491 So.2d at 1135, 1139. The prosecutor's repeated misrepresentations of the law governing the jury's responsibilities in the penalty phase of the trial, especially when considered together with the prosecutor's misconduct in cross-examination set forth in Issue II, violated Poole's right to a fair penalty phase trial and compromised the integrity of the proceeding. The death sentence must be reversed, and this case must be remanded for a new penalty phase trial with a new jury.

ISSUE IV

THE FLORIDA DEATH PENALTY STATUTE VIOLATES THE SIXTH AMENDMENT RIGHT TO TRIAL BY JURY.

In Ring v. Arizona, 536 U.S. 584, 609 (2002), the United States Supreme Court held that the Sixth Amendment[2] requires a jury to find the aggravating circumstances necessary for imposition of the death penalty. Defense counsel filed pretrial motions to bar imposition of a death sentence in this case on the ground that Florida's capital sentencing procedure is unconstitutional under Ring v. Arizona because the death penalty statute, section 921.141, Florida Statutes (2000), does not require express, unanimous findings of aggravating circumstances by the jury. [IV R615-638, 671-690, 697-701] The court denied the motions. [V R880, 893, 896]

The court's denial was consistent with this Court's decision in State v. Steele, 921 So.2d 538 (Fla. 2005). In Steele, this Court determined that the finding of at least one aggravating circumstance is implicit in the jury's recommendation of death, id., at 546, and held that the trial court departs from the essential requirements of law if it uses a penalty phase verdict form which details the jurors' determinations on aggravating circumstances. Id., at 550.

Appellant respectfully disagrees with this Court's decision

[2] The Sixth Amendment guarantee of the right to a jury trial is applicable to the States under the Fourteenth Amendment.

(..continued)
Ring, at 597.

in Steele and requests this Court to reconsider its holding. In a separate opinion in Steele, Justice Pariente expressed her belief that the better practice pursuant to the holding in Ring would be to instruct the jurors "that in order to recommend a sentence of death, they must unanimously conclude that at least one aggravating circumstance exists." Steele, at 555 n.12 (Pariente, C.J., concurring in part and dissenting in part). Appellant agrees, but would add that Ring requires that *all* aggravating circumstances necessary for the imposition of the death penalty must be found by the jury. "[T]he core principle of Ring [is] that aggravating circumstances actually relied upon to impose a death sentence may not be determined by a judge alone." Duest v. State, 855 So.2d 33, 52 (Fla. 2003)(Anstead, C.J., concurring in part and dissenting in part), cert. denied, 541 U.S. 993 (2004). This principle applies even when the trial court finds the aggravating circumstance of prior violent felony convictions, as in this case. Id.

Neither the trial court in imposing sentence, nor this Court in reviewing the sentence, can know with any certainty which aggravating circumstances were actually found by the jury in the absence of a special verdict form requiring the jurors to state which aggravating circumstances they unanimously found to have been proven beyond a reasonable doubt. In Walton v. Arizona, 497 U.S. 639, 648 (1990), the

Supreme Court explained that the Arizona sentencing procedure later held invalid in Ring could not be distinguished from the Florida procedure, despite the Florida requirement of a jury recommendation absent from the Arizona procedure:

> It is true that in Florida the jury recommends a sentence, but it does not make specific findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. *A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.*

See also, Winkles v. State, 894 So.2d 842, 848-849 (Fla.)(Anstead, J., concurring in part and dissenting in part), cert. denied, 126 S.Ct. 78 (2005). Nothing less than specific findings of fact on the aggravating circumstances found to be proven beyond a reasonable doubt by a unanimous jury will satisfy the Sixth Amendment requirements of Ring.

Because the Florida death penalty statute does not require express unanimous findings of aggravating circumstances by the jury it violates the Sixth Amendment. In the absence of a constitutionally valid death penalty statute, the State of Florida has no lawful authority to impose a death sentence on any criminal defendant. The death sentence imposed on Mark Poole must be vacated, and this case must be remanded with instructions to resentence Mark Poole to life imprisonment.

CONCLUSION

Appellant respectfully requests this Court to grant the following relief: Issue I, reverse the judgments and sentences and remand for a new trial; Issues II and III, reverse the death sentence and remand for a new penalty phase trial with a new jury; Issue IV, reverse the death sentence and remand for resentencing to life imprisonment for first-degree murder.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Scott A. Browne, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of March, 2007.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

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