IN THE SUPREME COURT OF FLORIDA

MARK ANTHONY POOLE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC11-1846
L.T. No. CF01-7078A-XX
DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

On direct appeal, this Court provided the following summary of facts:

> Mark Anthony Poole was convicted of the first-degree murder of Noah Scott, attempted first-degree murder of [L.W.], armed burglary, sexual battery of [L.W.], and armed robbery. Poole was convicted based on the following facts presented at trial. On the evening of October 12, 2001, after playing some video games in the bedroom of their mobile home, Noah Scott and [L.W.] went to bed sometime between 11:30 p.m. and 12 a.m. Later during the night, [L.W.] woke up with a pillow over her face and Poole sitting on top of her. Poole began to rape and sexually assault her as she begged Poole not to hurt her because she was pregnant. As [L.W.] struggled and resisted, Poole repeatedly struck her with a tire iron. She put her hand up to protect her head, and one of her fingers and part of another finger were severed by the tire iron. While repeatedly striking [L.W.], Poole asked her where the money was. During this attack on [L.W.], Scott attempted to stop Poole, but was also repeatedly struck with the tire iron. As Scott struggled to defend [L.W.], Poole continued to strike Scott in the head until Scott died of blunt force head trauma. At some point after the attack, Poole left the bedroom and [L.W.] was able to get off the bed and put on clothes but she passed out before leaving the bedroom. Poole came back in the bedroom and touched her vaginal area and said "thank you." [L.W.] was in and out of consciousness for the rest of the night. She was next aware of the time around 8 a.m. and 8:30 a.m. when her alarm went off.
>
> When her alarm went off, [L.W.] retrieved her cell phone and called 911. Shortly thereafter, police officers were dispatched to the home. They found Scott unconscious in the bedroom and [L.W.] severely injured in the hallway by the bedroom. [L.W.] suffered a concussion and multiple face and head wounds and was missing part of her fingers. Scott was pronounced dead at the scene. Evidence at the crime scene and in the

surrounding area linked Poole to the crimes. Several witnesses told police officers that they saw Poole or a man matching Poole's description near the victims' trailer on the night of the crimes. Stanley Carter stated that when he went to the trailer park around 11:30 that night, he noticed a black male walking towards the victims' trailer. Carter's observations were consistent with that of Dawn Brisendine, who knew Poole and saw him walking towards the victims' trailer around 11:30 p.m. Pamela Johnson, Poole's live-in girlfriend, testified that on that evening, Poole left his house sometime in the evening and did not return until 4:50 a.m.

Poole was also identified as the person selling video game systems owned by Scott and stolen during the crime.[FN1] Ventura Rico, who lived in the same trailer park as the victims, testified that on that night, while he was home with his cousin's girlfriend, Melissa Nixon, a black male came to his trailer and offered to sell him some video game systems. Rico agreed to buy them for $50, at which point the black male handed him a plastic trash bag. During this exchange, Nixon got a good look at the man and later identified Poole when the police showed her several photographs. Nixon testified that the next morning, when her son was going through the trash bag, he noticed that one of the systems had blood on it.

FN1. [L.W.] testified that Scott owned a Sega Genesis, Sega Dreamcast, and Super Nintendo.

Pamela Johnson also testified that on the same morning, she found a game controller at the doorstep of Poole's house, she handed it to Poole, and Poole put it in his nightstand. She indicated that she had never seen that game controller before that morning and did not know what it would be used for because neither she nor Poole owned any video game systems. During the search of Poole's residence, the police retrieved this controller. In addition, the police retrieved a blue Tommy Hilfiger polo shirt and a pair of Poole's Van shoes, shoes Poole said he had been wearing on the night of the crimes. A DNA analysis confirmed that the blood found on the Sega Genesis

box, Super Nintendo, Sega Dreamcast box and controller matched the DNA profile of Scott. Also, a stain found on the left sleeve of Poole's blue polo shirt matched [L.W.]'s blood type. The testing of a vaginal swab also confirmed that the semen in [L.W.] was that of Poole. A footwear examination revealed that one of the two footwear impressions found on a notebook in the victims' trailer matched Poole's left Van shoe. The tire iron used in the crimes was found underneath a motor home located near the victims' trailer. A DNA analysis determined that the blood found on this tire iron matched Scott's DNA profile.

Based on this evidence, the jury returned a verdict finding Poole guilty on all charges, including first-degree murder. Following the penalty phase, the jury recommended death by a vote of twelve to zero. The trial court followed the jury's recommendation and sentenced Poole to death.

Poole v. State, 997 So. 2d 382, 387-89 (Fla. 2008).

This Court affirmed Poole's conviction, but vacated his sentence of death and remanded to the trial court to conduct a new penalty phase. Poole, 997 So. 2d at 397. The new penalty phase commenced on June 20, 2011. On June 28, 2011 the jury recommended by a vote of eleven to one (11-1) that the defendant be sentenced to death for the murder of Noah Scott. A Spencer hearing was held on July 29, 2011, wherein the Court heard additional argument for mitigation and legal arguments. The Court again sentenced Poole to death on August 19, 2011. (V5, 716-29).

The trial court found in aggravation the following: 1) prior violent felony convictions [attempted first degree murder

and sexual battery with great force, very great weight]; 2) contemporaneous violent felonies [armed burglary, armed robbery, and sexual battery [great weight], 3) financial gain [less than moderate weight], and 4) the murder was heinous, atrocious and cruel [very great weight]. (V5, 719-23).

In mitigation, the court found the crimes were committed while Poole was under influence extreme mental or emotional disturbance (moderate to great weight) and, that his capacity to appreciate or conduct/conform his conduct to the requirements of the law was substantially impaired (great weight). (V5, 727).

The court also found the following non-statutory mitigating circumstances: borderline intelligence (little weight); defendant dropped out of school (very little weight); loss of father figure had emotional effect and led to his drug abuse (very little weight); defendant sought help for drug problem (very little weight); alcohol problem at time of crime (very little weight); drug abuse problem at time of crime (very little weight); defendant has a relationship with son (very little weight); strong work ethic (very little weight); defendant is a religious person (very little weight); dedicated uncle (very little weight); defendant needs treatment for mental disorder unrelated to substance abuse (very little weight); defendant has severe chronic alcohol and cocaine problem for which he needs

treatment (not proven). (V5, 723-26).

The court sentenced Poole to death finding that the aggravating circumstances "far outweigh the mitigating circumstances" and that the "heinous, atrocious, and cruel aggravator alone outweighs all the mitigating circumstances in this case." (V5, 729).

A. The State's Case

L.W. was eighteen (18) years old on October 12, 2001. She was a senior in high school and was approximately five (5) months pregnant at the time of the crimes. L.W. and her fiancé, Noah Scott, were living in a mobile home at the Orangewood Mobile Home Park in Lakeland, Florida. Mr. Scott was twenty-five (25) years old at the time he was murdered.

L.W. testified that she and Mr. Scott went to bed at approximately 11:30 p.m. on the night of October 12, 2001. L.W. was awakened when an individual [later identified as Poole] placed a pillow over her face. She could see through the side of the pillow and observed Scott. (V10, 718-23). L.W. also said that the position of the pillow allowed her to see the arm of the person on top of her. L.W. was repeatedly struck by a hard object. She was able to see that Poole was armed with a long hard, black object when it was placed next to her on the bed. (V10, 721).

L.W. was raped during the attack and recalled begging Poole, "don't hurt me. I'm pregnant." (V10, 721-23). As Poole was raping L.W., Scott attempted to come to her defense and was repeatedly struck about the head with the hard object. (V10, 721). Poole rolled her over forcing her face down into the pillow during the attack and continued to hit her on the back of the head. Poole asked L.W. where the money was and she told him they didn't have any, and, he continued to hit her. Id.

L.W. was unable to determine the number of times Mr. Scott was struck by the tire iron, but testified, "I just know it was a lot." L.W. stated that Mr. Scott made several attempts to come to her aid and each time Scott was struck by a blunt instrument. (V10, 720). L.W. said she was conscious throughout the attack. After she was raped, the defendant rolled her on to her stomach and hit her repeatedly in the back of her head with the tire iron. At that point, L.W. was going in and out of consciousness. L.W. testified that just before the defendant left the residence, "he came back in the room and he touched my vaginal area again and he told me thank you." She got out of bed and passed out after putting on some clothes. She was in and out of consciousness the rest of the night. L.W. threw up and recalled hearing Noah breathe and got sick and fell back down. (V10, 724-25, 728).

The next morning, L.W. recalled being awakened by an alarm clock around 8:00. She went to the bathroom and started to clean up, but passed out again. L.W. woke up again, found Noah's cell phone, and, managed to call 911. (V10, 725-27).

The 911 tape was played for the jury. L.W. said that "[s]omebody broke into my house last night, and now I keep passing out. And I don't know if my fiancé is alive or not." (V10, 760). L.W. told the 911 operator that "there's blood everywhere." L.W. told the operator that she had a head injury and that she had been "raped."[1] (V10, 761-62). She said that blood was pouring from the back of her head. (V10, 767).

Noah Scott was dead when the police arrived and L.W. was clinging to life. Lakeland police officer Todd Edwards arrived at the trailer and found L.W. sitting on the floor with her back against the wall. She was unable to respond to his directions and she was visibly injured. In the back bedroom, there was a male lying motionless on the floor with a lot of blood in the surrounding area. (V9, 673-74). Paramedics brought L.W. outside the trailer and officer Edwards again attempted to speak with her. She did not appear to understand what he was saying and was in "shock." (V9, 675-76).

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[1] L.W. and Noah owned a number of games and gaming systems which she later learned had been taken from the trailer. (V10, 772-73).

Dr. Ransom Simmons, an emergency room doctor at Lakeland Regional Medical Center, treated L.W. on the morning of October 13, 2001. L.W. had suffered severe head injuries which included multiple lacerations to her face and the back of her head. (V9, 689-93). L.W. had very low blood pressure from significant blood loss. Dr. Simmons testified that L.W. would have died as a result of her injuries had she not been pregnant. (V10, 689-93). The doctor explained that L.W.'s pregnancy resulted in her having more fluid than she would normally have. (V10, 701).

L.W. suffered a severe head injury resulting in a concussion which can cause some memory loss. L.W. appeared to have some of these symptoms as she was unable to recall certain things such as her name and the fact she was pregnant. (V10, 692). The end of her middle finger of the left hand as well as the nail of her long finger on her left hand had been severed and was missing. State Exhibits 93 and 95 depict the left hand of the victim, "the tissue was crushed" and "the nail bed is gone." (V10, 699-700). The tip of the finger was preserved but it could not be reattached. The treating physicians had to trim and close the bone on her finger. (V10, 709).

A CAT scan revealed skull fractures of L.W.'s occipital bone. L.W.'s injuries were from blunt force consistent with a tire iron. (V10, 700, 704).

The apparent murder weapon, a tire iron, was found by crime scene technician Renee Arlt underneath a mobile home located in between the victims' trailer and the trailer where Poole had been staying. (V9, 625-30, 660-61). The exterior door to the trailer had damage consistent with having been pried open. (V9, 634-36). Blood stains were located throughout the victims' trailer. (V9, 636-51). A small safe located in the bedroom had apparent pry marks on it. (V9, 638). Crime scene photographs were introduced, including photographs reflecting the victim's severed fingertip on the bedroom floor. (V9, 646-47).

Items stolen from the trailer were later linked to Mr. Poole. A gaming system was recovered with blood on it that Poole had sold to another individual for $50.00. (V10, 785). The blood on that gaming system was tested and matched victim Scott and/or L.W. (V10, 785). A total of three gaming systems were recovered that were linked to the victims' residence and Mr. Poole. (V10, 786-87).

FDLE Crime Lab Supervisor, Leroy Parker, an expert in bloodstain pattern analysis, examined the crime scene, and issued a report of his findings. (State's Exhibit 173, V10, 803). Parker testified that kinetic energy from forceful impacts to the victim or victims resulted in blood impact spatter on the wall and ceiling. (V10, 826-831). The blood

spatter patterns indicated that the victims were not standing when they were subject to the blunt force trauma. (V10, 833). Based upon the spatter, Parker estimated there were at least a "dozen" blows. (V10, 833).

The Chief Medical Examiner for the Tenth Circuit, Dr. Stephen Nelson, testified that victim Noah Scott died from blunt-force trauma. (V10, 844-50). Mr. Scott was five feet, six inches tall and weighed 139 pounds at the time of his murder. (V10, 857-58). Mr. Scott had suffered a total of fifteen (15) areas of blunt force trauma, most of which, thirteen, were inflicted upon his head. (V10, 856-57). He suffered multiple skull fractures, cerebral contusions and hemorrhages from the attack. (V10, 856). Mr. Scott's brain was in effect, "bathed in blood." (V10, 856). The injuries inflicted were consistent with having been inflicted with a tire iron. (V10, 854).

A victim impact statement was read to the jury by the prosecutor from Noah Scott's mother, reflecting upon his qualities and the loss of her first born son. (V10, 859-60). Noah Scott's Aunt also reflected upon the loss to the family of Noah, at age 24, and his qualities as a father and nephew. (V10, 861). Finally, L.W.'s victim impact statement was read, noting how her now nine year-old son asks about his father and

the fact he is missing from their lives. That her son will never have the opportunity to play with his father, and, watch him and help him achieve his goals. (V10, 861-62). The continuing impact of the crime upon her and her view of people and the world has changed. (V10, 863).

B. The Defense Case

The State has no particular disagreement with the statement of facts offered by appellant relating to the defense case in mitigation, but adds the following.

Dr. Chowallur Dev Chacko acknowledged that his opinion that Poole was substantially impaired at the time of the crimes rested upon Poole's statements to him regarding cocaine and alcohol consumption prior to the crimes. (V11, 934-35). Dr. Chacko had neither interviewed any other person nor seen any witness statement documenting or corroborating Poole's drug or alcohol abuse prior to the murder. (V11, 931-32). While Poole told Dr. Chacko that he had no recollection of the crimes, Dr. Chacko was not aware that Poole told another mental health professional that he recalled going into the trailer and raping the female victim. (V11, 934).

Dr. Kremper testified that Poole had antisocial characteristics, but, he did not qualify for an Antisocial Personality Disorder diagnosis because he had no evidence Poole

had a conduct disorder prior to the age of 15. (V11, 893). Poole had a personality disorder [NOS, not otherwise specified] "primarily "due to antisocial features." Dr. Kremper noted that Poole "had multiple arrests, continued substance abuse, problems holding a job" and that his difficulties became progressively worse as "his substance abuse increases." (V11, 903).

Poole told Dr. Kremper a number of stories during the course of his evaluations regarding his participation in the charged offenses. During his second interview, Poole indicated that he entered the victims' residence, observed a mess, and, ran out. In a 2004 interview with Dr. Kremper, Poole admitted that he went into the residence, saw the woman beaten unconscious, and "raped her." Poole said that she asked him for help, but, that he did not help her, stating that he was a "monster" when he was "on drugs." Poole provided no further information about the offenses to Dr. Kremper. (V11, 892).

Poole also told Dr. Kremper a number of different stories about taking drugs or alcohol at the time of the offenses. Initially Poole told Dr. Kremper that he had been drinking beer all day but was "not using any drugs around that time, for four days." (V11, 891). Another time, Poole told Dr. Kremper that he had used "crack cocaine" that evening. (V11, 891). When Dr. Kremper interviewed Poole a second time "he did not mention

anything about drugs..." (V11, 891). As Dr. Kremper testified, "there were numerous discrepancies" in what Poole told him about the day of the offenses. (V11, 892).

SUMMARY OF THE ARGUMENT

ISSUE I--The prosecutor offered valid, racially neutral reasons for peremptorily striking two African American jurors. A juror's equivocation about the death penalty or "discomfort with" the death penalty is a race-neutral reason. So, too is age, which was cited by the prosecutor and credited by the trial court below. The record simply reveals a prosecutor attempting to empanel an older, experienced, mature panel of jurors that could and would impose the death penalty. The trial court fully complied with this court's precedent in evaluating the challenges to the strikes below. Poole has not met his burden of establishing that the trial court's ruling below was clearly erroneous. Accordingly, this claim must be denied.

ISSUE II--The trial court did not abuse its discretion in admitting victim L.W.'s fingertip into evidence. The fingertip was relevant and was not so gruesome or shocking that its probative value was outweighed by the danger of unfair prejudice.

ISSUE III--Appellant's challenges to the prosecutor's comments were largely unpreserved by objections in the court below. The trial court sustained an objection to a single objectionable remark, and provided a curative instruction to the jury. The prosecutor's argument addressed the evidence presented in aggravation and mitigation and fair inferences there from. No prejudicial, much less fundamental error can be discerned from any of the challenged comments on appeal.

ISSUE IV--Appellant's death sentence, supported by four powerful aggravators, recommended by the jury 11-1, and as imposed by the trial court, is clearly proportional. Appellant's aggravators include two of the most weighty under Florida law, HAC and prior violent felony. Appellant broke into a young couple's home, armed with a tire iron, and, in a heinous and atrocious and cruel manner, murdered a young man who attempted to fend the appellant off to protect his pregnant fiancée. Appellant raped victim L.W. in her own bed and left her for dead despite her pleas for mercy. Appellant's case is comparable to other cases in which the death sentence was imposed.

ISSUE V--Appellant's challenge to the constitutionality of Florida's capital sentencing statute based upon the Supreme Court's decision in Ring v. Arizona is without merit.

ARGUMENT

ISSUE I

WHETHER POOLE'S RIGHTS TO EQUAL PROTECTION AND AN IMPARTIAL JURY, GUARANTEED BY THE UNITED STATES AND FLORIDA CONSTITUTIONS, WERE INFRINGED BY THE PROSECUTOR'S PEREMPTORY STRIKES OF AFRICAN-AMERICAN JURORS WEARING AND BLANDIN?

In his first issue, appellant argues the prosecutor's use of two peremptory challenges violated his constitutional rights. He maintains that the prosecutor's proffered race-neutral reason was merely a pretext to exclude two African-American jurors. The State disagrees.

On appeal this Court presumes that peremptory challenges are exercised in a nondiscriminatory manner. Hayes v. State, 94 So. 3d 452, 461 (Fla. 2012). Trial judges are vested with broad discretion in determining whether peremptory challenges are racially motivated and an appellate court "must necessarily rely on the inherent fairness and color blindness of our trial judges who are on the scene and who themselves get a 'feel' for what is going on in the jury selection process". Reed v. State, 560 So. 2d 203, 206 (Fla. 1990). As this Court has recognized, [o]nly one who is present at the trial can discern the nuances of the spoken word and the demeanor of those involved." Reed, 560 So. 2d at 206; see also Files v. State, 613 So. 2d 1301, 1305 (Fla. 1992) (noting that this Court "must rely on the superior vantage

point of the trial judge, who is present, can consider the demeanor of those involved, and can get a feel for what is going on in the jury selection process.").

This Court has instructed it will affirm a trial judge's allowance of a peremptory challenge unless the decision is clearly erroneous. Murray v. State, 3 So. 3d 1108, 1120 (Fla. 2009); see also Banks v. State, 46 So. 3d 989, 996 (Fla. 2010) (stating that "the trial court's decision turns primarily on an assessment of credibility and will be affirmed on appeal unless clearly erroneous.").

In Melbourne v. State, 679 So. 2d 759, 764 (Fla. 1996), this Court determined that a trial court must go through a three-step process to resolve an allegation of discrimination during the jury selection process: (1) a party objecting to the other side's use of a peremptory challenge on racial grounds must make a timely objection, identify the venireperson as a member of a distinct racial group and request the court to direct the challenger to offer a race-neutral reason for the strike; (2) the court must ask the proponent of the strike to explain the reason for the strike and the proponent must come forward with a race neutral explanation; and (3) if the reason is facially race neutral and the trial court believes that, given all the circumstances surrounding the strike, the

explanation is not a pretext, the strike will be sustained.[2] "Throughout this process, the burden of persuasion never leaves the opponent of the strike to prove purposeful discrimination." Melbourne, 679 So. 2d at 764; see also Hayes, 94 So. 3d at 467 (advising that the "trial court should request that the opponent [of the strike] advise why the reason is not genuine, and how, given all the circumstances, the explanation is a pretext.").

The prosecutor exercised peremptory challenges to strike venirepersons Wearing and Blandin. (V8, 441, 444). Both are African-American. (V8, 368). Defense counsel objected to the strikes, identified both jurors as African-American, and submitted there was not any race-neutral reason for their removal. (V8, 441-44).

The first step of Melbourne was complied with. See Hayes, 94 So. 2d at 761 (stating that the objecting party must make a timely objection, show that the venireperson is a member of a distinct protected group, and request that the trial court ask the striking party to provide a reason for the strike); Welch v. State, 992 So. 2d 206, 212 (Fla. 2008) (finding the defendant made a sufficient step one objection by objecting to the State's peremptory challenge to Ms. Napolitano, alleging that Ms.

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[2] This three-step framework is derived from Batson v. Kentucky, 476 U.S. 79 (1986).

Napolitano belonged to a specific gender group and requesting the State to provide a gender-neutral reason for the strike). Thus, the focus of the inquiry in the instant case necessarily is the second and third step.[3]

During the second step of Melbourne, the party striking the prospective juror has the burden of production to come forward with an explanation for the peremptory challenge. The party must provide a reason for the strike at this stage. Hayes, 94 So. 3d at 761 (if the first step of *Melbourne* is met, the trial court must ask the party challenging the prospective juror to explain the reason for the strike and the party must provide a race-, ethnicity- or gender- neutral reason for the strike). As the United States Supreme Court has recognized, a "neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." Hernandez v. New York, 500 U.S.

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[3] Florida law is not demanding regarding the first step. Welch, 992 So. 2d 206, 212 (Fla. 2008) (referring to "simplified first step"); see also Hayes, 94 So. 2d at 461 (noting that the 'simplified inquiry' adopted by this Court recognizes that little is required to request a neutral explanation for the challenge).

352, 360 (1991). Indeed, the prosecutor's proffered reason for striking a juror need not be particularly persuasive, or even plausible, so long as it is race-neutral. Purkett v. Elem, 514 U.S. 765, 767-68 (1995).

Here, the prosecutor explained his two peremptory strikes of venirepersons Wearing and Blandin were race-neutral. The trial court asked the prosecutor to state his race-neutral reason for the strikes. (V8, 441, 443, 444). The prosecutor responded and explained:

> MR. AGUERO: I'm going to tell you the same thing for the next two jurors. We can read it back if we need to. **I asked a series of questions that had to do with if you were to have to vote on whether you would keep the death penalty or not keep the death penalty, how would you vote.**
>
> **Ms. Wearing said I'm not sure. And Mr. Blandin said not sure how I would vote. So they neither one are sure how they would vote with regard to the death penalty, and that is a race-neutral reason to strike them.**
>
> . . .
>
> MR. AGUERO: I'm not talking about this case. That's not what I was asking. I said if you had to vote for whether we kept the death penalty in Florida or not, how would you vote. And I asked each of the jurors that. Well, not each of them, I didn't because it came up as to each juror, depending on how they were answering my questions. But I asked them if you had to go into the voting booth and vote, how would you vote?
>
> **And I wrote it down verbatim. Ms. Wearing said: I'm not sure. And Mr. Blandin said: Not sure how I would vote.**

(V8, 441-43)(emphasis supplied).

The prosecutor was asked if he had any other race-neutral reason. He responded, he did not, and further explained his race-neutral rationale and how he ferreted out weak death penalty jurors. (V8, 443-44). He stated:

> . . .[A]ll I have to have is a reason that is a race-neutral reason. And what this is, is people that will not vote for the death penalty. **And I believe that they're weak death penalty jurors based on that answer. That is, that they're not sure whether they would keep the death penalty in the State of Florida.**
>
> **There's a lot of ways to figure out if people are weak death penalty jurors. That was one of them for me.**

(V8, 443-44)(emphasis supplied).

Later in the voir dire process, the prosecutor also explained that he sought to remove venirepersons Wearing and Blandin due to their young age. While the State recognizes that this Court has viewed somewhat belated responses with "some skeptism," age surely cannot be viewed as a contrived response. Nowell v. State, 998 So. 2d 597, 606 (Fla. 2008). Indeed, the right to an impartial jury "is best safeguarded not by an arcane maze of reversible error traps, but by reason and common sense." Melbourne, 679 So. 2d at 765; see also Batson v. Kentucky, 476 U.S. 79, 95 (1986) (noting the need for a judge to take into account "all possible explanatory factors" in a case).

After the trial court ruled on the prosecutor's initial

race-neutral reason, the prosecutor clarified:

> MR. AGUERO: Well, and I did say, when I struck Mr. Maruska, that Staresnick, Maruska, and the two African-Americans who I had the race -- other race-neutral reason for, were all too young. They're all in their early twenties.

(V8, 450).

In fact, when the prosecutor exercised a peremptory strike to remove venireperson Maruska he stated he is "also weak on the death penalty and young and white." (V8, 447-48). The following day the prosecutor again clarified his additional reason for removing venirepersons Wearing and Blandin:

> MR. AGUERO: And I have another issue to put on the record before we get all these folks in here.
>
> Yesterday, when I struck Ms. Wearing and Mr. Blandin, in addition to stating the race-neutral reason concerning their feelings about the death penalty, I also made mention of their age and made mention of Mr. Staresnick's age.
>
> I want to also advise the court that it's the state's position that -- they I feel very comfortably is a race-neutral reason that, while not sure how they feel about the death penalty, and that's race-neutral, and us using a peremptory, I know absolutely that there is case law regarding age being a race-neutral reason for a peremptory.
>
> **So for that reason, I'm going to point this out in addition to the other reason as a race-neutral reason: The state struck Mr. Staresnick, who is 22 years old. The state struck Mr. Maruska, who's 31 years old. The state struck -- they're both white. The state struck Ms. Wearing, who's 21 years old. And the state struck Mr. Blandin, who's 22 years old. All of those people, young, none of them have any children.**

...

> So to leave these young people -- and that's why we struck Mr. Izzo -- or Mr. Staresnick right out of the box. And the court even made a comment that we struck somebody that we could have waited and the defense probably would have struck.
>
> But in this group hearing only the death penalty portion of a trial, I feel extremely uncomfortable -- I'm only calling seven witnesses. They're not going to hear all of the evidence that took five -- four or five weeks in the last trial in making a decision, but rather this limited evidence. And so the fact they are a young as they are is another race-neutral reason to excuse these two jurors.

(V8, 501-03)(emphasis supplied). The prosecutor also noted that Ippert, an African-American who "didn't waffle at all" regarding her vote on the death penalty was seated as a juror. (V8, 503).

The second step of Melbourne was complied with in this case.

In step three, the trial judge focuses on the genuineness of the race-neutral explanation as opposed to its reasonableness. Banks, 46 So. 3d at 996; Farina v. State, 801 So. 2d 44, 49 (Fla. 2001). In making a genuineness determination, the court may consider all relevant circumstances surrounding the strike. This Court has determined that relevant circumstances include, but are not limited to, the racial make-up of the venire; prior strikes exercised against the same racial group; a strike based on a reason equally applicable to an unchallenged juror; or singling the juror out for special

treatment. Murray, 3 So. 3d at 1120. "The proper test under *Melbourne* requires the trial court's decision on the ultimate issue of pretext to turn on a judicial assessment of the credibility of the proffered reasons and the attorney or party proffering them, both of which 'must be weighed in light of the circumstances of the case and the **total course of the voir dire** in question, as reflected in the record.'" Hayes, 94 So. 3d at 462 (emphasis supplied). During this third step, the trial court must satisfy itself that the prosecutor's explanation is not a pretext. Melbourne, 679 So. 2d at 764. On appeal, "the defendant as the opponent of the strike, carries the burden of persuasion to demonstrate purposeful discrimination and must overcome the presumption that the State's strike was exercised in a nondiscriminatory manner." Hayes, 94 So. 3d at 461, n.6; see also Snyder v. Louisiana, 552 U.S. 472, 477 (2008) (at step three, in the Batson three-step process, the trial court must determine whether the defendant has shown purposeful discrimination).

Here, after listening to the prosecutor's rationale, the trial court allowed the strikes. In regard to the prosecutor's explanation he was striking venirepersons Wearing and Blandin based upon their equivocal hesitant answer to his question -- would you vote to keep the death penalty, the trial court first

noted:

> Oh, but I think -- I think you're allowed to ask, you know, a political question to determine somebody's philosophy as to whether they're conservative or liberal or -- so I don't think it matters if the question isn't, per se, about the case itself.

(V8, 443).

The trial court stated it did not disagree with the prosecutor's rationale. (V8, 444). The trial court preliminarily accepted the prosecutor's race-neutral reasoned and ruled:

> **I think Mr. Aguero is correct. By asking that question, even though it's a political-type question, would you vote for it, is a way of determining what your true views are on the death penalty.** And if you answer I'm not sure, I guess that's -- he could look at it the way he's looking at it. I don't know that -- but certainly --
>
> MR. AGUERO: I can tell you that no one else on this panel answered that way. In fact, Ms. Ippert, who's also an African-American juror, said very clearly she would vote for the death penalty. That is, she would vote to keep the death penalty as an option.
>
> THE COURT: Well, we're going to get to her, so let's see what happens. I'll -- for the time being, I'm going to accept those. . . .

(V8, 444-45)(emphasis supplied).

After jury selection was completed, the trial court reiterated its acceptance of the prosecutor's race-neutral rationale, and implicitly found the removal of jurors Wearing and Blandin based upon age to be a race-neutral rational:

> Okay. I'm going to make a record now. **I agree with Mr. Aguero that his rationale, when both of them said they were unclear how they would vote if there was a vote taken tomorrow on whether Florida should keep the death penalty would give an indication of someone as to how strongly they supported the death penalty when they said they didn't know. So that's race neutral.**
>
> **And given the fact that he kept Ms. Ippert, who answered that she would vote for it, and she is an African-American, I think it further indicates it.**
>
> **Now, I thought the reason you were striking them was to go along with Staresnick; they were all too young to be on the panel.** But you didn't mention it, so --
>
> But, anyway, I accept his race-neutral reason for striking the two of them.

(V8, 450)(emphasis supplied).

As noted above, thereafter the prosecutor clarified his strikes were also because Wearing and Blandin were "too young" just in "their early twenties." (V8, 450).

First, a juror's equivocation about the death penalty or "discomfort with" the death penalty is a race-neutral reason. Morrison v. State, 818 So. 2d 432, 443-44 (Fla. 2002). As this Court has stated:

> "[T]he State may properly exercise its peremptory challenges to strike prospective jurors who are opposed to the death penalty, but not subject to challenge for cause ... [because] [b]oth parties have the right to peremptorily strike 'persons thought to be inclined against their interests.'" *San Martin v. State,* 717 So.2d 462, 467-68 (Fla. 1998) (quoting *San Martin v. State,* 705 So.2d 1337, 1343 (Fla. 1997)) (quoting *Holland v. Illinois,* 493 U.S. 474, 480, 110 S.Ct. 803, 107 L.Ed.2d 905 (1990)). Moreover, this Court has found that "discomfort with" the death penalty is a sufficient race-neutral reason for the

> State to exercise its peremptory strike. *See, e.g., Walls v. State,* 641 So.2d 381, 386 (Fla. 1994) (holding trial court did not err in sustaining peremptory strike of venireperson who had "expressed discomfort with the death penalty") (citing *Atwater v. State,* 626 So.2d 1325, 1327 (Fla. 1993)).

Morrison, 818 So. 2d at 443-44;[4] see also Murray, 3 So. 3d at 1121 (trial court's ruling on genuineness affirmed where irresolute answer given in response to question, how do you feel about the death penalty); Floyd v. State, 850 So. 2d 383, 393-95 (Fla. 2002) (peremptory challenge based upon an equivocal response about the death penalty was race-neutral); Farina, 801 So. 2d at 50 (affirming trial court's ruling peremptory strikes of two venirepersons were race-neutral where one voiced

[4] The Supreme Court has observed that prosecutors often use peremptory challenges to remove death scrupled prospective jurors. Gray v. Mississippi, 481 U.S. 648, 668 & n.19 (1987) (noting that "prosecutors often use peremptory challenges in this manner). Several individual justices have also stated that a prosecutor may use peremptory challenges to remove death scrupled prospective jurors. Baze v. Rees, 553 U.S. 35, 91-92 (2008)(Scalia, J. concurring)(noting that prosecutors in capital case, "like defense counsel, are permitted to use the challenges for cause and peremptory challenges . . . to arrive at a jury that both sides believe will be more likely to do justice in a particular case"); Gray, 481 U.S. at 671 (Powell, J., concurring)(stating that there "can be no dispute that a prosecutor has the right, indeed the duty, to use all legal and ethical means to obtain a conviction, including the right to remove peremptorily jurors whom he believes may not be willing to impose lawful punishment."); Brown v. North Carolina, 479 U.S. 940 (1986)(O'Connor, J., concurring in the denial of certiorari)(stating that permitting prosecutors to take into account the concerns expressed about capital punishment by prospective jurors in exercising peremptory challenges "simply does not implicate the concerns expressed in *Witherspoon.*").

hesitancy about the death penalty and one was tentative in her support of the death penalty).

In Walls v. Buss, 658 F.3d 1274 (11th Cir. 2011), the Eleventh Circuit reviewed this Court's decision is Walls v. State, 641 So. 2d 381 (Fla. 1994), wherein this Court held there was no error where the trial court sustained the peremptory challenge of an African-American venireperson who expressed discomfort with the death penalty. The venireperson in question voiced hesitation about capital punishment. Among the hesitation was his equivocal response to the question-- would you vote for or against keeping the death penalty as a legal option. The Eleventh Circuit affirmed the denial of habeas relief, explaining:

> The state trial court permitted the peremptory challenge. On direct appeal, the Florida Supreme Court noted that DG "had expressed discomfort with the death penalty," and concluded that this discomfort was "a sufficient race-neutral reason for the State to exercise its peremptory." *Walls II,* 641 So.2d at 386. So, the Florida Supreme Court rejected Petitioner's claim on this issue.
>
> The believability of a prosecutor's race-neutral explanations for striking a juror is a "pure issue of fact ... peculiarly within a trial judge's province." *McNair v. Campbell,* 416 F.3d 1291, 1310 (11th Cir. 2005) (internal quotation marks and citation omitted). In addition, under AEDPA we presume the correctness of the state court's factual determinations; Petitioner bears the burden of rebutting this presumption with clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Petitioner has not carried this burden, and so we cannot say that the Florida Supreme Court unreasonably accepted the State's race-neutral explanation for striking DG. When asked whether he "ha[d] a feeling about the death penalty that makes you wonder whether it's the right thing to do or not," DG answered, "Sometimes." And he seemed to express further hesitation about capital punishment when he was asked whether he would support a referendum against the death penalty.[FN7] The Florida Supreme Court thus had a sound basis for determining that DG had "expressed discomfort with the death penalty," and Petitioner has not offered the clear and convincing evidence required to overcome our presumption that this factual determination is correct.

> FN7. We see some lack of clarity on whether DG understood the questions about a referendum: some of DG's responses might be understood as indicating that he would prefer to vote either against the death penalty in a given case, or against a referendum wholly eliminating the death penalty. But this lack of clarity actually makes it harder for us to say that the Florida Supreme Court reached an unreasonable determination of the facts in finding that DG had "expressed discomfort with the death penalty." *Walls II*, 641 So.2d at 386. Where, as here, the record might be read as supporting multiple conclusions, it would be error for us to substitute our view of the facts for that of the Florida Supreme Court. *See Wainwright v. Goode*, 464 U.S. 78, 104 S.Ct. 378, 382-83, 78 L.Ed.2d 187 (1983).

Nor was the Florida Supreme Court's decision contrary to, or an unreasonable application of, federal law. Even if we assume that Petitioner has made the required prima facie showing of racial discrimination — *see Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 1723, 90 L.Ed.2d 69 (1986)—we accept the State's race-neutral explanation that was based on Petitioner's opposition to the death penalty. "[C]learly established federal law, as determined by holdings in Supreme Court decisions, does not prohibit prosecutors from using their peremptory strikes to

> remove venire members who are not ardent supporters of the death penalty...." *Bowles v. Sec'y for Dep't of Corr.*, 608 F.3d 1313, 1317 (11th Cir. 2010). Nothing pertinent to the law has changed since *Bowles* was decided: no United States Supreme Court precedent establishes a basis for challenging the Florida Supreme Court's decision in this case.
>
> Moreover, Petitioner has failed to offer evidence—for example, a comparative analysis of jurors who the State accepted and rejected, to show that the State did not attempt to remove similarly situated nonblack jurors—even suggesting that the prosecutor's race-neutral explanation was merely pretextual. Petitioner, in short, is unable to establish purposeful discrimination. The Florida Supreme Court's decision rejecting Petitioner's *Batson* claim was neither contrary to, nor an unreasonable application of, federal law as determined by the United States Supreme Court.[FN8]
>
> > FN8. Because we conclude that DG's expressed opposition to the death penalty was a permissible basis for the State's peremptory challenge, we need not consider the other reasons the prosecutor offered for striking DG—his age and the hostility that the prosecutor claimed to sense in DG—except to say that Petitioner has offered nothing to show that either reason was a pretext for racial discrimination.

Walls, 658 F.3d at 1281-82.

It is hard to imagine, from a prosecutor's perspective trying a capital case, a more rational basis for the use of peremptory challenges than to remove those who express discomfort with the death penalty. A prosecutor in a capital case who cannot challenge prospective jurors based on their views of the death penalty might as well not have any peremptory

challenges. See generally United States v. Villarreal, 963 F.2d 725, 729 (5th Cir. 1992) (refusing to extend *Batson* to a prosecutor's use of peremptory challenges to exclude death scrupled prospective jurors because such an expansion would effectively eliminate the peremptory challenge). Here, both venirepersons Wearing and Blandin gave equivocal responses when asked whether they would support the death penalty. The trial court's ruling was not clearly erroneous.

Additionally, the prosecutor explained he removed venirepersons Wearing and Blandin due to their young age. Age is a race-neutral reason. In Rice v. Collins, 546 U.S. 333, 338 (2006), the United States Supreme Court held that a state trial court's decision finding a prosecutor's reason for a peremptory strike of an African-American juror was race-neutral where the juror was young, single and lacked ties to the community. Indeed, "[a] potential juror's youth and apparent immaturity are race-neutral reasons that can support a peremptory challenge." People v. Sims, 5 Cal. 4th 405, 430, 20 Cal.Rptr.2d 537, 853 P.2d 992 (Cal. 1993); United States v. You, 382 F.3d 958, 968 (9th Cir. 2004) ("valid and non-discriminatory" reasons for strikes included that one excused "juror lacked the sufficient age and maturity level" . . .); United States v. Williams, 934 F.2d 847, 849-50 (7th Cir. 1991) (youth and marital status are

neutral considerations).

In fact, youth is a genuine, common, race-neutral reason for prosecutors striking prospective jurors. See Saffold v. State, 911 So. 2d 255, 256 (Fla. 3d DCA 2005); Cobb v. State, 825 So. 2d 1080 (Fla. 4th DCA 2002); see also Daniels v. State, 837 So. 2d 1008, 1009 (Fla. 3d DCA 2002) (noting "[t]he prevailing view is that a peremptory challenge based on the age of the juror is permissible. *See Weber v. Strippit, Inc.*, 186 F.3d 907, 911 (8th Cir. 1999), *cert. denied,* 528 U.S. 1078, 120 S.Ct. 794, 145 L.Ed.2d 670 (2000); *United States v. Cresta,* 825 F.2d 538, 545 (1st Cir. 1987); *State v. Taylor,* 142 N.H. 6, 694 A.2d 977 (1997); *Baxter v. United States,* 640 A.2d 714 (D.C. 1994)."). As a number of courts have recognized, prosecutors routinely remove young jurors, and such removals withstand challenge. See e.g. United States v. Williams, 214 Fed.Appx. 935, 2007 WL 140997, *1 (11th Cir. 2007) (unpublished) (finding a prosecutor's strike of a prospective juror based in part on "her youth and lack of worldly experience" to be genuine and observing it "is not unreasonable to believe the prosecutor remained worried that a young person with few ties to the community might be less willing than an older, more permanent resident" to find Williams guilty quoting Rice v. Collins, 546 U.S. 333, 341 (2006)); United States v. Thompson, 450 F.3d 840

(8th Cir. 2006) (finding a prosecutor's strike of a 20 year-old prospective juror based in part on his age to be genuine); People v. Hamilton, 200 P.3d 898, 933 (Cal. 2009) (finding a prosecutor's strike of a 22 year-old prospective juror based on his age to be genuine); Leonard v. State, 969 P.2d 288, 294 (Nev. 1998) (finding a prosecutor's strike of a 22 year-old prospective juror based on his age to be genuine).

While appellant has attempted to cast the prosecutor as a member of the same squad as those from the Dallas District Attorney's Office who took part in the insidious discrimination outlined in Miller-El v. Dretke, 545 U.S. 231 (2005) and Reed v. Quarterman, 555 F.3d 364 (5th Cir. 2009), such is simply not true. A review of the entire voir dire demonstrates that the prosecutor favored a strong death penalty jury comprised of older venirepersons.

The prosecutor generally individually questioned the venire regarding their position on and understanding of the death penalty. Venireperson Westcott's answers indicated she thought the death penalty was necessary. (V8, 381-82). When asked why she thought that the death penalty should be an option, she responded the "punishment fits the crime." (V8, 382). Westcott was chosen as a juror. (V8, 440; V9, 569). Venireperson Day's answers initially indicated she did not completely believe in

the death penalty. (V8, 382-83). The prosecutor then posed a narrow question which placed Day in a position to choose a stance on the death penalty. The question was:

> Let's say that tomorrow was a voting day and what you were going to go vote on would be whether Florida has a death penalty or didn't have a death penalty. Would you vote to keep it or do away with it?

(V8, 384).

Venireperson Day indicated she would vote in to keep the death penalty. (V8, 384). Day was chosen as a juror. (V8, 440; V9, 569).

The next three venirepersons: Moore, Staresnick, and Hussey appeared to be comfortable with the death penalty as a punishment. (V8, 384-87). Moore was chosen as a juror, but was later excused by the court because it was discovered she knew victim Scott's mother. (V7, 213-14; V8, 439, 491-501). The prosecutor exercised a peremptory challenge to strike Staresnick, a 22 year old student. (V7, 219-20; V8, 439). The defense exercised a peremptory challenge to strike Hussey who previously worked for the police department, and had family members who worked in law enforcement. (V7, 279-83; V8, 413-14, 440).

Venireperson Shoffield who spoke after venireperson Hussey, indicated unlike venireperson Hussey, she was "not perfectly

fine" with the death penalty as a punishment. (V8, 387). She elaborated, "it's something you're going to carry with you the rest of your life. So it's something that weighs heavily on the conscience." (V8, 387). The prosecutor exercised a peremptory challenge to strike Shoffield. (V8, 448).

Venireperson Bramlett, when questioned by the prosecutor on how she felt regarding the death penalty, responded, "[w]ell, you had asked the question if I were to vote tomorrow for a death penalty or not. . . .I would vote for the death penalty." (V8, 388-89). Bramlett was chosen as a juror. (V8, 440; V9, 569). Next, venireperson Faucette indicated she felt the death penalty was "necessary" and "we need that kind of law." (V8, 389). Faucette was chosen as a juror. (V8, 440-41; V9, 569).

The next three venirepersons questioned by the prosecutor were Maruska, Wearing, and Blandin. These prospective jurors were among the youngest in the venire. Maruska was 31 years of age, Wearing was 21 years of age and lived at home with her parents, and Blandin was a 22 year old college student. (V7, 241, 297, 301, 303; V8, 347, 361, 502).

Maruska, while initially indicating he had "mixed feelings" about the death penalty, indicated he would vote to keep the death penalty in place. (V8, 390). However, when questioned by the defense to rate himself from zero to 10--zero, indicating he

would under no circumstances recommend death, and 10, indicating death was warranted because Poole was convicted of first-degree murder, Maruska rated himself as a "4," the **lowest** self-imposed rating in the venire. (V8, 427-28, 436-39). Wearing was equivocal regarding her feelings on the death penalty, and equivocal when asked to stake her position regarding a vote on the death penalty. Blandin, who followed Wearing, was also equivocal regarding his vote on the death penalty. The following exchange took place:

> MR. AGUERO: Okay. Ms. Wearing, how do you feel about this idea, just philosophically, that we put people to death as punishment for a crime?
>
> PROSPECTIVE JUROR WEARING: I'm kind of like - like a little mixed feeling, but at the same time, if the punishment fits the crime then, yeah, go ahead and do - away and put him to death. But if not, then like, you know, why take a life for a life? So it's -- I'm just kind of in between.
>
> MR. AGUERO: How old are you?
>
> PROSPECTIVE JUROR WEARING: 21.
>
> MR. AGUERO: How do you feel about being asked to do this job when you're barely old enough to vote?
>
> PROSPECTIVE JUROR WEARING: I'm kind of nervous, but at the same time, really confident that I can handle it.
>
> **MR. AGUERO: If you were to be the person that went to the polls tomorrow and said we keep a death penalty in Florida or we just do away with it, people that get found guilty of murder just get life in prison, would you keep the death penalty or do away with it?**

PROSPECTIVE JUROR WEARING: I'm not sure. It's --

MR. AGUERO: That's a fair enough answer. It doesn't have to be a yes-or-no answer. I'm not sure is a perfectly good answer.

I mean, we're asking very weighty questions here. Believe me, I understand what I'm asking.

Mr. Blandin?

PROSPECTIVE JUROR BLANDIN: Yes, sir.

MR. AGUERO: How do you feel about this idea philosophically that we say it's okay to put people to death as punishment in Florida?

PROSPECTIVE JUROR BLANDIN: I'm like the rest of these guys. If the punishment fits the crime they committed and -- but at the same time, I'm like, if I had to vote -- kind of like her, I don't -- really know what I would vote for.

(V8, 390-92)(emphasis supplied).

The prosecutor exercised peremptory challenges to strike Maruska, Wearing, and Blandin. (V8, 441, 444, 447). All three jurors were young, and all three jurors revealed themselves to be weak death penalty jurors, especially when compared to the other prospective venirepersons who were accepted by the prosecutor.[5] The prosecutor clearly has the right to peremptorily strike "persons thought to be inclined against their interests." Holland v. Illinois, 493 U.S. 474, 480

[5] The State notes the prosecutor also struck prospective juror Shoffield whose answers indicated she was not comfortable with the death penalty. (V8, 387, 448).

(1990); San Martin v. State, 705 So. 2d 1337, 1343 (Fla. 1997).

In addition to the voir dire outlined above, the last eight venirepersons that were questioned -- Gilbert, Izzo, Freeman, Sims, Ippert, Saucerman, Gay, and Featherlin each supported the death penalty as a punishment. (V8, 392-96). For instance, when venireperson Ippert was asked how she would vote regarding the death penalty, she responded "I believe it should stay in place." (V8, 394).[6] The prosecutor exercised a peremptory challenge and struck Gay, the remaining seven were chosen to sit

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[6] Other responses included:

Gilbert - "I think we need it" and "I think the State of Florida needs the death penalty, yes."

Izzo - "I've always been in favor of it" and "if the punishment fits the crime, it's justifiable."

Freeman - "I feel it's necessary because of the crimes that are committed."

Sims - "I think some crimes warrant the death penalty."

Saucerman - "I think it's necessary in some cases, but not all cases. I -- I would probably vote for that should I have to vote for it or against it."

Gay - "I think if the crime fits the criteria, that it should put them to death. If the crime fits the criteria. We have court system in place to protect all citizens. And there's times that it has not -- in a very serious way, it has to be there."

Fetherlin - "I would agree with the death penalty."

(V8, 392-95).

as jurors. (V8, 445-48; V9, 569-70).[7]

As detailed above, the prosecutor sought to remove young prospective jurors Staresnick (22 years of age), Maruska (31 years of age), Wearing (21 years of age), and Blandin (22 years of age).[8] In contrast, the prosecutor consistently accepted older jurors, almost all in their 50's and 60's:

Day	55 years of age
Westcott	54 years of age
Bramlett	52 years of age
Faucette	59 years of age
Gilbert	51 years of age
Izzo	61 years of age
Freeman	61 years of age
Sims	60 years of age
Ippert	40 years of age
Saucerman	60 years of age
Fetherlin	61 years of age
Harris	Approximately 60 years of age

(V8, 502-03; V9, 566).[9]

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[7] The record reveals Gay's son had drug problems, had been arrested on more than one occasion, and had served time in the Polk County jail. (V7, 309-11). With this experience, Gay may certainly have harbored bias against the criminal justice system. She lamented about the Polk County jail that "[t]hey just about get him straight, and they release him." (V7, 310).

[8] Regarding Staresnick's age, the trial court noted "by my standards, that's young." (V7, 220). Regarding Wearing, the trial court noted, she was "by my standards, young." (V7, 241). Defense counsel even noted Wearing and Blandin "have not been adults that long." (V8, 412).

[9] Moore was accepted, later excused by the trial court and replaced with Harris, and while the prosecutor accepted Hussey, she was struck by the defense. Moore's exact age does not appear in the record. But based on her answers, it appears she is at least 50 years of age. Moore had been a teacher for 24 years, divorced for 30 years, and has a 35 year old daughter.

Just as "disparate treatment of similarly situated jurors can give rise to a finding of pretext," Hayes, 94 So. 3d at 467, similar treatment of similarly situated jurors should give rise to a finding of genuineness. Here, the prosecutor treated all young jurors in the same manner, he struck them. While the prosecutor struck young African-American prospective jurors Wearing and Blandin, the prosecutor also struck young Caucasian prospective jurors. The prosecutor struck young prospective jurors Staresnick and Maruska, who were **both** Caucasian. (V8, 502). The prosecutor, regardless of race, struck all young jurors keeping only jurors of mature age. The youngest chosen juror was juror Ippert, an African-American woman in her 40's. (V8, 447, 503). The prosecutor's similar treatment of all young jurors supports a finding of genuineness.

The final jury consisted of jurors Day, Westcott, Bramlett, Faucette, Fetherlin, Saucerman, Ippert, Sims, Freeman, Izzo, Gilbert, and Harris. (V9, 569-70). Jurors Seay and Wood were

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(V7, 232-33, 271). Hussey's exact age does not appear on the record. But based on her answers, it appears she is also at least 50 years of age. Hussey retired from government employment in 2005. (V7, 209-11, 282-83). Harris' exact age does not appear on the record. But based on his answers, it appears he was approximately 60 years of age. Harris enlisted in the military in 1968, and retired in 1988. (V9, 522).

chosen as alternates. (V9, 567, 570).[10] The record reveals that juror Ippert is African-American and that jurors Day, Westcott, Gilbert are Caucasian. (V8, 369, 502-03). The race of the other jurors do not appear in the record.

In the instant case, the prosecutor did not single out any African-American prospective juror and the record does not reveal any discriminatory intent by the prosecutor. The record simply reveals a prosecutor attempting to empanel an older, experienced, mature panel of jurors that could and would impose the death penalty. Appellant has not shown the trial court's ruling below was in error, much less clearly erroneous. The judgment of the trial court must be affirmed. Appellant is not entitled to any relief.

[10] From the alternates' venire, three jurors were chosen. One, to replace juror Moore who was previously excused because of her connection to victim Scott's mother, and two, to sit as alternates. (V8, 448-49, 501).

ISSUE II

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO INTRODUCE INTO EVIDENCE AN EXHIBIT OF THE SEVERED FINGERTIP OF THE SURVIVING VICTIM?

Appellant contends that the trial court erred in allowing the State to introduce the surviving victim's severed finger tip into evidence. The State disagrees.

Of course, a trial court "has broad discretion" to determine the relevance and admissibility of evidence. Wright v. State, 19 So. 3d 277, 291 (Fla. 2009). A trial court abuses its discretion only "when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable [person] would take the view adopted by the trial court." Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990) (quoting Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980)). The trial court did not abuse its discretion in admitting the fingertip into evidence.

The following colloquy occurred below relating to admission of the fingertip:

> MR. HERNANDEZ [Trial Defense Counsel] -- to Stat's Exhibit Number 183. And that is the fingertip of the -- of [L.W.]. The -- I understand that it was admitted at the trial. But I would -- I would object to -- that there are photographs that show the missing fingertip, which certainly proves everything that I think the state would need to -- want to prove any relevance to the fact that a fingertip is missing.

To show the jury that fingertip, that exhibit, would simply be -- there may be relevance, but it's certainly -- it's extremely inflammatory and particularly in light of the fact that there's photographs that already show the missing fingertip, that any probative value would be far outweighed by the unfair prejudice that it presents.

THE COURT: Well, let me ask you this: She's testifying, is she not?

MR. AGUERO: She is.

THE COURT: And if I'm correct, that fingertip didn't grow back, did it?

MR. AGUERO: It did not. I would only tell you that Mr. Poole was convicted of attempted first-degree murder. That is an aggravating factor in this case. That fingertip was objected to at the initial trial. It was overruled. It went up to the Supreme Court. It's still in evidence.

And I disagree that it is inflammatory. If anything, it is absolutely sort of what people see in a biology class. There is nothing inflammatory about it. It's not bloody. It's just a fingertip in a jar.

THE COURT: Well, let the record reflect, because this is a record, that it's been preserved in formaldehyde, and it's still in the same condition it was when it was placed in there, it appears; is that correct?

MR. AGUERO: Yes. It's actually formalin that's it's fixed in.

THE COURT: Okay. That's something similar to what we used to know as formaldehyde.

MR. AGUERO: Correct.

THE COURT: Let me look at it again.

MR. AGUERO: There's also a couple of finger -

THE COURT: You don't intend to take it out of the bottle?

MR. AGUERO: Oh, no, no, no. It wouldn't remain fixed if I took it out of there.

THE COURT: I don't --

MR. AGUERO: There are actually two fingernails that were seized as well, that were knocked off in this attack. And they're 181 and 182, and they look just like fingernails.

MR. HERNANDEZ: Judge, I would object to these as well, but the fingertip is the one that has -- causes me the greatest concern.

THE COURT: Let me see those others, and I'll just rule on them.

MR. AGUERO: I'll show you one of them. They both look alike.

THE COURT: Is that an actual fingernail, as opposed to one of those fakes that is glued on, as far as you know?

MR. AGUERO: I believe it is a fingernail, but I would have to ask [L.W.], to be 100 percent sure.

MS. PATTEY: Dr. Simmons testified at the first trial they were fingernails.

MR. AGUERO: Yeah.

THE COURT: All right. Anything else?

MR. HERNANDEZ: No, sir.

THE COURT: I'm going to overrule your objection. I -- the one -- particularly the one in formaldehyde, it's not -- it's really not -- it's not difficult to look at. It's not unpleasant. There's not blood on it. It just shows what appears to be a large chunk of skin and the end of a finger.

(V9, 611-14).

Appellant apparently concedes some relevance of the fingertip, as he fails to challenge the admission of photographs and testimony introduced below which established that Poole's attack upon victim L.W. resulted in her fingertip being severed. Nonetheless, appellant contends that actually introducing the fingertip, preserved in a jar, constituted reversible error. Notably, defense counsel conceded that the fingertip had been admitted in the original trial over defense objection but that this potential issue was not addressed or raised on appeal. Regardless, the record reflects that the trial court appropriately used its discretion, finding it was not highly prejudicial, that it was not bloody, that it simply reflected a large chunk of skin, at the end of which, was a finger tip. (V9, 614-15). It is understandable that Poole would like to shield the jury from this evidence; but, it reflected the level and degree of force used by Poole in committing a contemporaneous attempted murder, and, therefore was relevant to an aggravator in this case. See e.g., Grey v. State, 727 So. 2d 1063, 1065 (Fla. 4th DCA 1999) (Photographs "which bear on the issues of the nature and extent of injuries, the nature and

force of the violence used, premeditation or intent are relevant.").

Appellant appears to argue that since the fingertip was relevant to the prior violent felony conviction, the certified copy of the conviction was sufficient to establish this aggravator. Consequently, according to appellant, the fingertip lacked sufficient relevance to justify its admission into evidence. (Appellant's Brief at 60-61). Any such argument is clearly without merit.

As an initial matter, appellant did not make this argument below and therefore it is not preserved for appeal. In any case, the attempted murder of L.W. and the sexual assault were contemporaneous convictions, occurring at the same time and part of the same criminal episode as the murder of Mr. Scott. Appellant provides absolutely no authority for the notion that the State cannot provide details of contemporaneous violent felonies during the penalty phase.

Appellant's reliance upon Duncan v. State, 619 So. 2d 279 (Fla. 1993), is misplaced. In Duncan, this Court held it was error to introduce a gruesome photograph which "did not directly relate" to the charged murder "but rather depicted the extensive injuries suffered by the victim of a totally unrelated crime." 619 So. 2d at 282. Here, the crimes were inextricably

intertwined contemporaneous felonies, not "unrelated" prior crimes as in Duncan.

Mr. Scott struggled to protect victim L.W., only to be beaten down by Poole using a tire iron. The homicide, rape, robbery, and burglary were all linked in time and circumstance. Consequently, the State properly introduced details of the attack upon victim L.W. See Campbell v. State, 679 So. 2d 720, 725 (Fla. 1996) ("We find the testimony and photographs [of a prior victim] relevant to explain the sequence of events surrounding the murder of Billy Bosler and to provide details showing that Campbell had been convicted of a prior violent felony.") (citing Dufour v. State, 495 So. 2d 154 (Fla. 1986), cert. denied, 479 U.S. 1101, 107 S. Ct. 1332, 94 L.Ed.2d 183 (1987)).

Poole also contends that the actual fingertip was cumulative to other evidence introduced, such as crime scene photographs reflecting the severed fingertip. While true, other evidence established that victim L.W.'s fingertip had been severed, the standard for admissibility is relevance, not that the State had other evidence to prove a relevant fact. See e.g. Pope v. State, 679 So. 2d 710, 713-714 (Fla. 1996) ("The test for admissibility of photographic evidence is relevancy rather than necessity.") (citing Nixon v. State, 572 So. 2d 1336, 1342

(Fla. 1990)). The fact that the state exhibited the actual severed fingertip rather than a photograph, does not alter the admissibility equation.

This situation is not different from those wherein a defendant seeks to prevent the State from admitting photographs of the deceased murder victim. Courts generally allow the State to introduce such photographs even where they are inherently unpleasant. See Pope, 679 So.2d at 714 ("Relevant evidence which is not so shocking as to outweigh its probative value is admissible."); Bush v. State, 461 So. 2d 936, 940 (Fla. 1984) ("We require only that the photograph not be so shocking in nature that it defeats the value of its relevancy."); Henderson v. State, 463 So. 2d 196, 200 (Fla. 1985) ("Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments."). The trial court did not abuse its broad discretion in admitting the fingertip into evidence.[11] Indeed, the actual fingertip itself was less gruesome than the crime scene and autopsy photographs reflecting the impact of Poole's homicidal violence upon victim

[11] The State should be granted leeway in presenting its case to the jury as long as the defendant is not "unfairly" prejudiced. For example, in Lisenba v. California, 314 U.S. 219, 62 S. Ct. 280 (1941), the United States Supreme Court held that the introduction of live rattlesnakes, with which defendant attempted to murder his wife, was not a violation of due process right to a fair trial.

Scott. The court viewed the fingertip and found it was not so shocking or gruesome that the danger of unfair prejudice outweighed its relevance. Appellant has not carried his burden on appeal to show that this ruling amounted to an abuse of discretion.

Body parts, particularly sanitized body parts, have been used as exhibits in courts and are subject to the same relevancy considerations as photographs. See e.g. State v. Cazes, 875 S.W. 2d 253, 263 (Tenn. 1994) (holding that the victim's skull was relevant in illustrating the forensic pathologist's testimony that he found a "signature" for the murder weapon); State v. Pike, 978 S.W. 2d 904, 925 (Tenn. 1998) (finding the probative value from the medical examiner's use of the victim's skull outweighed any prejudice because the skull was "no more prejudicial or gruesome than a model diagram would have been" where the skull had been thoroughly cleansed); Crain v. State, 736 N.E. 2d 1223, 1234 (Ind. 2000) (finding no abuse of discretion where the victim's skull was "neither particularly gruesome nor ominous" but preferring other more conventional alternatives); Hilbish v. State, 891 P. 2d 841, 849-850 (Alaska Ct. App. 1995) (affirming trial court finding that the probative value of the victim's skull, utilized by the State to assist the jury in understanding the precise location of the gunshot

wounds, outweighed any prejudice). See also Peterka v. State, 890 So. 2d 219, 231 (Fla. 2004) (summarily rejecting claim that appellate counsel was ineffective for failing to challenge use of the victim's skull as a demonstrative aid during trial).

Appellant attempts to turn this claim into an allegation of prosecutorial misconduct. It is not. It was an evidentiary ruling by the trial court which is subject to considerable deference on appeal. In an attempt to buttress his argument that this evidence was unduly prejudicial, appellant contends that the prosecutor held up the jar with the victim's fingertip during closing argument. However, this is a speculative contention; one that is not based upon a fair reading of the transcript. The prosecutor's argument relating to the finger suggests that he was referring to a photograph, not the jar containing the fingertip. The prosecutor argued:

> . . .The crime scene technician showed you **this picture**. This is what Mr. Poole did.
>
> This is [L.W.]'s finger. He whacked it off with a tire iron. He didn't cut it with a knife. He hit her so hard, I would submit to you almost certainly while she was trying to cover the back of her head because he had to hit it so hard that the blunt force of that tire iron cut the end of her finger off.

(V12, 1095). Notably, there was no objection from defense counsel that this argument was inflammatory or in any way improper. See Steinhorst v. State, 412 So. 2d 332, 338 (Fla.

1982) ("[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.").

Similarly, appellant repeats the argument he makes below regarding the prosecutor's brief characterization of the mitigation as "crap" which the prosecutor recognized was improper. The prosecutor apologized to the jury for making this remark. (V12, 1112). Appellant's attack on the sincerity of the prosecutor's apology is unwarranted. The State notes that sometimes, in the heat of argument, a prosecutor, even an experienced prosecutor, can make a misstatement. There is no evidence the prosecutor in this case, a long time public servant, was anything but sincere in his apology. Further, as noted under issue III below, the trial court appropriately instructed the jury to disregard this comment. There was no pattern of prosecutorial misconduct in this case.

Finally, assuming *arguendo*, it was error to admit the fingertip into evidence, this error does not require reversal of Poole's death sentence. As appellant's counsel has recognized, the actual fingertip itself was cumulative to other evidence introduced in the penalty phase, including photographs of the fingertip. (Exhibits 76, 77, 78; V10, 754). Further, the treating physician testified that the victim's fingertip has

been severed and could not be reattached. (V10, 699-700, 708). Under these circumstances, and, the near unanimous jury recommendation for death, any error in admitting the actual fingertip itself into evidence was harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); see also Almeida v. State, 748 So. 2d 922, 930 (Fla. 1999) (finding admission of irrelevant autopsy photo harmless "in light of the minor role the photo played in the State's case"); Thompson v. State, 619 So. 2d 261, 266 (Fla. 1993) (finding error in admission of irrelevant autopsy photographs harmless); Hertz v. State, 803 So. 2d 629, 643 (Fla. 2001).

Appellant was sentenced to death because he broke into a sleeping young couple's home, armed with a tire iron, and, in a heinous and atrocious and cruel manner, murdered a young man, Noah Scott, who attempted to fend the appellant off to protect his pregnant fiancée. The accompanying crimes of violence which comprise the prior violent felony aggravator in this case are also particularly weighty. Appellant mercilessly raped and attempted to murder L.W. who was begging him not to hurt her and her unborn child. Poole left her for dead after repeatedly hitting her in the head with a tire iron. His blows left her permanently disfigured and she would have died as a result of Poole's attack, had she not been pregnant. Appellant's callous

criminal behavior is shockingly cruel and was the reason he received a near unanimous death recommendation in this case, not the fact the State introduced a portion of a severed finger.

ISSUE III

WHETHER POOLE WAS DEPRIVED OF A FAIR PENALTY PHASE BY THE PROSECUTOR'S MISCONDUCT IN CLOSING ARGUMENT?

Although Poole challenges a number of arguments made by counsel for the State during closing argument, the record shows that defense counsel raised a single objection to one statement by the prosecutor; the trial court sustained the objection and gave a curative instruction. No motion for a mistrial or objection to any other comment was offered. (V12, 1111-12). As such, no challenge to the closing argument was preserved for appeal. Poole recognizes that his argument is not preserved, but is apparently asking this Court to turn the contemporaneous objection rule on its head and find that preservation was not necessary as the "cumulative impact of the prosecutor's transgressions deprived Poole of a fair trial." (Appellant's Brief at 36). This Court should decline the invitation.

A. Appellate Review of A Prosecutor's Comments

"The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of the judicial system. A contemporaneous objection places the trial

judge on notice that an error may have been committed and thus, provides the opportunity to correct the error at an early stage of the proceedings. Castor v. State, 365 So. 2d 701, 703 (Fla. 1978). While the motion for mistrial may be made as late as the end of the closing argument, a timely objection must be made in order to allow curative instructions or admonishment to counsel." Nixon v. State, 572 So. 2d 1336, 1341 (Fla. 1990). As a general rule, the failure to raise a contemporaneous objection when improper closing argument comments are made waives any claim concerning such comments for appellate review. See e.g. Ford v. State, 802 So. 2d 1121, 1129 (Fla. 2001); Brooks v. State, 762 So. 2d 879, 898 (Fla. 2000); McDonald v. State, 743 So. 2d 501, 505 (Fla. 1999). The only exception to this rule is when the "unobjected-to comments rise to the level of fundamental error, that is, an error that 'reaches down into the validity of the trial itself to the extent that a [...] jury recommendation of death could not have been obtained without the assistance of the alleged error.'" Poole v. State, 997 So. 2d 382, 390 (Fla. 2008), citing Card v. State, 803 So. 2d 613, 622 (Fla. 2001).

As the following will show, none of the now-challenged arguments, beyond the single comment for which a curative was

given, constituted error, much less error that resulted in a more severe recommendation than the facts of the case supports.

B. The Challenged Comments

In Franqui v. State, 804 So. 2d 1185, 1194-1195 (Fla. 2001), this Court noted that it will largely defer to the trial court's handling of prosecutorial comments. This Court stated:

> This Court has held that wide latitude is afforded counsel during argument. *See Moore v. State*, 701 So. 2d 545, 550 (Fla. 1997); *Breedlove v. State*, 413 So. 2d 1, 8 (Fla. 1982). Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments. *See Thomas v. State*, 748 So. 2d 970, 984 (Fla. 1999). The standard jury instructions contain cautions that while the arguments of counsel are intended to be helpful and persuasive, such arguments are not to be taken as sources of the law or evidence. Further, the control of comments made to the jury is within the trial court's discretion, and an appellate court will not interfere unless an abuse of discretion is shown. *See Occhicone v. State*, 570 So. 2d 902, 904 (Fla. 1990).

As previously noted, only one comment drew an objection below. The record shows the following:

> MR. AGUERO: . . . Although all of those family members talked about motorcycle accidents and car accidents and head injuries and all that crap, neither of these doctors told you that this man ever -
>
> MR. COHEN: Objection, Your Honor.
>
> (The attorneys approached the bench and there was a discussion as follows:)
>
> MR. COHEN: I object to Mr. Aguero's reference to all of that crap that we talked about. It's improper closing argument.

MR. AGUERO: (Shrugs.)

THE COURT: You have any other argument?

MR. AGUERO: No, sir.

THE COURT: Well, I'll sustain it. What do you want me to do about it?

MR. COHEN: We would ask for a curative instruction.

MR. HERNANDEZ: Judge, maybe something along the lines of Mr. Aguero's reference to mitigation testimony as being all that crap is improper argument, and you should disregard that argument.

MR. AGUERO: I have no objection to that.

THE COURT: That's -- actually, he's okay arguing it what he's arguing, if he just used different terminology. So maybe I should tell them to disregard the terminology or the description that he's given thus far of the mitigating - the testimony concerning mitigators yesterday.

MR. COHEN: Thank you, Your Honor.

THE COURT: I sustained an objection for Mr. Aguero's description of the mitigating evidence that you heard yesterday, and it was a description that was improper. So you are to disregard the comment of it being crap, and I'm striking that from the record. Thank you.

(V12, 1111-12).

Despite having obtained the relief he asked for, Poole now challenges the unobjected-to arguments that followed. First, he complains that the prosecutor's "apology" that followed the instruction was no apology at all. (Initial Brief at 65). There was nothing that required counsel to apologize for making the error; his failure to do so in a manner that apparently

satisfied trial counsel and the court but not appellate counsel does not constitute fundamental error.

Poole also mischaracterizes the remainder of his argument as improperly denigrating the mental mitigation by pointing out that it was largely based on the voluntary use of drugs or alcohol. The prosecutor did not denigrate the defense case, he simply offered a fair comment on the evidence. See Mann v. State, 603 So. 2d 1141, 1143 (Fla. 1992) (prosecutor's comments addressing defense expert's testimony, that because he is a pervert or child molester his actions are "more excusable" than a person who is not a pervert was not improper where it is clear the prosecutor made these statements to rebut the psychologist's conclusion that the statutory mitigators applied). Specifically, the prosecutor explained:

> MR. AGUERO: I apologize to you, ladies and gentlemen. I get wound up when I talk about murders, especially heinous, atrocious, or cruel murders.
>
> Certainly you should consider what all the family members -- what they said deserves your consideration. What I was trying to point out was that as regards these two mitigators, they only rely on the use of drugs and alcohol. While the family members testified about head injuries, nothing that the doctors said what would sometimes apply to these mitigators doesn't exist in this case. That is, there's no testimony that he ever suffered any sort of significant head injury that impaired him mentally in any way.
>
> So while you heard testimony from the family about that, what the doctors specifically said to support these two mitigators, that he - the capacity -

- his capacity to appreciate the criminality of his conduct -- think about that. I asked Dr. Kremper specifically, didn't Mr. Poole know when he was raping [L.W.] that it was wrong? He said yes.

Yet he said that this ability to - or capacity to appreciate the criminality of his conduct was impaired by drugs. And what I submit to you is, that ain't mitigating. And you don't have to consider it as mitigating. They definitely put evidence on about that.

But it's up to each of you individual jurors, does the fact that a guy goes out and drinks and does drugs and then beats somebody to death deserve any weight in this scale at all? He voluntarily did it. Nobody made him take drugs. And there's not even testimony that he was on drugs, except from Dr. Chacko, who I submit to you you shouldn't believe at all. Dr. Chacko talked to the guy for two hours in his whole life and comes in here and says, oh, yeah, that's what I think, but. I said, well, did you read Dr. Kremper's report? Did you know that Mr. Poole gave him different accounts of this? In some he said he did do drugs that night, some he said he didn't, some he said he drank, some he said he didn't. Dr. Chacko said no. I said, well, would that change your opinion? He said yes.

So what's he? He's a wash.

Dr. Kremper, I think you can consider. And we're drawing sorts of fine lines here, but it all is about weight. Every bit of it is about weight. You certainly can believe that the defense reasonably proved to you that his -- he had a hard time conforming his conduct to the requirements of the law because he used crack. But what you don't have to do is give it any weight. That's this side of the scale. It doesn't have to go down at all compared to the attempted murder and the rape and everything else. That's what it goes to.

(V12, 1112-14).

This Court has rejected similar challenges to closing arguments finding that it is proper to review the evidence and to explicate those inferences which may reasonably be drawn from it. Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985). As in Mann, the prosecutor properly made these statements to negate the experts' conclusions that the statutory mental mitigators applied. "Merely arguing a conclusion that can be drawn from the evidence is permissible fair comment. After hearing the evidence and the instructions, it was the duty of the judge and jury to decide the weight to be given to the evidence and testimony, and there was no impropriety here." Mann, 603 So. 2d at 1143. See also Rogers v. State, 957 So. 2d 538, 548-549 (Fla. 2007) (finding that claim that prosecutorial comments allegedly denigrating the statutory mitigator that Rogers had an impaired capacity to appreciate the criminality of his conduct by asserting that voluntary intoxication and brain damage are no excuse for murder were fundamental error had been rejected on direct appeal and trial counsel was not ineffective for failing to object); Darling v. State, 966 So. 2d 366, 383-384 (Fla. 2007) (rejecting claim of error where prosecutor simply asserted that mitigation advanced did not reduce Darling's degree of moral culpability for the murder at issue); Jones v. State, 652 So. 2d 346, 352 (Fla. 1995) (upholding argument to jury to use

its common sense to reject the defense expert's testimony that because Jones had been abandoned by his mother and raised by his aunt he suffered from extreme mental or emotional distress throughout his life.)

The prosecutor did not denigrate the defense's case and the argument properly offered a fair comment on the evidence. Both Dr. Chacko and Dr. Kremper agreed that Poole's mental mitigation rested upon his life of drug and alcohol abuse. (V10, 895-900; 929-30) Certainly, the prosecutor can point out that not all mental mitigation is entitled to the same weight and certainly, the jury is not required to find voluntary drug and alcohol intoxication is entitled to the same weight as other type of mental mitigation to reduce his moral culpability for the brutal rape, murder and attempted murder committed by Poole. See Jones v. Butler, 864 F.2d 348, 360 (5th Cir. 1988) (finding no error in the prosecutor's closing, noting that "[r]ead in context, she [the prosecutor] was arguing not that the jury could not find mercy and intoxication mitigating circumstances, but that they should not do so here."). Indeed, defense lawyers have long recognized that drug and alcohol abuse can be viewed unfavorably by juries. See Cummings-El v. State, 863 So. 2d 246, 267 (Fla. 2003) ("Counsel acknowledged that drug abuse can have a double-edged sword effect on the jury, as juries are not sympathetic to

junkies generally."); Johnson v. State, 769 So. 2d 990, 1001 (Fla. 2000) ("juries do not like the intoxication defense.")

Appellant is simply wrong in his assertion that this Court's opinion in Mahn v. State, 714 So. 2d 391 (Fla. 1998) and Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990) requires a jury to give weight to a specific mitigator in a specific case. Mahn and Nibert have been overruled to the extent they required a trial court to find a specific mitigator.

This Court has now made it clear that:

> "A trial court may reject a claim that a mitigating circumstance has been proven provided that the record contains competent, substantial evidence to support the rejection." *Hurst v. State*, 819 So.2d 689, 697 (Fla. 2002); *see also Mansfield v. State*, 758 So.2d 636, 646 (Fla. 2000). Moreover, in *Trease v. State*, 768 So.2d 1050, 1055 (Fla. 2000), we receded from our decision in *Campbell v. State*, 571 So.2d 415, 420 (Fla. 1990), and held that trial courts may assign no weight to a mitigating factor. In doing so, we recognized that a trial judge "may not preclude from consideration any evidence regarding a mitigating circumstance that is proffered by a defendant in order to receive a sentence of less than death." However, there are circumstances where although a mitigator may be relevant and must be considered by the trial judge because it is generally recognized as a mitigator, the judge "may determine in the particular case at hand that it is entitled to no weight for additional reasons or circumstances unique to that case." *Trease*, 768 So.2d at 1055.

Orme v. State, 25 So. 3d 536, 548 (Fla. 2009).

Accordingly, arguing the weight the jury should give to mitigating and aggravating factors and commenting upon evidence

admitted during the penalty phase is certainly proper. Consequently, the prosecutor's remarks did not constitute error, let alone fundamental error which would excuse the lack of an objection below.

Poole also asserts error based upon the prosecutor's arguments concerning the merged robbery/pecuniary gain aggravating factor. Again, no objection was raised to this argument below and it procedurally barred in this appeal. Again he has failed to show fundamental error. While this Court in Brooks v. State, 762 So. 2d 879 (Fla. 2000), did find that it was improper to make such an argument, reversal in that case was limited to the facts of that case where this Court, after "carefully reviewing the prosecutor's penalty phase closing argument in this case, and considering the jury's close seven-to-five recommendation that Brooks be sentenced to death, [] determine[d] that the objected-to comments, when viewed in conjunction with the unobjected-to comments, deprived Brooks of a fair penalty phase hearing." Id. at 899. Poole's challenges to the closing arguments stand in stark contrast the "overlapping improprieties in the prosecutor's penalty phase closing argument comments in Brooks including: impermissibly inflaming the passions and prejudices of the jury with elements of emotion and fear by using the word 'executed' or 'executing'

at least six times; engaging in pejorative characterizations of the defendant; urging jurors to show the defendant the same mercy shown the dead victim; impermissibly arguing 'prosecutorial expertise' in stating that the State had already determined this was a genuine death penalty case; misstating the law regarding the merged robbery and pecuniary gain aggravating circumstances; personally attacking defense counsel; and characterizing the mitigating circumstances as 'flimsy,' 'phantom,' and 'excuses.' Moore v. State, 820 So. 2d 199, 208 n.9 (Fla. 2002) (discussing Brooks). The prosecutor's remarks in this case pale in comparison.

Appellant also complains about the comments concerning his conscienceless touching of the second victim on his way out the door. This was a proper comment on the evidence which shows the totality of circumstances surrounding the unprovoked attack on Noah Scott and how it satisfied the definition for the heinous, atrocious or cruel aggravator. Baker v. State, 71 So. 3d 802, 821 (Fla. 2011) (finding HAC proper based on the totality of the circumstances.). In addition, there was no objection to introduction of this testimony during the resentencing.

This Court has held that it is proper to consider evidence from even non-contemporaneous prior violent felonies if it is relevant to refute challenges to an aggravator. Jones v. State,

652 So. 2d 346, 352-353 (Fla. 1995). Further, even where such arguments are improper, this Court has rejected the contention that it is fundamental error. Hall v. State, 2012 WL 3732823, 8 (Fla. Aug. 30, 2012) (finding prosecutor's comments intertwining facts of previous crimes with the facts of the crime at issue were not so egregious as to reach the level of becoming a feature of the penalty phase so as to render the validity of the penalty phase questionable or produce fundamental error.) The HAC aggravator was clearly supported by the evidence as set forth in the sentencing order and nothing in the unpreserved comments undermines that finding. The lower court found that Noah Scott was struck fifteen times with a tire iron; he had several blows to his arms and likely defense wounds; thirteen blows to his head, resulting in multiple skull fractures and hemorrhaging to four areas of his brain. The court also correctly recognized the agony the victim suffered trying to defend his pregnant fiancée. (V5, 723). See Heyne v. State, 88 So. 3d 113, 122 (Fla. 2012) ("[F]ear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel.").

Appellant has not shown that that any of the unpreserved allegedly improper comments were so prejudicial that they rose

to the level of fundamental error, i.e. that the sentence of death "could not have been obtained without the assistance of the alleged error." Snelgrove v. State, 2012 WL 1345485, 12 (Fla. April 19, 2012). This was not a close case. Appellant's crimes clearly established two of the most weighty of aggravators under Florida law, HAC and prior violent felony [armed burglary, armed robbery and sexual battery]. See Maxwell v. State, 603 So. 2d 490, 493 (Fla. 1992); Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999). The original sentencing jury recommended death by a vote of 12-0 and the resentencing jury by a vote of 11-1. Further, the resentencing judge noted after a careful analysis of the aggravating and mitigating circumstance that "the aggravating circumstances far outweigh the mitigating circumstances for the murder of Noah Scott." The court also noted that the HAC aggravator alone outweighed all the mitigation in this case, including the mental mitigators. (V5, 713). The 11 to 1 vote was not gained by sleight of hand or prosecutorial misstatements. It was simply the jury's recognition of the overwhelming weight of the aggravation in comparison with the mitigation presented.

This claim should be denied as procedurally barred and otherwise without merit.

ISSUE IV

WHETHER POOLE'S DEATH SENTENCE IS PROPORTIONAL?

Of course, this Court has stated that its proportionality review does not involve a recounting of aggravating factors versus mitigating circumstances but, rather, compares the case to similar defendants, facts and sentences. Tillman v. State, 591 So. 2d 167 (Fla. 1991). What Poole is essentially asking this Court to do is reweigh the aggravating and mitigating circumstances and arrive at a different conclusion than that reached by the jury and trial court below. However, that is not the appropriate function of this Court.[12] See 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."). See also Bates v. State, 750 So. 2d 6, 12 (Fla. 1999) ("Our function in a proportionality review is not to reweigh the mitigating factors against the aggravating factors" but to "consider the totality of the circumstances in a case and compare it with other capital cases."). In any case, assuming for a moment that this Court were to engage such a *de novo* reweighing of the evidence, the

[12] The purpose of the proportionality review is to compare the case to similar defendants and facts "to determine if death is warranted in comparison to other cases where the sentence of death has been upheld." England v. State, 940 So. 2d 389, 408 (Fla. 2006).

outcome in this case would remain unchanged. The circumstances of this case clearly warrant the death penalty.

Appellant's death sentence, supported by four powerful aggravators, recommended by the jury 11-1, and as imposed by the trial court, is clearly proportional. The trial court found in aggravation the following: 1) prior violent felony convictions [attempted first degree murder and sexual battery with great force, very great weight]; 2) contemporaneous violent felonies [armed burglary, armed robbery, and sexual battery [great weight], 3) financial gain [less than moderate weight], and 4) the murder was heinous, atrocious and cruel [very great weight].

In giving very great weight to the prior violent felony aggravator, the court stated, in part, the following:

> The Court finds that the attempted first-degree murder conviction in this case establishes the violent felony conviction aggravator. The Court also finds that the attempted murder and rape of [L.W.], an eighteen year old pregnant female, was extremely brutal. Furthermore, this Court believes that had [L.W.] died, it would have met the definition of heinous, atrocious, and cruel.
>
> The Court further finds that the armed burglary, sexual battery with great force, and the armed robbery with a deadly weapon merges into the second aggravator below. Therefore, the Court is not considering the armed robbery, sexual battery with great force, and the armed robbery with a deadly weapon to establish this aggravating circumstance.

> Thus, the Court finds this aggravating circumstance was proven beyond and to the exclusion of every reasonable doubt and assigns it very great weight.

(V5, 720).

In giving great weight to the HAC aggravator, the trial court stated:

> In this case, Noah Scott was struck fifteen (15) times with a tire iron. Several of those blows were to his arms and were likely defense wounds. He suffered thirteen (13) blows to the head, resulting in multiple skull fractures and hemorrhaging to four (4) areas of his brain. According to the testimony of [L.W.], Mr. Scott made several attempts to defend her from the defendant's attack. Thus, this Court concluded he was not rendered unconscious upon, receiving the first blow. *See Elam v. State*, 636 So.2d 1312, 1314 (Fla. 1994).
>
> The evidence heard by this Court established beyond a reasonable doubt that the murder of Noah Scott was conscienceless or pitiless and unnecessarily torturous. This Court can only imagine the fear and pain experienced by Mr. Scott during the final moments of his life as he attempted to stop the brutal rape of his pregnant fiancé, L.W..
>
> Thus, the Court finds this aggravating circumstance was proven beyond and to the exclusion of every reasonable doubt and assigns it very great weight.

(V5, 723).

In mitigation, the court found the crimes were committed while Poole was under influence extreme mental or emotional disturbance (moderate to great weight) and, that his capacity to appreciate or conduct/conform his conduct to the requirements of

the law was substantially impaired (great weight). (V5, 727).

The court also found the following non-statutory mitigating circumstances: borderline intelligence (little weight); defendant dropped out of school (very little weight); loss of father figure had emotional effect and led to his drug abuse (very little weight); defendant sought help for drug problem (very little weight); alcohol problem at time of crime (very little weight); drug abuse problem at time of crime (very little weight); defendant has a relationship with son (very little weight); strong work ethic (very little weight); defendant is a religious person (very little weight); dedicated uncle (very little weight); defendant needs treatment for mental disorder unrelated to substance abuse (very little weight); defendant has severe chronic alcohol and cocaine problem for which he needs treatment (not proven). (V5, 723-26).

The court sentenced Poole to death finding that the aggravating circumstances "far outweigh the mitigating circumstances" and that the "heinous, atrocious, and cruel aggravator alone outweighs all the mitigating circumstances in this case." (V5, 729).

Appellant's challenge to the application or weight of the HAC aggravator is without merit. The trial court's findings were fairly based upon the evidence and testimony introduced

during the penalty phase. In Alston v. State, 723 So. 2d 148, 160 (Fla. 1998), this Court reiterated the standard of review for reviewing aggravating circumstances, noting that it "is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt - that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding," quoting Willacy v. State, 696 So. 2d 693, 695 (Fla.), cert. denied, 522 U.S. 970 (1997).

The evidence does not support appellant's speculation that the victim was rendered immediately unconscious. L.W., the surviving victim testified that Scott repeatedly attempted to intervene on her behalf, but, was beaten down by the appellant. (V10, 720). While appellant calls this a "recovered" memory, he provides no support for this contention -- it was her memory of the attack. The trial court was certainly entitled to credit her testimony, particularly in the absence of any contrary testimony or evidence from the defendant. Moreover, the blood spatter evidence and medical examiner's testimony indicates that Mr. Scott endured a protracted attack, with two blows to his arms and thirteen to his head.

In addition, Scott did suffer injuries to his arms, which are indicative of defensive wounds. Although the medical examiner did not address whether or not these wounds to Scott's arms were consistent with defensive wounds, L.W.'s testimony, the location of the wounds, as well as the blood spatter evidence establishes that this is a reasonable inference from the evidence. These circumstances provide competent, substantial evidence in support of the HAC aggravator. See Bright v. State, 90 So. 3d 249, 261 (Fla. 2012) ("The trial court's assignment of great weight to the HAC aggravator in the deaths of King and Brown is consistent with other capital cases which involved beating deaths where the victim was conscious for part of the attack.") (citations omitted); Dennis v. State, 817 So. 2d 741, 766 (Fla. 2002) (affirming HAC where both victims suffered skull fractures and even though victims may have been rendered unconscious, defensive wounds suggest they were conscious during at least part of the attack); Rolling v. State, 695 So. 2d 278, 296 (Fla. 1997) (upholding HAC even though the medical examiner testified the victim was probably conscious only thirty to sixty seconds after being attacked); Peavy v. State, 442 So. 2d 200, 202, 203 (Fla. 1983) (upholding HAC where the victim lost consciousness within seconds and bled to death in a minute or less and there were no defensive wounds).

This case is clearly comparable to other cases in which this Court has found death sentences proportional. See Singleton v. State, 783 So. 2d 970 (Fla. 2001) (this Court found the death sentence proportionate for a single murder based upon aggravators of prior violent felony conviction (attempted murder, kidnapping) and stabbing/HAC balanced against both statutory mental health mitigators and non statutory mitigation); Rose v. State, 787 So. 2d 786 (Fla. 2001) (death sentence proportionate where four aggravators, including HAC and prior violent felony, outweighed substantial mental mitigation and deprived childhood); Duest v. State, 855 So. 2d 33 (Fla. 2003) (aggravators included HAC/stabbing, prior violent felony conviction, robbery/pecuniary gain); Rogers v. State, 783 So. 2d 980 (Fla. 2001) (two aggravators of pecuniary gain and stabbing/HAC); Orme v. State, 677 So. 2d 258, 263 (Fla. 1996) (death penalty proportional where defendant beat and strangled victim where the court found three statutory aggravators-HAC, pecuniary gain, and sexual battery balanced against two statutory mental mitigators of substantial impairment and extreme emotional disturbance); Spencer v. State, 691 So. 2d 1062, 1063 (Fla. 1996), cert. denied, 522 U.S. 884 (1997) (death sentence proportionate based upon HAC murder of estranged wife, with prior violent felony convictions [contemporaneous

convictions for aggravated battery, and attempted second degree murder] despite the lower court finding both statutory mental mitigators applied and significant non-statutory mitigating factors in Spencer's background, including drug and alcohol abuse, paranoid personality disorder, sexual abuse by his father, honorable military record, and ability to function in a structured environment that does not contain women."); Johnston v. State, 863 So. 2d 271, 286 (Fla. 2003) (affirming death sentence where two aggravators (prior violent felony conviction and HAC) outweighed one statutory mitigator (substantially impaired capacity) and twenty-six nonstatutory mitigators).

Appellant's aggravators include two of the most weighty under Florida law, HAC and prior violent felony. See Maxwell, 603 So. 2d at 493; Larkins, 739 So. 2d at 95. The 11 to 1 jury recommendation recognizes the overwhelming weight of the aggravation in comparison with the mitigation presented. Appellant broke into a young couple's home, armed with a tire iron, and, in a heinous and atrocious and cruel manner, murdered a young man who attempted to fend the appellant off to protect his pregnant fiancée. Appellant raped victim L.W. in her own bed and left her for dead despite her pleas for mercy. She was lucky to survive with serious head wounds and was left permanently disfigured. Appellant stole items of value from the

home, which, shortly after the offenses, he moved to sell for financial gain. The defense case in mitigation pales in comparison. The sentence is proportional.

ISSUE V

WHETHER FLORIDA'S CAPITAL SENTENCING SCHEME, WHICH EMPHASIZES THE ROLE OF THE CIRCUIT JUDGE OVER THE JURY IN THE DECISION TO IMPOSE A DEATH SENTENCE, IS CONSTITUTIONALLY INVALID?

To date, this Court has rejected every single challenge to Florida's capital sentencing statute based upon ruling in Ring v. Arizona, 536 U.S. 584, 609, 122 S. Ct. 2428 (2002). See Rigterink v. State, 66 So. 3d 866, 895-96 (Fla. 2011) (noting that "[i]n over fifty cases since Ring's release, this Court has rejected similar Ring claims."). Further, Poole was convicted of the qualifying contemporaneous felonies of sexual battery and attempted murder. These contemporaneous [prior violent felony] felony convictions were necessarily found by a unanimous jury, a fact which takes this case out of the purview of Ring. As this Court recently stated in Ellerbee v. State, 87 So. 3d 730, 747 (Fla. 2012):

> This Court has consistently held that a defendant is not entitled to relief under *Ring* if he is convicted of murder committed during the commission of a felony, or otherwise where the jury of necessity has unanimously made the findings of fact that support an aggravator. *See Baker*, 71 So. 3d at 824 ("[W]e have previously explained that *Ring* is not implicated when

the trial court has found as an aggravating circumstance that the crime was committed in the course of a felony."); *see also Douglas v. State*, 878 So. 2d 1246, 1263-64 (Fla. 2004) (rejecting *Ring* claim where jury convicted defendant of committing murder during the commission of sexual battery); *Caballero v. State*, 851 So. 2d 655, 663-64 (Fla. 2003) (rejecting *Ring* claim where defendant was convicted by unanimous jury of committing murder during the commission of burglary and kidnapping); *Doorbal v. State*, 837 So. 2d 940, 963 (Fla. 2003) (stating that prior violent felony aggravator based on contemporaneous crimes charged by indictment and on which defendant was found guilty by unanimous jury "clearly satisfies the mandates of the United States and Florida Constitutions"). Accordingly, under this Court's precedent, Ellerbee is not entitled to relief under *Ring*.

Accordingly, this meritless claim should be denied.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court AFFIRM the sentence imposed below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF THE APPELLEE has been furnished electronically to Steven L. Bolotin, Assistant Public Defender, Public Defender's Office, Post Office Box 9000 - Drawer PD, Bartow, Florida 33831-9000, appealfilings@pd10.state.fl.us, sbolotin@pd10.state.fl.us, and kstockman@pd10.state.fl.us, on this 7th day of November, 2012.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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