IN THE SUPREME COURT OF FLORIDA

MARK POOLE,	:	
Appellant,	:	
vs.	:	Case No. SC11-1846
STATE OF FLORIDA,	:	
Appellee.	:	
_____	:	

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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TOPICAL INDEX TO BRIEF

PAGE NO.

STATEMENT OF THE CASE AND FACTS 1

A. Pretrial (Resentencing) 1

B. Penalty Trial - State's Case 3

C. Penalty Trial - Defense Case 12

D. Spencer Hearing 27

E. Sentencing 32

SUMMARY OF THE ARGUMENT 32

ARGUMENT 37

[ISSUE I] POOLE'S RIGHTS TO EQUAL PROTECTION AND AN IMPARTIAL JURY, GUARANTEED BY THE UNITED STATES AND FLORIDA CONSTITUTIONS, WAS INFRINGED BY THE PROSECUTOR'S PEREMPTORY STIKES OF AFRICAN-AMERICAN JURORS WEARING AND BLANDIN FOR PRETEXTUAL REASONS, BECAUSE (1) NEITHER JUROR EXPRESSED ANY OPPOSITION TO THE DEATH PENALTY NOR ANY RELUCTANCE TO VOTE FOR IT IN THIS CASE, AND (2) THE PROSECUTOR ENGAGED IN DISPARATE QUESTIONING ON THE SUBJECT 37

A. Review of Batson Claims 37

B. The Prosecutor's Strikes of Jurors Wearing and Blandin 39

C. The Prosecutor's Belated Reliance on the Jurors' Young Age as a Justification for the Strikes is a Post-Hoc Rationalization Which is Strongly Indicative of Pretextual Motivation 42

D. The Voir Dire Responses of Jurors Wearing and Blandin do not Show that they Oppose the Death Penalty or that they Would be Reluctant to Impose it in This Case 44

E. Disparate Questioning 50

[ISSUE II] THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO INTRODUCE IN THIS PENALTY TRIAL, OVER DEFENSE OBJECTION, THE SEVERED FINGERTIP OF THE SURVIVING VICTIM 56

[ISSUE III] POOLE WAS DEPRIVED OF A FAIR PENALTY PHASE BY THE PROSECUTOR'S MISCONDUCT IN CLOSING ARGUMENT 65

[ISSUE IV] POOLE'S DEATH SENTENCE IS PROPORTIONALLY UNWARRANTED BASED ON THE SIGNIFICANCE AND WEIGHT OF THE MITIGATING CIRCUMSTANCES 78

A. The Two-Pronged Proportionality Test 78

B. This Case is Not Among the Least Mitigated of Murders for Which the Death Penalty is Reserved 79

C. Aggravating Factors 86

D. Poole's Death Sentence Should be Reduced to Life Imprisonment Without Possibility of Parole on Proportionality Grounds 93

[ISSUE V] 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 93

CONCLUSION 97

CERTIFICATE OF SERVICE 97

TABLE OF CITATIONS

	PAGE NO.
Abshire v. State, 642 So.2d 542 (Fla. 1994)	37
Allen v. Butterworth, 756 So.2d 52 (Fla. 2000)	33, 56
Allred v. State, 55 So.2d 1267 (Fla. 2000)	75
Almeida v. State, 748 So.2d 922 (Fla. 1999)	56, 78, 81
Atkins v. Virginia, 536 U.S. 304 (2002)	85
Ault v. State, 53 So.3d 175 (Fla. 2010)	67
Banks v. State, 700 So.2d 363 (Fla. 1997)	75
Barnes v. State, 29 So.3d 1010 (Fla. 2010)	75
Batson v. Kentucky, 476 U.S. 79 (1986)	37
Bell v. State, 965 So.2d 48 (Fla. 2007)	44
Bertolotti v. State, 476 So.2d 130 (Fla. 1988)	33, 57, 69
Bottoson v. Moore, 833 So.3d 694 (Fla. 2002)	95
Brant v. State, 21 So.2d 1276 (Fla. 2009)	81
Bright v. State, 2012 WL 1947877 (SC09-2164 opinion dated May 31, 2012)	87

Brooks v. State,
762 So.2d 879 (Fla. 2000) 34, 69, 70, 74

Bryant v. State,
565 So.2d 1298 (Fla. 1990) 37

Chavez v. State,
832 So.2d 730 (Fla. 2002) 71

Clark v. State,
609 So.2d 513 (Fla. 1992) 68

Coday v. State,
946 So.2d 988 (Fla. 2007) 73

Conde v. State,
860 So.2d 930 (Fla. 2003) 95

Cooper v. State,
43 So.2d 42 (Fla. 2010) 65

Cooper v. State,
739 So.2d 82 (Fla. 1999) 79, 81

Crook v. State,
813 So.2d 68 (Fla. 2002) 67, 82, 85

Crook v. State,
908 So.2d 350 (Fla. 2005) 78,81

Delta Property Management v. Profile Investments, Inc.,
2012 WL 739193 (March 8, 2012) 63

Densey v. State,
191 S.W.3d 296 (Tex.App.-Waco 2006) 55

Doorbal v. State,
983 So.2d 464 (Fla. 2008) 33, 56, 61

Dorsey v. State,
868 So.2d 1192 (Fla. 2003) 38

Douglas v. State,
878 So.2d 1246 (Fla. 2004) 87, 90

Duest v. State,
855 So.2d 33 (Fla. 2003) 95

Duncan v. State,
619 So.2d 279 (Fla. 1993) 61, 62

Duncan v. State,
776 So.2d 287 (Fla. 2d DCA 2000) 34, 66

Elam v. State,
636 So.2d 1312 (Fla. 1994) 87

Farnell v. State,
214 So.2d 753 (Fla. @d DCA 1968) 64

Florida Department of Transportation v. Juliano,
801 So.2d 101 (Fla. 2001) 63

Foster v. State,
732 So.2d 22 (Fla. 4th DCA 1999) 38

Franqui v. State,
59 So.3d 82 (Fla. 2011) 69

Garron v. State,
528 So.2d 353 (Fla. 1988) 57, 64

Gill v. State,
14 So.3d 946 (Fla. 2009) 83

Globe v. State,
877 So.2d 663 (Fla. 2004) 73

Guardado v. State,
965 So.2d 108 (Fla. 2007) 90

Gunn v. State,
78 Fla. 599 So.511 (1919) 64

Hall v. Daee,
602 So.2d 512 (Fla. 1992) 42

Hall v. United States,
419 F.3d 582 (5th Cir. 1969) 77

Hartley v. State,
686 So.2d 1316 (Fla. 1996) 44

Hawk v. State,
718 So.2d 159 (Fla. 1998) 81

Hickson v. State,
472 So.2d 379 (Miss. 1985) 33, 56, 61

Hildwin v. Dugger,
654 So.2d 107 (Fla. 1995) 79

Hitchcock v. Dugger,
481 U.S. 393 (1987) 73

Hurst v. State,
819 So.2d 689 (Fla. 2002) 71

Jacques v. State,
883 So.2d 902 (Fla. 4th DCA 2004) 70

Jones v. State,
705 So.2d 1364 (Fla. 1998) 95

Jones v. State,
748 So.2d 1012 (Fla. 1999) 61

Kearse v. State,
770 So.2d 1119 (Fla. 2000) 81

Knight v. State,
672 So.2d 590 (Fla. 4th DCA 1996) 70

Knowles v. State,
632 So.2d 62 (Fla. 1993) 81

Kramer v. State,
649 So.2d 274 (Fla. 1993) 78

Lamb v. State,
532 So.2d 1051 (Fla. 1988) 90

Lawrence v. State,
698 So.2d 1219 (Fla. 1997) 87

Lebron v. State,
982 So.2d 649 (Fla. 2008) 63

Lockett v. Ohio,
438 U.S. 586 (1978) 71,73

Luce v. State,
642 So.2d 4 (Fla. 2d DCA 1994) 34, 66

Mahn v. State,
714 So.2d 391 (Fla. 1998) 68, 74

Melbourne v. State,
679 So.2d 759 (Fla. 1996) 38

Merck v. State,
975 So.2d 1054 (Fla. 2007) 63, 69, 70, 72

Metaxotos v. State,
37 So.3d 991 (Fla. 4th DCA 2010) 63

Miller v. State,
373 So.2d 882 (Fla. 1979) 81

Miller-El v. Cockrell,
537 U.S. 586 (1978) 38,55

Miller-El v. Dretke,
545 U.S. 231 (2005) 37,42,55

Morrison v. State,
818 So.2d 432 (Fla. 2002) 44

Morton v. State,
789 So.2d 324 (Fla. 2001) 63

Muehleman v. State,
3 So.3d 1148 (Fla. 2009) 63

Murray v. State,
3 So.3d 1108 (Fla. 2009) 37, 38, 49

Nibert v. State,
574 So.2d 1059 (Fla. 1990) 68, 74, 81

Nowell v. State,
998 So.2d 597 (Fla. 2008) 33,38,43,44,49

Overstreet v. State,
712 So.2d 1174 (Fla. 3d DCA 1998) 38

Peterson v. State,
2012 WL 1722581 (case no. SC10-274, opinion dated
May 17, 2012) 92,93

Pham v. State,
70 So.3d 485 (Fla. 2011) 75

Poole v. State,
997 So.2d 382 (Fla. 2008) 60, 64, 66, 93

Preston v. State,
607 so.2d 404 (Fla. 1992) 63

Provence v. State,
337 So.2d 783 (Fla. 1976) 74

Quaggin v. State,
752 So.2d 19 (Fla. 5th DCA 2000) 70

Reed v. Quarterman,
555 F.3d 364 (5th Cir. 2009) 42,45,55

Reynolds v. State,
934 So.2d 1128 (Fla. 2006) 90

Rhodes v. State,
547 So.2d 1201 (Fla. 1989) 61

Ring v. Arizona,
536 U.S. 584 (2002) 36,93

Robertson v. State,
669 So.2d 1343 (Fla. 1997) 81

Rodgers v. State,
948 So.2d 655 (Fla. 2006) 81

Rolling v. State,
695 So.2d 278 (Fla. 1997) 90

Rose v. State,
675 So.2d 567 (Fla. 1996) 80

Ruiz v. State,
743 So.2d 1 (Fla. 1999) 33,34,57,77

San Martin v. State,
705 So.2d 1337 (Fla. 1997) 44

Santos v. State,
629 So.2d 838 (Fla. 1994) 80

Schoensetter v. State,
31 So.2d 857 (Fla. 2006) 75

Shuler v. State,
816 So.2d 257 (Fla. 2d DCA 2002) 38

Simmons v. State,
934 So.2d 1100 (Fla. 2006) 71

Songer v. State,
544 So.2d 1010 (Fla. 1989) 68

Spencer v. State,
615 So.2d 688 (Fla. 1993) 94

State v. Alen,
616 So. 2d 452 (Fla. 1993) 37

State v. DiGuilio,
491 So.2d 1129 (Fla. 1989) 65, 91

State v. Daniels,
542 A.2d 306 (Conn. 1988) 94

State v. Fleming,
61 So.3d 399 (Fla. 2011) 63

State v. Hungerford,
697 A.2d 916 (N.H. 1997) 89

State v. Neil,
457 So.2d 481 (Fla. 1984) 37

State v. Parker,
836 S.W. 2d, 930 (Mo. 1992) 43

State v. Slappy,
522 So.2d 18 (Fla. 1988) 37

State v. Steele,
921 So.2d 538 (Fla. 2006) 93

State v. Walker,
675 P.2d 1310 (Ariz. 1984) 62

Stevens v. State,
552 So.2d 1082 (Fla. 1989) 70

Sumner v. Shuman,
483 U.S. 66 (1987) 33,56

Swafford v. State,
533 So.2d 270 (Fla. 1997) 76

Torres-Arboledo v. Dugger,
636 So.2d 1321 (Fla. 1994) 71

Trawick v. State,
478 So.2d 1235 (Fla. 1988) 60

Trease v. State,
768 So.2d 1050 (Fla. 2000) 73

Troy v. State,
948 So.2d 635 (Fla. 2006) 94

United States v. Barnette,
644 F.3d 192 (4th Cir. 2011) 38,55

United States v. Biaggi,
909 F.2d 662 (2d Cir. 1990) 43

United States v. Garza,
608 F.2d 659 (5th Cir. 1979) 77

United States v. Taylor,
636 F.3d 901 (7th Cir. 2011) 43

Urbin v. State,
714 So.2d 411 (Fla. 1998) 69

Wade v. State,
41 So.3d 857 (Fla. 2010) 44

Whitton v. State,
649 So.2d 861 (Fla. 1995) 90

Williams v. State,
37 So.2d 187 (Fla. 2010) 90

Williams v. State,
967 So.2d 735 (Fla. 2007) 94

Williamson v. State,
994 So.2d 1000 (Fla. 2008) 69

Woodson v. North Carolina,
428 U.S. 280 (1976) 56

Young v. State,
744 So.2d 1077 (Fla. 4th DCA 1999) 37

STATEMENT OF THE CASE AND FACTS

A. Pretrial (Resentencing)

Appellant, MARK POOLE, was convicted of first-degree murder of Noah Scott, attempted first-degree murder and sexual battery of L.W., armed burglary, and armed robbery. On December 11, 2008, this Court affirmed the convictions but reversed Poole's death sentence on the murder conviction for a new jury penalty proceeding (1/35a-35dd). In the guilt phase the Court found that the prosecutor improperly suggested that Poole had a burden to come forward and testify, but that the comment was not so prejudicial as to require a mistrial (1/35g-35k). In the penalty phase the Court found that the prosecutor improperly cross-examined defense witnesses about unproven arrests, the unproven content of a tattoo, and lack of remorse. The cumulative effect of the preserved (arrests, tattoo) and unpreserved (lack of remorse) errors deprived Poole of a fair penalty phase, and necessitated reversal (1/35k-35r).

On remand, the Public Defender's office (which had represented Poole in the original trial and penalty phase) withdrew based on conflict of interest, and attorneys Daniel Hernandez and Lee Adam Cohen were appointed (1/59-77, 81, 89-92). Assistant State Attorney John Aguero, the experienced homicide prosecutor

who represented the state in the original trial and penalty phase, continued to do so in the 2011 resentencing proceeding (1/85, 98, 117; 2/162, 164-65; 7/263).

On April 20, 2011, defense counsel filed a motion for a continuance of the penalty trial, then scheduled for May 16, on the ground that Drs. Sesta, Kremper, and Chacko, who "are all going to be essential mitigation witnesses in the case", would be unavailable due to prior commitments (SR2/247-48; 2/171). The motion infuriated the trial judge ("Did you feel the building shake about a quarter till nine? That was the roof above my office when I saw this"), who ultimately moved the trial back a month - - which defense counsel indicated might not be enough to alleviate the problems with the doctors' schedules - - but made it clear the trial would take place in June whether the doctors were available or not (2/171-178). On June 9, counsel informed the trial court and the state that the defense would not be calling Dr. Sesta during the penalty phase, although he might be called to testify in the event of a Spencer hearing (2/210).

Jury selection commenced on June 20, 2011 before Judge Michael Hunter (6/3). During voir dire the prosecutor said to the prospective jurors, "And the judge will instruct you at the appropriate time which aggravators he believes apply to this case. ...And whichever ones the judge thinks have been proven, he'll tell you about" (7/335-36). Judge Hunter said, "Now that's not - - I need to correct that" , whereupon Mr. Aguero corrected himself: "I'm sorry. Whichever ones he thinks are applicable to the case.

He's not deciding if they're proven; you are" (7/336). A jury was selected and sworn, over defense objection that the prosecutor's proffered reasons for his peremptory strikes against African-American jurors Wearing and Blandin were pretextual (8/441-45, 450-51, 501-05).

B. Penalty Trial - State's Case

During his opening statement, Mr. Aguero again said to the jurors that the court was going to tell them "the aggravating circumstances that exist in this case" (9/581). Once again, Judge Hunter caught the error and gave the jury a curative instruction (9/584-86).

Before the first witness was called, the state's exhibits were marked for identification (9/587-610). Defense counsel objected to State Exhibit 183, which was the severed fingertip of the surviving victim, L.W., preserved in a jar of formalin (similar to what used to be known as formaldehyde), on the ground that it was inflammatory and that any probative value would be far outweighed by its unfair prejudice (9/611-14). The trial court overruled the objection (9/614-15).

The state introduced a certified copy of the 2005 court documents adjudging Poole guilty of first-degree murder, attempted first-degree murder, sexual battery, armed burglary, and armed robbery (9/618-19).

The state presented the following testimony. L.W. was an 18 year old high school senior on October 12, 2001. She was 21 weeks

pregnant. [The baby was later born without complications]. L.W. and her 24 year old fiancé, Noah Scott, had moved into a trailer in the Orangewood mobile home park in North Lakeland three weeks earlier. She attended school in the morning, and then went to work in a kiosk at the Lakeland Mall. Noah worked at the same place (10/711-16).

Only one of the trailer's doors opened; the other had been nailed shut, possibly by a prior occupant. The door which worked was always kept locked (10/720).

On October 12, L.W. and Noah bought groceries, got home early in the evening, and went to bed around 11:30. They normally slept unclothed, and they did so that night. Noah usually slept on his side. Their bed was a box spring and mattress on the floor, without a frame (10/717-18). At some point during the night, L.W. was awakened with a pillow over her face. She was lying on her back and she could see through the bottom of the pillow when she looked down. She was able to see the arm of the person who was on top of her. Noah was at the foot of the bed on the floor; L.W. could hear him wrestling around trying to get up. During the attack, L.W. was hit repeatedly with a hard object. She was able to see it when it was lying on the bed; it was long and black but she didn't know what it was (10/718-23). "And every time the attacker would try to rape me, Noah would get up, and he would pick up the object and hit Noah in the face" (10/721).

L.W. was raped during the attack. She remembers hollering "Don't hurt me. I'm pregnant". While this did not stop him, he

didn't hit her in the stomach. He rolled her over with her face in the pillow, and was hitting her in the back of the head, asking her where the money was. She told him they didn't have any and he continued hitting her (10/721-23).

When the attacker left the room, L.W. was able to get off the bed. She found a black tank top and some red plaid boxers which she put on; then she passed out. She was in and out of consc-iousness for the rest of the night. At some point after he left the room, the attacker came back in, touched her vaginal area, and thanked her. She remembers seeing a clock and it was around 3:00 or 3:30. She couldn't really focus. She remembers getting up, pulling on Noah, hearing him breathe, and then she got sick again and fell back down (10/724-25, 728).

The alarm clock had been set for 8:00 or 8:30 because they were supposed to go to work. L.W. pulled on Noah who was lying at the end of the bed; he was not moving and she doesn't remember if he was breathing. She went to the bathroom and started washing her hands because she didn't know what was going on. After briefly passing out again, she went to the dining room and found Noah's cell phone because she knew she needed to call somebody. She tried two times to call her boss to let her know she didn't think they were coming into work, but she was unable to reach her. Then she called 911 (10/725-27).

An audiotape of the 911 call was introduced and played to the jury (10/745-46, 757-58). L.W. tells the operator that somebody broke into her house last night and now she keeps passing out

(10/760). She doesn't know if her fiancé is alive or not. Asked whether her fiancé was assaulted, she replied "I have no clue. All I know is that there's blood everywhere." When the operator asks her to check if he is breathing, L.W. says she can't move (10/760-61, 764-65, 769-70). She doesn't know who broke in but they were both black males; one was in the bedroom and she thinks there was one in the living room (10/765-66). She couldn't tell if they had masks on because they covered her face (10/765). They didn't take anything (10/760). L.W. tells the operator she has a head injury and she was raped. The operator asks if they had a weapon; L.W. says "All I know is one had a belt". Asked whether they had hit her in the head, she answers "I don't know what all they did to me" but there was blood pouring from her head. The operator asks if she thought she might have a cut on the back of her head; she replies "I don't know. I fell on the floor. Blood is pouring" (10/762, 766-68).

When the police arrive, they find the doors are locked and L.W. is unable to move to let them in. They make entry and the 911 call ends (10/764-65, 769-72; see 10/663-73).

The prosecutor asked L.W. on the witness stand if she ever saw more than one person inside the trailer; she replied "Not that I remember" (10/792). Although she had described on the tape that she thought she saw a belt, the item which struck her on the back of the head felt hard (10/773-74). L.W. and Noah owned a number of game systems which attached to their television; she later learned that these were taken from the trailer (10/772-73, see

9/643-46, 653-54; 10/784-88).

Lakeland policeman Todd Edwards was one of the officers dispatched to the trailer park (9/662-72). L.W. was sitting on the floor with her back against the wall; she was visibly injured and unable to respond to his commands. Eventually she was able to indicate that she couldn't move (9/671-72). In the back bedroom there was a male lying motionless on the floor, and a lot of blood in the area (9/673-74). When the paramedics brought L.W. outside, Officer Edwards attempted to speak to her, but she didn't appear to understand what he was saying, nor could he understand what she was saying; "[s]he was more like in shock" (9/675-76).

Crime scene technician Renee Arlt found the tire iron which was the weapon used in these crimes underneath the front wheel of a mobile home located midway between Noah Scott and L.W.'s trailer and Mark Poole's trailer (9/625-29, 655-57, 660-61). The exterior of the door to the Scott/L.W. trailer had damage in the area of the handle and locking mechanism (9/634-36). Bloodstains could be seen in various locations throughout the trailer (9/636-51). A small lockbox (Sentry safe) in the bedroom had what appeared to be pry marks on it (9/638, 647-48). Among the crime scene photographs which were shown to the jury by Ms. Arlt were three which depicted a severed fingertip on the carpeted floor (9/646-47; State Exhibits 76, 77, 78). The actual fingertip (earlier admitted into evidence over defense objection) was preserved in a substance known as formalin:

> Q (by Mr. Aguero): I show you what's been introduced as State's Exhibit 183. Is that what this is?
>
> A. Yes, sir.
>
> (9/647).

Dr. Randall Simmons is an emergency room physician at Lakeland Regional Medical Center (9/686). L.W. was brought to the emergency room on October 13, 2001 with serious head injuries, as well as injuries to her left hand. She had multiple lacerations to the left side of her face and scalp and to the back of her scalp, and bruising to the left side of her face, with low blood pressure and obvious signs of blood loss (9/689-90; 10/691-93). Her initial blood pressure was so low that if she had not received medical attention when she did, and had she not been pregnant (which increases blood volume), Dr. Simmons would not have expected her to survive (10/701).

L.W. had a concussion (10/691-92). "When you have a severe head injury or blow of any type, it can shake the brain and kind of disturb the connections there, so there can be some memory loss, and people tend to repeat things" (10/691-92). L.W. appeared to have some of these symptoms, but she was able to re-call certain things such as her name and the fact that she was pregnant (10/692). She was coherent up to a point, but [e]xactly what happened to her, she really had minimal recollection of that at that time" (10/692). While Dr. Simmons was with her during treatment her consciousness was altered, but she never became completely unconscious (10/709-10).

A CAT scan showed an occipital skull fracture (10/694-95; 702). L.W.'s injuries were blunt force injuries; they were consistent with an assault and consistent with having been inflicted with a tire iron (10/700, 704).

Because L.W. had indicated that she was assaulted, a rape kit was done (10/706-08).

Dr. Simmons testified that L.W. had lost the end of her long finger and the nailbed of her ring finger on her left hand (10/691, 693, 695). Photographs were then shown to the jury and described by Dr. Simmons. State Exhibit 94 "is her left hand, which is being examined. And it turns out that she lost the distal portion of the tip of the long finger and the nail bed and part of the skin of the ring finger" (10/699). State Exhibits 93 and 95 depict the same left hand but you see the injuries in a little more depth; "the tissue here is crushed. The nail bed is gone. And this finger normally should be sticking out here, like this, but it's gone, so" (10/699-700).

Asked later whether L.W. sustained any injuries he would define as permanent disability or disfigurement, Dr. Simmons answered, "Well, clearly, she's lost part of the finger. That's part of it" (10/708). "And also, with the severity of the head injury, you don't know how much of her memory is going to come back. So once you have lost it, it's a matter of time to determine are they going to come back or not. And the only thing that can determine that is wait and see" (10/708).

The prosecutor stated, "Now, the jury has already seen the

tip of the finger, because it was preserved" (10/708). Dr. Simmons agreed. The fingertip could not be reattached, so the treating physicians had to trim and close the bone (10/708-09). Potentially, if the bone were to become infected it could cause long-term problems (10/709).

An autopsy on the deceased victim, Noah Scott, was performed by chief medical examiner Stephen Nelson (10/844-46). The cause of death was blunt force head trauma, resulting in skull fractures and subarachnoid hemorrhage, and the manner of death was homicide (10/856-57). The implement which inflicted the injuries had some type of roundness to it, and was consistent with a tire iron (10/854). Photographs were shown to the jury; "[w]hat we've done is we've shaved more of Mr. Scott's hair to better demonstrate these wounds. So by looking at the head unshaven … you can only see maybe one or two type wounds. Now, when we shave the head, we can see a lot more wounds. More - - these are all, again, lacerations. These are not cuts." The skin was torn, not cut, "[a]nd, again, abrasions and lacerations here, even on the back of the left ear" (10/855-56, see 851-52). Noah Scott's eyes were black and blue; the "black eye corresponds to underlying skull fractures in his skull. And blood just oozed down into these soft tissues around his eye" (10/852). There were lacerations and abrasions, and bruising to his forehead, nose, ear, and the inside of his mouth; the latter consistent with a punch to the face (10/852-53).

Altogether, according to Dr. Nelson, there were 15 areas of

blunt force trauma to Noah Scott's body; 13 to the head and "[h]e has two others present on his left arm" (10/856). [This is the only testimony given by Dr. Nelson concerning injuries to the left arm. Dr. Nelson did not testify that these were likely defensive wounds nor did he indicate that they were consistent with defensive wounds. Neither the prosecutor nor defense counsel (who did not cross-examine Dr. Nelson) asked him anything about defensive wounds, and the prosecutor did not argue to the jury that these might be defensive wounds (see 12/1093-1119)].

Lakeland police detective Bradley Grice testified that his agency received results that the DNA sample from L.W.'s rape kit matched Mark Poole's DNA (10/779). Detective Grice seized shoes from Poole's trailer which matched a shoe impression on a vinyl notebook in L.W. and Noah's bedroom (10/781; see 9/641, 651). Gaming systems and a game controller stolen from the Scott/L.W. trailer were recovered in three locations: Poole's trailer (the controller); a trailer (across the street from Poole's) belonging to a Mr. Rico, who said he had bought them from Poole for 50 dollars; and the trunk of a woman's car (Rico had given one of the game stations to the woman's young son) (10/784-88; see 9/643-46, 653-54).

The prosecutor asked Detective Grice how long after October 13 did they obtain a warrant for Poole's arrest. The detective replied that Poole was already "wanted for a failure to appear, so we were kind of looking for him then under that warrant" (10/788-89). Defense counsel objected and moved for a mistrial. The

trial judge sustained the objection, denied the motion for mistrial, and instructed the jury to disregard Detective Grice's nonresponsive answer (10/789-96). The judge explained that the outstanding capias had nothing to do with the case; it was for a failure to appear and it was withdrawn because Poole was given the wrong date to appear, "[a]nd then after he did appear, the charges were dismissed" (10/796-97).

FDLE bloodstain pattern analyst Leroy Parker concluded that approximately a dozen blows were struck, and that none of the blows was higher than 36 inches off the floor (10/833, see 12/1100).

Before resting, the prosecutor (over defense objection) read to the jury victim impact statements from L.W. and from Noah Scott's mother and aunt (10/859-63, see 10/834-43; SR1/1-21; SR2/176-83, 222-32; 7/177-78).

C. Penalty Trial - Defense Case

Dr. William Kremper is a clinical and forensic psychologist, with experience in the area of substance abuse (11/873-80). Dr. Kremper examined Mark Poole twice in 2002 and once in 2004, reviewed records and transcripts of witness statements, and attended all of his 2005 penalty phase (in which he testified)(11/880-81). When he was retained again in 2011, Dr. Kremper (who had routinely purged his original notes and test data) requested and received additional records and transcripts to

fill the gaps in his file, including neuropsychological test data from Dr. Sesta (11/881-82). He also re-interviewed Poole in 2011 to see if there were any changes in his cognitive functioning (typically you don't see major changes), and to revisit his background information and the events surrounding the offense (11/883).

Poole's DOC records did not tell Dr. Kremper very much; there were two D.R.s, one for a fight during a basketball game and one for contraband (two lighters and a water bug)(11/883-84). Poole disclosed his prior criminal record which consisted of several arrests for public intoxication in Mississippi and Louisiana, a two year prison sentence in Louisiana for possession of cocaine, and a battery in Georgia (11/884-85). Poole mentioned several head injuries. One occurred while hunting when he was a teenager; he fell out of a tree and was knocked unconscious. When he was around 25 he was struck in the head with a gun; he was dazed but didn't lose consciousness. After each of these occurrences he had headaches for several weeks (11/885-86).

Dr. Kremper found it interesting that Poole made no mention to him of a head injury from a motorcycle accident which was reported to Dr. Sesta and Dr. Chacko and was witnessed by Poole's brother. However, Dr. Kremper did not think it was unusual for Poole to be omitting potentially beneficial information, nor that there would be inconsistencies in his statements as to his medical history or as to the offense in general (11/886-87). First of all, "we're talking about events that have taken place many years

ago. Normal forgetting is not unusual" (11/887). Moreover, in Poole's case, "he has a significant alcohol and drug problem. Alcohol and drug problems, in addition to head injuries, impair memory functioning"(11/887).

Poole has been low functioning intellectually from an early age. He dropped out of school after repeating the ninth grade or just after entering the tenth grade. He reads at a sixth grade level. An intelligence test administered while he was still in school resulted in an IQ score of 66, which falls within the mentally retarded range. However, Dr. Kremper does not believe Poole is mentally retarded. Premorbidly (i.e, prior to any head injuries) he is "probably around a borderline level, not mentally retarded, but he's also not functioning within a low-average range either. He's somewhere in between" (11/887-88).

Borderline scores range between 70 and 79 (11/890). When Dr. Kremper initially evaluated him in 2002, Poole had a verbal IQ of 76. The current evaluation (nine years later in 2011) "puts him at a 74. Both of these scores place him within a borderline range"(11/889-90).

During his various interviews, Poole gave different versions of the offenses (11/906-07). When initially interviewed (not by Kremper) he denied being in the trailer (11/906-07). The first time Dr. Kremper spoke with him, he said he'd been drinking beer all day and he went outside the trailer, picked up some games, and sold them (11/891, 907). In their second interview, he acknowledged that he did go into the residence of the victims, saw what

was there, which he described as a mess, and ran" (11/891-92, 907). In the third interview, in 2004, "he indicated that, in fact, he did go into the residence, saw the woman beaten unconscious, raped her. He indicated that he - - she asked him for help and he didn't. And when I asked him about that, he basically said, I was a monster and I was on drugs, and [he] provided no further information" (11/892, 907-08). According to Dr. Kremper, Poole was consistent in his statements regarding his alcohol consumption but there were discrepancies regarding his drug use (11/891, 908-11).

In the first interview Poole initially said he hadn't used cocaine for several days prior to the offense, but later in the same interview he said he had used cocaine on the evening of the offense but was unclear as to the exact time. In their second interview, they didn't discuss cocaine. And in the third interview he said he used cocaine around midnight on the night of the offense (11/891, 908-09). By the time of their fourth interview in 2011, Poole no longer remembered any specifics; when Dr. Kremper asked him how come he had said he went to this person's house, got two rocks of cocaine, and came back, Poole said "[w]ell, that's what I normally did" (11/909-10). Dr. Kremper testified, "So rather then giving me an accurate recollection of what he - - and, again, this is in 2011 - - recalled, he basically was telling me what he basically would do most nights" (11/980).

The prosecutor asked Dr. Kremper on cross if it would be fair to say - - since much of the information regarding alcohol or drug

use was coming from Poole - - that he [Kremper] had no idea how much alcohol or cocaine Poole might have used on the day of the offense (11/910). Dr. Kremper answered:

> Based on what I know about people who use alcohol and drugs, based on his descriptions of how he reacts under the influence of both, based on his record of being imprisoned for crack cocaine use, multiple arrests for being under the influence, I would . . . . believe that he in fact, was abusing alcohol, the amount unclear. But repeatedly, he's telling me he's drinking around noon. Even outside of the offenses, he's telling me he's typically drinking in the morning and at work. With regard to the cocaine use, he basically was saying it's a pattern and this is what I typically do. But actually, what he used and how much he used, I don't know. (11/911)

Dr. Kremper testified that, while Poole displays a number of antisocial characteristics, he does not meet the diagnostic criteria for antisocial personality disorder for two main reasons: (1) there was no demonstrated conduct disorder prior to the age of 15; and (2) Poole appears to have a very strong connection with multiple family members (11/893, 918). Early on, he was able to maintain stable employment and even ran his own concrete business, but these abilities deteriorated with time "as he became further and further involved in alcohol and drugs, where he was not even able to maintain employment" (11/893-94). Poole's alcohol and drug use became excessive in his late teens, and his problems became progressively worse as his substance abuse increased and its longer term effects became more prominent (11/895, 901). He experimented with a large variety of drugs, including meth-

amphetamine, PCP, barbiturates, Quaaludes, and prescription sleep medications, but as he grew older he gravitated more towards cocaine (11/895). Eventually it got to where all of his money was spent on cocaine and alcohol (11/895).

Dr. Kremper explained that as a person's alcohol abuse becomes heavier there is an increased tolerance; it takes more and more to get the same effect. As the individual becomes dependent on alcohol, much of his time is focused on drinking, and it starts in the morning or early afternoon and occurs during work. Behavior starts to deteriorate (11/895-96). Cocaine works a little differently. While alcohol has a pretty long shelf life and its effects will last for hours, the euphoria produced by cocaine (and especially crack cocaine) only lasts from a couple of minutes to maybe as long as half an hour to an hour (11/896). "Which is why you find people who are addicted to crack cocaine, they can't get enough. They're spending large amounts of money within a relatively short period of time. I've seen individuals who have run through thousands of dollars within a week because the effect wears off" (11/896-97).

There appears to be a pharmacological relationship between cocaine use and violent behavior, with the violent acts occurring simultaneously with the ingestion of cocaine, or within a couple of hours, or within several days (11/897-98). In terms of long-term effects, functional brain imaging shows that for a period as long as ten days after the last use of cocaine there is decreased metabolism in the frontal cortex of the brain (11/898-99). In

addition, with individuals who have been addicted to cocaine, there is atrophy of the frontal lobes (11/899). Dr. Kremper explained, "Repeated cocaine use affects those parts of the brain that are involved with judgment, reasoning." The frontal lobes "work to inhibit, . . . hold back impulsive judgments, allow for reasoning, considering different courses of action in dealing with problem situations" (11/899). Cocaine grossly impairs an individual's ability to think and to reason, as does alcohol (11/899). While alcohol and cocaine do not directly cause violent behavior, their effects "set the stage for criminal behavior to occur" (11/899-900).

Dr. Kremper found that Poole suffers from a severe and long-term cocaine and alcohol addiction which is in need of treatment (11/902, 904). Based in part on the results obtained by the neuropsychologist Dr. Sesta (who was not called in the penalty phase but who later testified in the Spencer hearing) Dr. Kremper also believes that Poole has a cognitive disorder, with significant deficits in verbal and nonverbal memory (11/900-01, 904), as well as a personality disorder with antisocial features (11/901). Both of these are related to and exacerbated by substance abuse (11/901, 904).

Dr. Kremper found that Mark Poole's ability to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was, at the time of the offenses, substantially impaired (11/902, 918), due to the combination of his low intelligence and the long and short term effects of his

alcohol and drug abuse, resulting in grossly impaired impulse control and reasoning ability (11/902-904). "It's not insanity, but the ability to control one's behavior is seriously compromised" (11/904, see 912-13, 917-18). Dr. Kremper expressed the belief that were it not for the crack cocaine and alcohol dependence these offenses may well not have occurred (11/905).

Dr. Chowallur Chacko is a board certified psychiatrist with areas of expertise including forensic and addiction psychiatry (11/920-23). Dr Chacko interviewed Mark Poole in 2011, and reviewed police reports, witness statements, and medical and psychological records (11/923-24, 930). He talked with Poole about the series of head injuries he had sustained (including one from boxing). Head injuries can cause brain damage, and their cumulative effect can impair a person's intellectual capacity (11/924-25).

In addition, Poole "has had a very long and extensive history of alcohol and drug addiction" (11/925). From the age of sixteen up until the time of his arrest at the age of 38 he drank an average of 12 to 18 beers a day, and sometimes hard liquor on top of that (11/925). He smoked marijuana on a daily basis from his mid-teens until he was 27, and then switched to crack cocaine. His cocaine use was mostly on weekends at first, but it progressed to the point where for many years (up to the time of his arrest) "he was smoking crack cocaine on a daily basis, smoking an average of between 50 and 60 dollars worth per day, which is quite a bit" (11/925).

Asked whether Poole had ever received substance abuse treatment, Dr. Chacko said he did one time in Shreveport, after which he stayed clean for six months (11/926).

Crack cocaine, Dr. Chacko explained, has two effects on the brain: "One is the acute effect. When you smoke it, you get intoxicated. Your brain, cortical inhibitory centers are knocked out, and you lose your impulse control" (11/926). The chronic effect is "[i]n the long run, if you keep smoking crack on a daily basis for years, you become what is commonly known as a crackhead, which is you develop injury to brain cells" (11/926). Similarly, alcohol is toxic to the brain, and long-term consumption of large amounts of alcohol causes injury to brain cells, resulting in intellectual deterioration (11/926).

Poole told Dr. Chacko that on the night of the offenses he drank 15 cans of beer and smoked $100 worth (five or six bars) of crack cocaine (11/926-27). This "would completely knock out a person's normal inhibitory centers in the brain, the cortical inhibitory centers, and the person loses all impulse control"; if there are violent impulses the person acts on them because he has lost his ability to control them (11/927-29).

Dr. Chacko concluded that at the time of the offenses Mark Poole was under the influence of extreme mental disturbance because of the effects of acute alcohol and crack cocaine intoxication (11/928-29), and that his capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law were substantially impaired (11/929).

The defense presented the testimony of numerous family members, including Mark Poole's parents (Joe, Sr. and Hattie Poole), his brother (Joe Poole, Jr.), his sister and brother in-law (Caroline and Arry Moody, Jr.), and his nephews (Romaine Poole, A.D. Moody, and D'Marcus Moody), as well as a letter written by Mark's 13 year old son (Matayus Williams). They are all products of a very close extended family - - consisting of Pooles, Moodys, and Bryants - - from Haughton, Louisiana near Shreveport (11/942-43, 945-46, 968-74, 985-86, 991-92, 999, 1012, 1026-28, 1030; 12/1041-42, 1046, 1055). The family is active in the Red Chute Baptist Church, which is the center of the local community (11/944-45, 966-67, 982-84).

Mark's older sister Carolyn Moody is an elementary school principal, employed by the Bossier County School System for 36 years (11/943-44). [Where Carolyn Moody's testimony overlaps with that of other family members, record citations to each witness are included here]. Mark is the youngest of three siblings, and was a very active little boy who loved to be outdoors; fishing, hunting, and playing sports (11/946-48). Mark was also compassionate; when Carolyn had migraine headaches he was always the one who would bring her water and stay with her (11/961). Mark had lots of friends his own age, and he also gravitated toward older people (11/947-50). He often went fishing with his Uncle Sims or another older gentleman named Snow. One time when he was walking with his uncle to go fishing his uncle started having chest pains and went down; Mark tried to help him and then ran back to get help, but

Uncle Sims died the same day. He and Mark were very close, and his death (as well as the subsequent death of Mr. Snow) was tough on Mark (11/948-50; see 12/1048).

Mark much preferred working over school, and he dropped out when he was in tenth grade (11/951-52, see 989, 1014; 12/1043, 1049-50). He was a very hard worker and he loved working; even out in the hot sun pouring concrete (11/953-54, see 989, 1014, 1028; 12/1043). He began working for the Jarue Bryant Construction Company, which was the main construction firm in the Haughton area at the time. Jarue Bryant's daughter was married to Mark's brother Joe. Mark's closest friend was Jarue's son Nicky; they did construction jobs together, worked on cars, and went hunting and fishing. Jarue Bryant and Mark had virtually a father/son relationship as well as an employer/employee relationship (11/952-57, see 12/1046).

One Christmas, however, when the extended family was gathered at Mark's parents' house, they got word that Mr. Bryant had been found dead. The news was devastating because the families were so connected, and Mr. Bryant's death had a very obvious effect on Mark. As his sister put it, "I guess you could say he went out of the box, totally left, just - -." He began staying in the back room of the house a lot, not being with the family, not socializing (11/954, 957-58, 962-63, see 12/1046-47).

Carolyn was in college when she began to realize that Mark (then in his late teens) was developing a drug and alcohol problem. It was a combination of both; they'd seen him drink,

"[b]ut the drug thing is - - that's what just floored us". His demeanor had changed and he had become reclusive and depressed (11/961-63, 979, see 12/1054). At one point, Carolyn and Reverend Daniels (one of the ministers at their church) helped Mark seek treatment at a center in Shreveport (11/963-64).

When Mark was about 15 he was in a motorcycle accident (without a helmet). Carolyn had also heard about a car accident Mark had in front of their parents' house, and a time when he fell from a tree while hunting. Mark also participated in Tough Man boxing bouts (11/958-60, 964-65, 980).

According to Carolyn (as well as her husband and Mark's brother in-law, Arry Moody, Jr.), Mark had always had a good relationship with his nephews. Mark would always come to their football and baseball games and (because Arry was frequently away from home working in the oilfields) Mark would often transport them to practice. The boys were unaware of Mark's drug problems, and from what Carolyn and Arry could see, he was a good influence on them (11/965, 990).

Mark has a son named Matayus Williams, known as Tay, who was 13 years old at the time of the 2011 penalty phase. Mark and Tay have a unique relationship; they constantly write to each other and they talk on the phone (11/967-68).

At the conclusion of Carolyn's direct examination, numerous family photographs were introduced into evidence (11/968-74; 4/576-97).

Mark's older brother, Joe Poole Jr., described Mark's con-

dition after his motorcycle accident, in which he was not wearing a helmet. His head, back, and legs were full of gravel rocks, and Joe was "trying to pick some of them out of his head because he was bleeding so profusely" (11/1014-17). After this accident, according to Mark's brother in-law Arry, Mark complained of bad headaches all the time (11/987-89). Hattie Poole, Mark's mother, testified that he acted differently after the motorcycle accident; he would stay in his room and just want to lie down (12/1053).

Mark's three nephews, Romaine Poole (son of Joe, Jr.), A.D. Moody, and D'Marcus Moody (sons of Carolyn and Arry) each had a close and positive relationship with their uncle. Romaine is a Marine Corps veteran; A.D. attended Texas Southern University for four years on a football scholarship and is lead dispatcher at a Houston limo company; and D'Marcus attended the same college for two years and now owns his own trucking business which operates in the Louisiana oilfields (11/991-97, 998-1002, 1030-32).

Romaine had good uncles growing up. (Mark's best friend, Nicky Bryant, was also Romaine's uncle on the other side of the family). Because his dad (Joe, Jr.) wasn't a big hunter or fisherman, Mark took on that role for Romaine, and he also taught him a lot about concrete work. Romaine ran track and played basketball, and Mark would come to his athletic events and support him (11/1030-33).

While A.D. was growing up, he spent a lot of time with his uncle, and they are still close. Mark taught him the concrete business, took him hunting and fishing, supported his sports act-

ivities, and taught him how to work out and lift weights. A.D. described him as a great friend and advisor and a great person to be around. Both before and after his incarceration, Mark always acknowledged holidays and family birthdays with phone calls and letters. He never forgets A.D.'s 2-year-old daughter's birthday, and A.D. would like for her to meet him someday (11/992-97).

For D'Marcus, his uncle Mark filled a gap in his life, and he was a second father figure. Mark was always loving toward D'Marcus and looked out for him. As did his brother and his cousin, D'Marcus learned how to work hard under his uncle's supervision. Mark would take him hunting and fishing all the time, and they worked out together (11/1000-02). D'Marcus never saw the side of Mark that used drugs; "I seen the work horse. . . . I seen the uncle who took us hunting, fishing" (11/1003-04). D'Marcus now looks out for Mark's son. Matayus works for him keeping his trucks detailed, and D'Marcus makes sure he has haircuts and school clothes. "I mean, I look out for him because that's how my uncle did me and my brother" (11/1002).

Each of his three nephews followed Mark's participation in Tough Man boxing. To D'Marcus his uncle was "bigger than life". Romaine saw Mark get hit in the head more than once, and A.D saw him get knocked down from head shots (11/995-96, 1001, 1032). Other than boxing, A.D. never saw Mark act violently toward people (11/997).

Mark's father, Joe Poole, Sr., worked for the City of Shreveport Housing Authority for 22 years. Mark was a good son

and he loved to work (11/1026-28). Mark's mother, Hattie Poole, testified that they are a churchgoing family and Mark was brought up that way (12/1045). Mark and Nicky Bryant were like brothers, and Mark was very much affected by the death of Jarue Bryant and the subsequent death of Nicky in a car accident (12/1046-47, see 11/954-58). Hattie is helping to raise Mark's son Matayus (11/1047-48).

A letter from 13 year old Matayus was read to the jury. He has a long distance relationship with his dad because he is in jail, but he gets an opportunity to talk to him on the phone. His dad "is always telling me to be good, mind my grandparents and stay in school, get a good education, go to church, and don't hang with the wrong crowd" (12/1036-57).

Mark's parents, siblings, and nephews all affirmed their intention to keep in contact with Mark if he were sentenced to life imprisonment (11/974-75, 997, 1002, 1019, 1028, 1032-33; 12/1042, 1045-46, 1049).

After hearing the closing arguments of counsel and the court's instructions, the jury deliberated and returned an 11-1 death recommendation (2/228; 12/1178). After the jury was discharged, counsel stated that the defense intended to call Dr. Sesta in the Spencer hearing (12/1178-80).

D. Spencer Hearing

The Spencer hearing took place on July 29, 2011. Dr. Joseph Sesta is a board certified neuropsychologist with experience (including recent service as a civilian doctor for the U.S. Army examining wounded soldiers returning from overseas combat duty) studying traumatic brain injury (5/620-23). Dr. Sesta was originally retained as a defense expert in Mark Poole's case in 2005. He conducted a comprehensive neuropsychological examination to determine whether Poole suffers from any brain impairment, and - - if so - - whether it was serious enough to be a mitigating circumstance in his case (5/623-24). Dr. Sesta reviewed a large volume of records and conducted and supervised a day-long battery of physical and psychological tests (5/624-25). He reviewed Dr. Kremper's reports in 2005 (as well as Kremper's updated report prior to the 2011 resentencing), and he also reviewed Dr. Chacko's 2011 report. Dr. Sesta testified that his findings were consistent with those of the other doctors (5/625-26).

Dr. Sesta found that Mark Poole has a measured IQ of 76. The cutoff for mental retardation is an IQ of 70, plus or minus 5, along with an impairment in adaptive functioning. Dr. Sesta did not find that Poole was mentally retarded; rather he was in the borderline range (5/626-30).

Poole indicated a history of severe alcohol and drug abuse, as well as chronic depression (dysthemia) (5/635, 650-51). He had

prominent anxiety, which was consistent with his legal situation (5/635). While he had some antisocial traits, he could not be diagnosed with antisocial personality disorder, primarily due to his lack of a juvenile criminal history or a conduct disorder prior to age 15 (5/635-36, 647).

There are several factors which a neuropsychologist looks at to determine the existence of brain damage (5/636-37). First is whether there is empirical evidence of brain impairment. Based "on the testing that we gave, particularly the Halstead-Reitan neuro psych test battery, which is the most commonly used and empirically validated fixed battery in the country, Mr. Poole obtained summary scores that were in the moderate-to-severe range of - - brain impairment" (5/637).

Next Dr. Sesta looked at pattern of performance. "[W]e tested Mr. Poole . . . . his verbal and his nonverbal memory, and found that both were very severely impaired" (5/631, 638, 642). Memory impairment is the most common and prominent characteristic of individuals who suffer from traumatic brain injury (5/631, 638).

Poole also had difficulties with some aspects of executive function (involving abstract reasoning) and with his visual-spatial perception, as well as slowed informational processing speed and impairment in his sense of smell. "[A]ll of [these] are consistent with the typical sequela or effects of traumatic brain injury" (5/638, see 631-33, 642). Validity testing led Dr. Sesta to the conclusion that "Mr. Poole was not attempting to malinger signs and symptoms of neurological injury" (5/634, 638).

Thirdly, Dr. Sesta looked at Poole's history; what doctors call clinical correlation. Poole's history "is replete with what we call serial head injury", including a serious motorcycle accident resulting in unconsciousness, a bicycle accident, falling out of a tree, being hit in the head with a gun, and blows to the head during Tough Man boxing contests (5/638-40, 648-49).

On a continuum of severe, moderate, and mild, Dr. Sesta opined that Poole has a moderate degree of brain damage. However, he explained that even mild brain impairment is medically substantial, and "can cause significant impairment in an individual's adaptive functioning" in "[e]verything from work to play to interpersonal relationships" (5/640-41).

Dealing with new or unexpected situations "is particularly problematic when brain injury rises above the mild level." When confronted with a situation that requires them to "think on their feet", brain damaged individuals become very stressed and frustrated, which in turn can lead to aggression (5/641, 645-56). "And that's almost a ubiquitous finding with brain injury, is that individuals have difficulty putting the brakes on to inhibit impulses. The stronger the impulses are, particularly aggressive and sexual impulses, the greater the amount of inhibition that is necessary to control them. This is where the brain-injured person really breaks down and has difficulty keeping those aggressive and sexual impulses in check" (5/646-47).

Conversely, Dr. Sesta explained, the more routine you can make a brain-injured person's life, the better the likelihood of

them functioning (5/641).

Dr. Sesta diagnosed Mark Poole on Axis I with dementia due to head trauma with behavioral disturbance, and poly substance dependence. On Axis II he would find borderline intellectual functioning, and on Axis III traumatic brain injury at a moderate level (5/647-49). Defense counsel asked about the effect that chronic cocaine and alcohol abuse would have on a person with a low IQ, brain damage, and dementia (5/643). Dr. Sesta replied that given Poole's history of consuming grossly excessive amounts of beer (two or three cases of beer on the weekends and sometimes half a case on weekdays) "the effect of that on a good brain would be bad enough", and on someone already suffering from brain damage it would exacerbate their neurological impairment (5/643-44). Similarly, cocaine addiction "would affect his behavior more because the damaged brain is more sensitive to any type of drug" (5/644).

Dr. Sesta expressed the opinion that Poole's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired due to his combination of dementia, brain damage, and low IQ (5/645). "Certainly, clinically, he has substantial brain injury and would have difficulty doing that. Whether it meets the legal standard for that, again, as I think I said, that's a decision for the court" (5/645).

At the conclusion of the testimony, when defense counsel was contemplating whether to file a motion concerning his inability to

recall Dr. Chacko in the Spencer hearing, Judge Hunter noted that he typically allows the defense great latitude in death penalty cases, but since "Dr. Chacko has already testified before me [in the jury penalty phase] . . . . I'm not sure what he could add that would help me" (5/569). Judge Hunter continued:

> Number two, I find Dr. Kremper and Dr. Sesta to both be extremely credible witnesses. I'm familiar with both of those doctors. They've testified in front of me multiple times. I actually even picked Dr. Sesta one time, when in a 3.851, the defense picked a psychologist, the state picked a psychologist, and guess what, they came to opposite results. And so they gave me a list of doctors I could choose from or I could bring in a third one, and I chose Dr. Sesta.
>
> So Dr. Sesta and Dr. Kremper have a great deal of credibility with me. I do believe some of Dr. Chacko's testimony, particularly as it relates to the defendant being alcohol and drug dependent. But I find some of his testimony not to be so credible.
>
> But in addition to that, as you can well imagine, I've already started formulating - because I'm in a new division - my order. And I intend to find that the defense proved both mental health mitigators, and I'm going to rely most heavily on Dr. Sesta and Dr. Kremper.
>
> Now, it is corroborated to some extent by Dr. Chacko on the alcohol and drug dependency, which is what his expertise is supposed to be in. I think he's wrong on some things. But when JAC objected and I thought this hearing was going to get held up, I was willing to go to bat on getting Dr. Sesta here because I had not heard from him, and because I do think pretty highly of Dr. Sesta.
>
> So if you want to make a motion because I didn't allow you to bring in Dr. Chacko, feel free, but - -

(5/659-61)(emphasis supplied)

The defense thereupon opted not to file a motion regarding

Dr. Chacko (5/611).

E. Sentencing

On August 19, 2011, Judge Hunter imposed a death sentence on Mark Poole, finding four aggravating circumstances: (1) the contemporaneous conviction for attempted murder of L.W. (very great weight); (2) capital felony occurred during the commission of burglary, robbery and sexual battery (great weight); (3) capital felony committed for financial gain (merged with robbery but not merged with burglary or sexual battery)(less than moderate weight); and (4) HAC (very great weight) (5/709-14, 719-23, 728-29). The judge found both statutory mental mitigating circumstances: (1) capital felony committed while the defendant was under the influence of extreme mental or emotional disturbance (moderate to great weight); and (2) defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (great weight) (5/727-28). [The judge also found eleven nonstatutory mitigating circumstances, according them little or very little weight (5/723-26)].

SUMMARY OF THE ARGUMENT

The prosecutor exercised peremptory strikes against two African-American prospective jurors, Ms. Wearing and Mr. Blandin, in violation of their rights and in violation of Poole's rights, guaranteed by the United States and Florida Constitutions, to

equal protection and to be tried by an impartial jury. Neither Ms. Wearing nor Mr. Blandin expressed any opposition to the death penalty nor any reluctance to vote for it in this case if appropriate under the evidence. See Nowell v. State, 998 So.2d 597,605-06 (Fla. 2008). The pretextual nature of these peremptory challenges is further indicated by the disparate questioning engaged in by the prosecutor, and his post-hoc efforts to rationalize the strikes. [Issue I].

The introduction of flagrantly improper evidence for no legitimate purpose but only to inflame the jury in a capital penalty phase can go beyond mere evidentiary error; it can constitute "inexcusable prosecutorial overkill." Ruiz v. State, 743 So.2d 1,8-9 (Fla. 1999). The U.S. Supreme Court and this Court have recognized the unique nature of capital sentencing and the corresponding "heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate in a particular case" [Sumner v. Shuman, 483 U.S. 66,72 (1987); see Allen v. Butterworth, 756 So.2d 52,59 (Fla. 2000)]; and a Florida jury's penalty verdict should reflect " a logical analysis of the evidence in light of the applicable law", and not "an emotional response to the crime or the defendant." Bertolotti v. State, 476 So.2d 130,134 (Fla. 1988).

In light of these principles, the prosecutor's introduction (over defense objection) and display to the jury of the severed fingertip - - preserved in a jar of formalin - - of the surviving female victim, L.W., whom the jury had just seen and heard on the

witness stand, was entirely unnecessary, was irrelevant to any disputed issue, and was clearly done for no reason other than to prejudice the jury. See Hickson v. State, 472 So.2d 379,385 (Miss. 1985); Doorbal v. State, 983 So.2d 464,497-499 (Fla. 2008); Ruiz v. State, 743 So.2d at 8. The error, especially in combination with the misconduct which permeated the prosecutor's closing argument, was harmful; the state cannot show beyond a reasonable doubt that the display of L.W.'s fingertip in a jar, and its presence in the jury room during deliberations, did not have its intended effect on the jury. [Issue II].

"[T]rial attorneys must avoid improper argument if the system is to work properly. If attorneys do not recognize improper argument, they should not be in a courtroom. If trial attorneys recognize improper argument and persist in its use, they should not be members of the Florida Bar." Duncan v. State, 776 So.2d 287,290 (Fla. 2d DCA 2000), quoting Judge Blue's well-known admonition specially concurring in Luce v. State, 642 So.2d 4 (Fla. 2d DCA 1994). If it is improper in a capital penalty phase for a prosecutor to denigrate the evidence of mitigation as "excuses", how much more inexcusable is it for a prosecutor with 25 years experience as director of the homicide division of the Tenth Circuit State Attorney's Office - - in his closing argument to the jury - - to denigrate the mitigating evidence as "all that crap"? In determining whether comments to the jury were calculated to forestall a life recommendation, the reviewing court may consider the prosecutor's "track record." See Brooks v. State, 762

So.2d 879-905 (Fla. 2000). Assistant State Attorney John Aguero is the same lawyer who prosecuted Mark Poole in 2005, where (in the guilt phase) he improperly suggested that Poole had a burden to prove his innocence by testifying, and then he violated Poole's right to a fair penalty phase by cross-examining defense witnesses about unproven prior arrests, the unproven content of a tattoo, and lack of remorse. Then, in this 2011 penalty retrial, he introduced and displayed L.W.'s severed fingertip; he misled the jurors that they could consider acts done and a remark made to the surviving victim (long after the homicide victim became unconscious) to prove the HAC aggravator; he misled them that they could accord extra weight to the armed robbery aggravator because it merged with financial gain; he misled them that they should ignore the testimony of Poole's family members about his background and his good character before becoming addicted to drugs and alcohol because it "goes to sympathy that you're not allowed to consider"; he misled them that they could give no weight to the mitigating evidence of Poole's severe and long-term alcohol and drug addiction and his intoxication on the night of the crime solely on the basis that he drank and did drugs voluntarily; and - - in the context of dismissing the doctors' conclusions as to the mental mitigators - - referred to Poole's family members' testimony about motorcycle accidents, car accidents, and head injuries (information relied on by the doctors) as "all that crap" (12/1110-11).

Undersigned counsel recognizes that the "all that crap"

comment, while objected to, is unpreserved because trial defense counsel asked for a curative instruction and got one. Therefore, while the prosecutor is subject to sanction for this inexcusable comment, Poole can only receive a new penalty proceeding based on the comment if this Court determines that it amounted to fundamental error, or that any curative effect of the judge's instruction was undermined by the prosecutor's false apology, or that it was ineffective assistance on the face of the record for defense counsel to fail to object to the repeated misleading statements, or that the cumulative impact of the prosecutor's transgressions deprived Poole of a fair trial on the question of whether he should live or die. Given the sheer pervasiveness of Mr. Aguero's misconduct, and his systematic trashing of every aspect of the defense's case in mitigation, this Court should find that it did. [Issue III].

In light of the trial court's finding of, and assignment of great weight and moderate to great weight to, the statutory mental mitigators of impaired capacity and extreme mental or emotional disturbance based on the combined effects of Poole's brain damage, his low intelligence, his long-term alcohol and drug addiction, and his intoxication on the night of the offense, this is not one of the least mitigated murders for which the death penalty is reserved. Poole's death sentence should therefore be reduced to life imprisonment on proportionality grounds. [Issue IV-B].

Three of the aggravators in this case arise from the crimes for which Poole was convicted in the guilt phase; a criminal

episode which occurred while his capacity to conform his conduct and control his impulses was substantially impaired by intoxication and brain injury. This is also true of the fourth aggravator, HAC. In addition, the trial judge made significant factual errors which affected his finding of HAC and the weight he accorded it [Issue IV-C].

Florida's capital sentencing scheme is constitutionally invalid under Ring v. Arizona, 536 U.S. 584 (2002). [Issue V].

ARGUMENT

[ISSUE I] POOLE'S RIGHTS TO EQUAL PROTECTION AND AN IMPARTIAL JURY, GUARANTEED BY THE UNITED STATES AND FLORIDA CONSTITUTIONS, WAS INFRINGED BY THE PROSECUTOR'S PEREMPTORY STRIKES OF AFRICAN-AMERICAN JURORS WEARING AND BLANDIN FOR PRETEXTUAL REASONS, BECAUSE (1) NEITHER JUROR EXPRESSED ANY OPPOSITION TO THE DEATH PENALTY NOR ANY RELUCTANCE TO VOTE FOR IT IN THIS CASE, AND (2) THE PROSECUTOR ENGAGED IN DISPARATE QUESTIONING ON THE SUBJECT.

A. Review of Batson Claims

Discriminatory exercise of peremptory challenges based on race, ethnicity, or gender violates a defendant's rights to equal protection and to be tried by an impartial jury under the federal and state constitutions. See, e.g., Batson v. Kentucky, 476 U.S. 79 (1986); Miller-El v. Dretke, 545 U.S. 231 (2005); State v. Neil, 457 So.2d 481 (Fla. 1984); State v. Alen, 616 So. 2d 452 (Fla. 1993); Abshire v. State, 642 So.2d 542 (Fla. 1994). The striking of even a single juror for racial reasons violates the Equal Protection clause. State v. Slappy, 522 So.2d 18,21 (Fla. 1988); Bryant v. State, 565 So.2d 1298,1300 (Fla. 1990); Joiner v.

State, 616 So.2d 174,176 (Fla. 1993); Young v. State, 744 So.2d 1077,1080 (Fla. 4th DCA 1999). "Each juror has a constitutional right to serve free of discrimination", Joiner, at 176, and in Florida both jurors and litigants have a right to a nondiscriminatory selection process. Murray v. State, 3 So.3d 1108,1119 (Fla. 2009). Where the party exercising a peremptory challenge of a minority juror offers a facially race-neutral explanation, the next step is for the trial court to determine whether, in light of all the surrounding circumstances, the proffered reason is genuine or whether it is pretextual. Murray, 3 So.3d at 1120; Melbourne v. State, 679 So.2d 759,764 (Fla. 1996); Shuler v. State, 816 So.2d 257 (Fla. 2d DCA 2002); Foster v. State, 732 So.2d 22 (Fla. 4th DCA 1999); Overstreet v. State, 712 So.2d 1174 (Fla. 3d DCA 1998).

While the trial court's assessment is accorded deference, this Court has also confirmed that "deference does not imply abandonment or abdication of judicial review" . . . . because "[d]eference does not by definition preclude relief". Nowell v. State, 998 So.2d 597,602 (Fla. 2008), quoting Dorsey v. State, 868 So.2d 1192,1200 (Fla. 2003) and Miller-El v. Cockrell, 537 U.S. 322,340 (2003).

As the United States Supreme Court made clear in Miller-El v. Dretke, supra, 545 U.S. at 210-230, the reviewing court must analyze the voir dire questions and answers in some depth, and must determine not only whether the proffered reasons were adequate but also whether the attorney exercising the peremptory

strikes engaged in "disparate questioning" of the challenged jurors in contrast to unchallenged jurors. See Miller-El v. Cockrell, supra, 573 U.S. at 344. See also United States v. Barnette, 644 F.3d 192,205,212 (4th Cir. 2011) (recognizing that in Miller-El v. Dretke the Supreme Court held that proper review of a Batson claim requires the appellate court to conduct a comparative juror analysis, and that disparate questioning during voir dire is "part and parcel" of a comparative juror analysis).

B. The Prosecutor's Strikes of Jurors Wearing and Blandin

In the instant case, the prosecutor exercised a peremptory strike on Ms. Wearing (8/441). Defense counsel objected, saying "I don't know of any race-neutral - -", and the judge interjected "Oh, is Ms. Wearing black. Oh, that's right. She is" (8/441). The judge asked the prosecutor "What's your rationale?" (8/441). The prosecutor replied that he had "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 [another black juror] said not sure how I would vote" (8/441-42). That, according to the prosecutor, was a race-neutral reason to strike them (8/442).

Defense counsel replied that the question was irrelevant because both jurors said they could impose the death penalty in this case based on their weighing of the aggravating and mit-

igating factors (4/442). The prosecutor said he wasn't talking about this case: "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" (8/443). Immediately the prosecutor caught himself and said, "Well, not each of them, I didn't because it came up as to each juror, depending on how they were answering my questions" (8/443). "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" (8/443).

The judge mused, " . . . I think you're allowed to ask . . . 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." He asked the prosecutor:

> Do you have any other race neutral reason besides that?
>
> MR. AGUERO: No I don't. Those are - - I mean, all 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 vote to keep the death penalty in the State of Florida.

(8/443-46) (emphasis supplied).

The judge said he didn't disagree with that, and "I take it you're striking Mr. Blandin, too, then" for the same reason (8/444). The defense objected to the excusal of Mr. Blandin on

the same ground (8/444). The prosecutor stated that no one else on the panel had answered the question the same way, and that Ms. Ippert (also an African-American) said very clearly that she would vote to keep the death penalty (8/445). The trial judge accepted the prosecutor's stated reason for the strikes, and jurors Wearing and Blandin were excused (8/445,450,457). The judge pointed out that he had thought the reason the prosecutor was striking them was that they were too young to be on the panel, '[b]ut you didn't mention it, so - - " (8/450). At that point the prosecutor said that he had mentioned young age when he struck a white juror, Mr. Maruska (8/450, see 448). [Note that the prosecutor struck Maruska after he told the judge he had no other reason than their death penalty responses for striking Wearing and Blandin]. The judge asked the prosecutor "Do you want any more record made other than that?", and Mr. Aguero replied "No, sir" (8/450-51). Defense counsel said:

> Your Honor, I think we've made a record regarding our objection. Just let the court know before the jury is sworn in, we will object at that point, contemporaneously, with the case law.
>
> THE COURT: Okay.
>
> MR. COHEN: It's something we need to do.
>
> THE COURT: Actually, you can do that if you like. And if not, I'll let you consider it objected right now. (8/451).

By the next morning the prosecutor had evidently changed his mind about making an additional record (8/501, see 491), and he now wanted to add young age (and their not being parents) as

"another race-neutral reason to excuse those two jurors" (8/501-04). Defense counsel renewed his prior objection to the (already accomplished) excusal of Ms. Wearing and Mr. Blandin, both on the original proffered reason and the newly proffered reason (8/504-05). The prosecutor said, "I have no further argument", and the judge said, "Well, you both made your record" (8/505).

C. The Prosecutor's Belated Reliance On the Jurors' Young Age as a Justification for the Strikes is a Post-Hoc Rationalization Which is Strongly Indicative of Pretexual Motivation.

Before addressing the voir dire questioning regarding the death penalty and the responses given by Ms. Wearing and Mr. Blandin, it is necessary to determine whether the prosecutor's belated reliance on the jurors' young age to justify the strikes holds water.

It doesn't. The true thought processes of an attorney seeking to excuse a prospective minority juror are shown by his response at the time the other party objects and the trial court asks for his reason or reasons. Post-hoc rationalizations are strongly disfavored as they are unlikely to be genuine and more likely to be pretexual. See Miller-El v. Dretke, 545 U.S. at 246 ("It would be difficult to credit the State's new explanation, which reeks of afterthought"); Reed v. Quarterman, 555 F.3d 364,382 (5th Cir. 2009) ("comparative analysis [in both Reed's case and in Miller-El] demonstrated that the State's post-hoc rationalizations for challenging these jurors were in reality

pretexts for discrimination"). See also Nowell v. State, 998 So.2d 597,606 (Fla. 2008) (viewing prosecutor's "afterthought" justification with skepticism); Hall v. Daee, 602 So.2d 512,515-16 (Fla. 1992) (after-the-fact Neil inquires "are fraught with speculation and seldom reflect the true thought processes that occurred at the time of the challenge"); United States v. Taylor, 636 F.3d 901,902 (7th Cir. 2011) ("the validity of a strike challenged under Batson must "stand or fall" on the plausibility of the explanation given for it at the time, not new post-hoc justifications"); United States v. Biaggi, 909 F.2d 662,679 (2d Cir. 1990) (postponing consideration of a Batson claim "risks infecting what would have been the prosecutor's spontaneous explanations with contrived rationalizations"); State v. Parker, 836 S.W. 2d, 930,938 (Mo. 1992) ("The danger of post-hoc rationalizations or fabrications is minimized because the prosecutor is forced contemporaneously to justify the reasons for the strikes").

In the instant case, when called upon to explain his reasons for striking Ms. Wearing and Mr. Blandin, the prosecutor relied solely on their answers that if they were to have to vote on whether to keep the death penalty in Florida they were not sure how they would vote (8/441-45). When the judge asked him point blank, "Do you have any other race-neutral reason besides that?" the prosecutor answered "No, I don't" (8/443). The fact that (after the trial judge's prompting) he was able to come up with one later does not show that Wearing's age or Blandin's age was a

genuine reason for the prosecutor's decision to peremptorily strike them; if anything it shows just the opposite.

D. The Voir Dire Responses of Jurors Wearing and Blandin do not Show that they Oppose the Death Penalty or that they would be Reluctant to Impose it in This Case.

This Court has held that "the 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." San Martin v. State, 705 So.2d 1337,1343 (Fla. 1997); Wade v. State, 41 So.3d 857,873 (Fla. 2010) (emphasis supplied); see also Bell v. State, 965 So.2d 48,71 (Fla. 2007) ([W]e have specifically held that the State may exercise peremptory challenges against jurors who express some opposition to the death penalty"); Nowell v. State, 998 So.2d 597,605 (Fla. 2008) (citing Morrison v. State, 818 So.2d 432,443-44 (Fla. 2002) and Hartley v. State, 686 So.2d 1316,1322 (Fla. 1996) for the proposition that a juror's "unequivocal discomfort" with the death penalty is a valid race-neutral reason for a peremptory strike).

However, neither juror Wearing nor juror Blandin ever expressed any opposition to the death penalty, nor did either juror indicate any doubt about their ability and willingness to follow the law, nor any reluctance to vote for a death recommendation in this case if appropriate under the evidence. See Nowell, 998 So.2d at 605-06 ("the record confirms that [juror] Ortega would fairly consider the imposition of the death penalty

depending on the evidence he heard in the courtroom, could impose a death sentence in a murder case depending on the circumstances presented, only had "mixed feelings" about capital punishment, and never expressed uncertainty about his ability to vote for it in a proper case according to the appropriate legal standards").

Moreover, the hypothetical question (if you had to vote on whether or not to keep the death penalty in Florida how would you vote?) which the prosecutor used to justify his peremptory strikes was not asked of many of the prospective jurors, including several of those who were selected to serve on Poole's jury. This disparate questioning raises additional doubt as to the genuineness of Mr. Aguero's proffered reason. See Miller-El v. Dretke, supra; Reed v. Quarterman, supra.

The prosecutor began his death penalty questioning with Ms. Westcott (who served on the jury): "And here's the way I like to start these questions: How do you feel, first of all, about the fact that we, as a society, have a law that says it's okay for the government to kill people, even though it's not all right for people to kill each other?" (8/381) Ms. Westcott's answer was "Wow. I'm not really sure on that" (8/381)(emphasis supplied). Instead of immediately writing Ms. Westcott off as "weak" on the death penalty based on that answer, the prosecutor continued to question her:

> MR. AGUERO: Do you understand that the death penalty is state sanctioned execution?
>
> PROSPECTIVE JUROR WESTCOTT: Okay.
>
> MR. AGUERO: That is, in this case - -

PROSPECTIVE JUROR WESTCOTT: The state governs that.

MR. AGUERO: If, in this case, the jury decides to recommend because they believe the law leads them to that path, leads them there, and the jury recommends the death penalty and the judge imposes the death penalty, that is the state sanctioning the killing of a human being, just like war is the sanctioning of killing another human being. You know, I grew up in the Vietnam War, and people my age went over there and they killed people in the name of society.

So how to you feel about that, that we even have a death penalty?

PROSPECTIVE JUROR WESTCOTT: I think it's necessary.

MR. AGUERO: Okay.

PROSPECTIVE JUROR WESTCOTT: I do feel that it's necessary.

MR. AGUERO: Any particular reason or reasons why you think that we should have that punishment available to us?

PROSPECTIVE JUROR WESTCOTT: The punishment fits the crime. (8/381-82)

Contrast Ms. Westcott's voir dire examination with that of Ms. Wearing or the prosecutor's even more perfunctory questioning of Mr. Blandin. He asked Ms. Wearing "[H]ow do you feel about the idea, just philosophically, that we put people to death as punishment for a crime?" She answered:

"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 - - 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: 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 - -
(8/391)

Mr. Aguero didn't wait for Ms. Wearing to finish; he interjected "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" (8/391-92). The next juror's examination was even more perfunctory:

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?

PROSPSECTIVE JUROR BLANDIN: I'm like the rest of these guys. If it 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 - - I don't really know what I would vote for.
(8/392)

Later in his voir dire examination, the prosecutor explained the weighing of aggravating and mitigating circumstances and asked each of the prospective jurors if they could use those rules to arrive at their decision (8/395-401). All of the jurors, including Ms. Wearing and Mr. Blandin answered that they could (8/399-401). The prosecutor asked the jurors if they would be able to tell the defendant that he should die, if that were their dec-

ision. Again, all of the jurors, including Wearing and Blandin, said they could do that (8/405-07). Finally, he asked the jurors if they could vote for the death penalty if they thought that was the appropriate punishment and, conversely, if they could vote for life imprisonment if they thought that was the appropriate punishment (8/408-09). All of them, including Wearing and Blandin, affirmed without equivocation that they could cast their vote either way based on the evidence (8/408-09).

After the prosecutor finished his voir dire, defense counsel asked the jurors if they could assure him that they would be able to not make any decision about their recommendation until all of the evidence was presented (8/417-18). All of the jurors, including Wearing and Blandin, answered yes (8/418-19). Counsel explained that if the mitigating factors outweigh the aggravating factors the recommendation is life imprisonment, but if the aggravating factors outweigh the mitigators the jury may recommend a death sentence but is not required to do so (8/430; see the trial court's preliminary instructions, 6/11-12,131-32). He asked Ms. Wearing if she would be able to follow that principle of law, and she answered yes (8/430-31). He asked Mr. Blandin if his aspirations to be a homicide detective would affect his thought processes or inclinations in the penalty phase one way or the other; Mr. Blandin said they would not affect him (8/433). Finally, counsel asked each juror to rate himself or herself on a scale of zero to 10, with "zero being I don't want to even listen to anything because I would never vote for the death penalty, and 10

is the other extreme, that I don't want to listen to anything because I've heard enough, Mr. Poole has been found guilty of first-degree murder and the only sentence that I would ever recommend is a death sentence" (8/436-37, see 8/427-28; 9/558-59,563). "And if you're in the middle, that you are - - you're open to both possibilities and you're totally willing to listen to both the presentation of evidence that may or may not prove an aggravator or any evidence that [may or] may not prove a mitigator, rate yourself a 5. Or feel free to rate yourself anywhere between zero to 10 if you lean one way or the other" (8/428).

A large number of prospective jurors who were either adamantly opposed to the death penalty, or who believed death should always be the punishment in all first-degree murder cases, had been excused for cause earlier in the selection process (6/64-79,97-105,156-65,172-74; 7/202-03,206-07,254-58; see 8/427). Of the 27 prospective jurors who remained, 22 - - including Ms. Wearing and Mr. Blandin - - rated themselves as a 5; while four jurors rated themselves as a 6 and one juror rated himself as a 4 (8/437-39; 9/563-64). [Contrast Murray v. State, 3 So.3d 1108,1121 (Fla. 2009), in which the challenged juror "gave an unintelligible answer to the prosecution when he was asked how he felt about the death penalty" and, when asked by defense counsel, was unable to or refused to rate his feelings toward the death penalty on a scale of one to five].

In Nowell v. State, supra, 998 So.2d at 605-06, the

prosecutor gave as a reason for striking an Hispanic juror that he was concerned about Mr. Ortega's ability to follow the law based on his philosophy on the death penalty. On appeal, this Court found that "the State's explanations, which may have appeared to be race-neutral, were pretextual":

> . . . the record confirms that Mr. Ortega would fairly consider the imposition of the death penalty depending on the evidence he heard in the courtroom, could impose a death sentence in a murder case depending on the circumstances presented, only had "mixed feelings" about capital punishment, and never expressed uncertainty about his ability to vote for it in a proper case according to the appropriate legal standards.

Similarly, in the instant case neither Ms. Wearing nor Mr. Blandin ever expressed any opposition to - - or "unequivocal discomfort" with - - the death penalty, either in general terms or with reference to this case. While the state may properly exercise its peremptory challenges against jurors who are opposed to the death penalty but not subject to a challenge for cause [San Martin; Wade; Bell], it may not engage in selective questioning to exclude a minority juror as weak on the death penalty when the record doesn't support the claim. Nowell.

E. Disparate Questioning

Ms. Wearing, whose overall responses on the subject of the death penalty were exemplary, was peremptorily excused by the state based solely on her truncated answer to a question which relatively few of the jurors were even asked. The contrast

between the prosecutor's questioning of juror Westcott (the very first juror he examined with regard to her feelings about the death penalty, and who ultimately served on the jury (8/381-82; 9/569-71; 12/1175-76)) and his questioning of juror Wearing demonstrates this point.

When the prosecutor asked Ms. Westcott how she felt about a capital punishment law that says its okay for the government to kill people even though it's not all right for people to kill each other, she replied "Wow. I'm not really sure on that." In response to further questioning, she said she felt the death penalty was necessary because "[t]he punishment fits the crime" (8/381-82).

When the prosecutor asked Ms. Wearing how she felt about the idea that we put people to death as punishment for a crime, she said she had "a little mixed feeling" [see Nowell], but at the same time if the punishment fits the crime go ahead and put him to death. And if not, why take a life for a life (8/391). When the prosecutor asked her the hypothetical question of how she would vote on whether Florida should keep or abolish the death penalty - a question which the prosecutor did not ask juror Westcott or a significant number of other jurors - - Ms. Wearing said "I'm not sure. It's - - ", whereupon the prosecutor said that was a fair enough answer; he explored the matter no further.

Similarly, Mr. Blandin answered the prosecutor's question about how does he feel philosophically about the death penalty by saying "I'm like the rest of these guys. If it fits the crime they committed. . .", but at the same time - - like the preceding

juror Ms. Wearing - - if he had to vote he didn't really know how he would vote (8/392). Every subsequent statement made by Ms. Wearing and Mr. Blandin in response to the prosecutor's or defense counsel's examination showed without equivocation that they could follow the law, weigh the aggravating and mitigating circumstances, vote for either the death penalty or life imprisonment, and tell the defendant that he should die if that were the jury's recommendation.

If the "how would you vote" question were genuinely so important to Mr. Aguero that it would overcome a juror's consistent responses that he or she could impose the death penalty if warranted by the evidence and (as evidenced by their self-rating) was not predisposed against doing so, then one would reasonably expect him to ask each prospective juror that supposedly crucial question. See Miller-El v. Dretke, supra. As the prosecutor acknowledged, he only asked it of certain jurors , purportedly depending on how they answered his other questions (8/442-43). In fact, some of the jurors (including African-Americans Wearing and Ippert) were asked the "how would you vote" question; some (including Blandin) volunteered an answer; some stated that they thought the death penalty was necessary in response to the prosecutor's more general inquiry as to how they felt philosophically about capital punishment; some expressed mixed feelings and still were not asked the "how would you vote" question; and some were not asked either how they felt philosophically about capital punishment or the "how would you vote"

question (8/381-98; 9/545-55).

Ms. Moore (who was accepted by the prosecutor to serve on the jury, and was a member of the originally-selected 12-person panel) said in response to the prosecutor's general question about her feelings about capital punishment:

> I - - I feel that in certain cases that it might be necessary, not as a deterrent necessarily, but to make sure that that person never gets another opportunity to do that again. I - I think that it should be on a case-by-case basis. I don't -I don't have any belief at all that it should be across the board, of any sort like that. (8/384-85)

Ms. Moore was not asked the "how would you vote" question (8/384-85).

Ms. Sims (who was accepted by the state and served on the jury), when asked generally how she feels about the capital punishment law, answered:

> I think some crimes warrant the death penalty. But when you're - - you know, you see it, you hear it, but when it comes down to a jury in this box, then you really have to do some soul searching, you know, and really weigh the evidence because this is - - this is going to be a difficult decision. (8/393)

Ms. Sims was not asked the "how would you vote" question (8/393).

The next juror was an African-American woman, Ms. Ippert, whose answer to the general question was strikingly similar to Ms. Sims':

> I believe that it was put in place for a reason. I don't have strong feelings towards the death penalty, but I am a rational

> person. I believe in looking at all the details before even determining if - - what the outcome would be. (8/394)

Ms. Ippert was then asked the "how would you vote" question, and she said "I believe it should stay in place" (8/394).

Twelve jurors were selected, but then Ms. Moore was excused due to her belated realization that she knew the homicide victim Noah Scott's mother (8/443-48,452,458-59,464,491-501). At that point eight more prospective jurors were called for voir dire examination in order to select the twelfth juror and the alternate (8/460-62,490-91,501,565-67). As he had done with the first group, Judge Hunter initially questioned the second group to determine whether they could follow the law, which resulted in the excusal for cause of a juror who could not consider a death sentence, Mr. Stephenson (8/464-74). The jurors from the second batch who were examined by Assistant State Attorney Aguero were Harris (who was selected to serve on Poole's jury and became it's foreperson), Seay (served as an alternate), Wood (served as an alternate), Grenade, Adam, Manz, Smith, and Nelson (8/513-15; 9/516-55). While the prosecutor asked these jurors a few questions about their understanding of and willingness to follow the law applicable to the death penalty, he did not ask any of the eight in the second group either the general question as to how they felt philosophically about capital punishment or the specific question as to how they would vote on whether or not to keep the death penalty in Florida (9/539-40,545-55).

If a juror's answer to this question were genuinely so

important to the prosecutor as to warrant peremptory strikes of two minority jurors (whose other answers made it clear that they could impartially weigh the aggravating and mitigating circumstances and recommend either a death sentence or life imprisonment depending on the evidence) solely because they said they were not sure how they would vote in a hypothetical election to keep or not to keep the death penalty in Florida, then it is reasonable to believe that the prosecutor would want to know every prospective juror's answer to that question. The fact that he wholly lost interest in it when questioning the second group, as well as his selective use of that hypothetical when questioning the first group, belies the genuineness of his proffered explanation and strongly suggests instead that it was pretextual. See Miller-El v. Dretke, 545 U.S. 231 (2005); Miller-El v. Cockrell, 537 U.S. 322,344 (2003); Reed v. Quarterman, 555 F.3d 364 (5th Cir. 2009). See also United States v. Barnette, 644 F.3d 192,212 (4th Cir. 2011) (disparate questioning "is part and parcel of a comparative juror analysis" which is the gravamen of the Supreme Court's holding in Miller-El); Densey v. State, 191 S.W.3d 296,308 n.14 (Tex.App.-Waco 2006) (Gray, C.J., concurring)(Miller-El put teeth in Batson).

Due to the abridgement of Poole's state and federal constitutional rights in the selection of his jury, his death sentence must be reversed for a new penalty proceeding.

[ISSUE II] THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO INTRODUCE IN THIS PENALTY TRIAL, OVER DEFENSE OBJECTION, THE SEVERED FINGERTIP OF THE SURVIVING VICTIM

"Little common sense is required to perceive that display of anatomical parts of a homicide victim may adversely affect the fairness of the trial atmosphere. Once the severed organ or limb has been seen, no amount of instruction or admonition from the trial judge may dispel the indelible imprint of its impression upon the juror's mind." Hickson v. State, 472 So.2d 379,385 (Miss. 1985). Even photos depicting severed body parts should be scrutinized with great caution and only introduced before a jury when they are probative of an issue which is in dispute. Doorbal v. State, 983 So.2d 464,497-99 (Fla. 2008); see, generally, Almeida v. State, 748 So.2d 922,929 (Fla. 1999)

These common sense principles apply even more forcefully in the jury penalty phase of a capital trial. The United States Supreme Court and this Court have recognized the unique nature of capital sentencing and the corresponding "heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate in a particular case." Sumner v. Shuman, 483 U.S. 66,72 (1987); see Allen v. Butterworth, 756 So.2d 52,59 (Fla. 2000), quoting Woodson v. North Carolina, 428 U.S. 280,305 (1976)(plurality opinion). A Florida jury's penalty verdict should reflect "a logical analysis of the evidence in

light of the applicable law", and not "an emotional response to the crime or the defendant." Bertolotti v. State, 476 So.2d 130,134 (Fla. 1985). Similarly, this Court will not condone the violation of a prosecutor's duty to serve justice, not merely "win" a death recommendation. Garron v. State, 528 So.2d 353,359 (Fla. 1988).

The introduction of flagrantly improper evidence designed to inflame the jury in a capital penalty phase can go beyond evidentiary error; it can constitute "inexcusable prosecutorial overkill." Ruiz v. State, 743 So.2d 1,8-9 (Fla. 1999). In that case, the Court on appeal agreed with Ruiz that the state improperly introduced into evidence an inflammatory photo of the homicide victim's corpse:

> The photo in issue is a two-by-three foot blow-up of the victim's upper body-it revealed in detail the bloody and disfigured head and upper torso—which the State introduced during the penalty phase. The record shows that the prosecutor provided no relevant basis for submitting the blow-up at that point in the trial; the standard-size photo from which the blow-up was made had already been shown to the jury during the guilt phase. Appellate counsel for the State likewise offered no credible explanation at oral argument before this Court. We must conclude that the photo was offered simply to inflame the jury. This was error.

In combination with numerous other acts of prosecutorial overreaching - - some objected to and some not - - this Court found that the line of zealous advocacy had been crossed by a wide margin and the integrity of the proceeding had been compromised. Ruiz, 743 So.2d at 7 and 9-10. [See Issue III, infra, regarding

the experienced prosecutor John Aguero's misconduct in his argument to the jurors in the instant case, most notably his description of mitigating evidence as "all that crap", and his false apology when called on it].

In this penalty trial, before the first witness was called, the State's exhibits were marked for identification (9/587-610). Defense counsel objected to State Exhibit 183, which was the severed fingertip of the surviving victim, L.W., preserved in a jar of formalin (similar to what used to be known as formaldehyde), on the ground that it was inflammatory and that any probative value would be far outweighed by its unfair prejudice (9/611-14). This was especially true, counsel continued, "in light of the fact that there's photographs that already show the missing fingertip" (9/612). The trial judge overruled the objection, saying "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" (9/614-15)[1]

During the testimony of crime scene technician Renee Arlt three photographs (State exhibits 76,77, and 78) which depicted a severed fingertip on the carpeted floor of the trailer were shown to the jury (9/646-47):

> Q [by Mr. Aguero]: And by a fingertip, do you mean the actual tip of a human being's

[1] Undersigned counsel's motion to supplement the record included a request that the physical exhibit 183 be transmitted to this Court. On April 13, 2012, this Court entered an order granting the motion to supplement with the items listed. However, upon the verbal direction of the Clerk of the Supreme Court, the Polk County Clerk's Office retained the physical exhibit 183 (SR265,269-72).

finger?

A. Yes.

Q. Did you collect that item for evidence?

A. Yes, I did.

Q: Was it placed in a substance known as formalin so that it could be preserved?

A. Yes, sir.

Q. I show you what has been introduced as State's Exhibit Number 183. Is that what this is?

A. Yes, sir.

(9/647).

The emergency room physician who treated L.W., Dr. Randall Simmons, testified that she had lost the end of her long finger and the nailbed of her ring finger on her left hand (10/691, 693,695). Photographs (State Exhibits 93,94, and 95) depicting the injuries to L.W.'s hand and fingers were shown to the jury and described in detail by Dr. Simmons (10/699-700). Asked whether L.W. had sustained any injuries he would define as permanent disability or disfigurement, he said "Well, clearly, she's lost part of the finger. That's part of it" (10/708). The prosecutor stated, "Now, the jury has clearly seen the tip of the finger, because it was preserved" (10/708) (emphasis supplied). Dr. Simmons agreed. The fingertip could not be reattached, so the treating physicians had to trim and close the bone; potentially if the bone were to become infected it could cause long-term problems (10/708).

It is clear, then, that the fingertip in the jar was intro-

duced into evidence, displayed to the jury during the state's presentation of its case, and included among the exhibits which were taken into the jury room during its deliberations. It also appears likely - - though it can't be conclusively demonstrated by a cold record - - that the prosecutor displayed the finger again during his closing argument. ["This is [L.W.'s] finger. He whacked it off with a tire iron" (12/1095)]. While the prosecutor could conceivably have been holding up one of the crime scene photos instead of the jar containing the actual fingertip, that seems unlikely considering that a person would have to look very closely at the photos to even be able to see the fingertip on the carpet. See State Exhibits 76,77,78].

As in Ruiz, the prosecutor offered no credible reason why the severed fingertip was relevant to any issue in the penalty phase, much less any issue in dispute. It could not go to prove the HAC aggravator because, for one thing, the fingertip did not belong to the homicide victim, but rather to the victim, L.W., of an attempted murder and rape for which Poole had already been sentenced to life imprisonment (1/357). Poole v. State, 997 So.2d 382,389 (Fla. 2008). See Trawick v. State, 478 So.2d 1235,1240 (Fla. 1988).

As for the three intertwined aggravators based on Poole's convictions on the other felony charges, the prosecutor introduced a certified copy of the 2005 court documents adjudging Poole guilty of first-degree murder (of Noah Scott), attempted first degree murder and sexual battery (of L.W.), armed burglary, and

armed robbery (9/618-19). While it is true that the state is not limited to the bare fact of the prior convictions and may present relevant details, this Court has cautioned that there are limits on the admissibility of such evidence, and "the line must be drawn when [the evidence] is not relevant, gives rise to a violation of the defendant's confrontation rights, or the prejudicial value outweighs the probative value." Rhodes v. State, 547 So.2d 1201, 1204-05 (Fla. 1989); Duncan v. State, 619 So.2d 279,282 (Fla. 1993); Jones v. State, 748 So.2d 1012, 1026 (Fla. 1999). In the instant case the state not only introduced a certified copy of the convictions, it also presented extensive testimony explaining the circumstances of the entire criminal episode from L.W., Dr. Simmons, law enforcement officers Edwards, Arlt, and Grice, and FDLE bloodstain analyst Parker. It also presented crime scene photos showing the location of the severed finger on the carpeted floor, and photos depicting the injuries to L.W.'s left hand. There was absolutely no relevance, no necessity, no justification for the macabre introduction of "the actual tip of a human being's finger" (9/647) before the jury in this penalty phase.

See, e.g., Hickson v. State, 472 So.2d at 385 (the obvious psychological impact of viewing severed anatomical parts is such that the trial judge "should exercise extreme caution. If there is reasonably available an alternative method of proving the point, the trial judge should preclude admission of the anatomical part"); Doorbal v. State, 983 So.2d at 498 (involving photos of body parts; trial court did not abuse its discretion where he

imposed a careful process to only admit the photos which were absolutely necessary to the testimony of the physical anthropologist); Duncan v. State, 619 So. 2d at 282 (photograph of injuries to victim of prior murder "was in no way necessary to support the aggravating factor of conviction of a prior violent felony", where a certified copy of the prior conviction was introduced, and where there was extensive testimony from the investigating officer explaining the circumstances of the prior murder and the nature of the injuries inflicted); State v. Walker, 675 P.2d 1310,1314 (Ariz. 1984)(obvious prejudice out-weighed probative value where "[t]here was no doubt that the victim had suffered burns over parts of his body. The medical evidence covered this matter in detail. There was no necessity to offer pieces of the victim's skin to further prove the point already established by the unchallenged medical testimony).

Contrary to the prosecutor's suggestion, the fact that the fingertip was introduced in Poole's 2005 trial does not justify its introduction in this 2011 penalty phase. While undersigned counsel certainly does not concede its relevance even in a guilt-phase trial in which the charges the jury was considering included the attempted murder and sexual battery of L.W., by the time of the 2011 penalty proceeding Poole had already been convicted and sentenced for those offenses. The sole duty of the newly impaneled jury was to determine, based on weighing the aggravating and mitigating circumstances, whether Poole should be sentenced to death or life imprisonment for the murder of Noah Scott. More-

over, as this Court has consistently emphasized, the "clean slate" rule applies. A capital resentencing "is to proceed in every respect as an entirely new proceeding." Merck v. State, 975 So.2d 1054,1061 n.4 (Fla. 2007); Muehleman v. State, 3 So.3d 1149,1162 (Fla. 2009); see e.g., Preston v. State, 607 so.2d 404,408-09 (Fla. 1992); Morton v. State, 789 So.2d 324,334 (Fla. 2001); Lebron v. State, 982 So.2d 649,659 (Fla. 2008); State v. Fleming, 61 So.3d 399,406 (Fla. 2011). Most importantly, "[a] trial judge is to properly apply the law during the new penalty phase and is not bound in proceedings after remand by a prior legal error." Merck, 975 So.2d at 1061 n.4, see Preston, 607 So.2d at 409.

[Even assuming arguendo that the "law of the case" doctrine could under other circumstances be invoked, it cannot apply here because (1) the prejudice/probative value calculus is different in a penalty phase as opposed to a guilt phase so the question of admissibility is not precisely the same issue, and (2) that doctrine applies only to issues actually considered and decided on appeal; without appellate review of the prior trial court's ruling, such ruling cannot become "law of the case." See Florida Department of Transportation v. Juliano, 801 So.2d 101,107 (Fla. 2001); Delta Property Management v. Profile Investments, Inc., 2012 WL 739193 (March 8, 2012); Metaxotos v. State, 37 So.3d 991 (Fla. 4th DCA 2010)].

It can be expected that, as in Ruiz, 743 So.2d at 8, the state will be unable or unwilling to offer a credible reason for presenting L.W.'s fingertip in a jar to this penalty phase jury.

If, as in Ruiz, it was "offered simply to inflame the jury" then this Court should look askance at any claim by the state on appeal that it couldn't have had its intended effect. See Gunn v. State, 78 Fla. 599, 83 So.511 (1919); Farnell v. State, 214 So.2d 753,764 (Fla. 2d DCA 1968). By displaying the fingertip during the penalty trial, and by causing it to be present in the jury room during deliberations, the state improperly shifted the focus from a dispassionate weighing of the aggravators and mitigators in the death of Noah Scott, and instead invited the jurors to react emotionally to L.W.'s suffering. It is important to note that the jurors saw and heard L.W. on the witness stand and inevitably would feel empathy with her. That, of course, is not legal error, but having her fingertip in the jury room as a constant remainder certainly is prejudicial error.

The prosecutor argued below that the fingertip was not bloody and that "it is absolutely sort of what people see in biology class" (9/613, see 614-15). While undersigned counsel - - having seen the exhibit - - concedes that that is true, that is not a reason for admitting it into evidence. It's prejudicial impact comes not from what it looks like, but from what it is; the severed fingertip of a young woman the jurors had just seen and heard. If this were a biology class, or a trial to determine patent rights for a medical device, it would have been no big deal. However, this was a trial to determine whether Mark Poole lives or dies, and this prosecutor once again chose to overreach in order to "win" a death recommendation. See Poole v. State, 997

So.2d at 391-94; see, generally, Garron, 528 So.2d at 359; Ruiz, 743 So.2d at 8. The fairness and reliability of the penalty proceeding were compromised because the state cannot now show beyond a reasonable doubt that its tactic didn't work. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1989); Cooper v. State, 43 So.3d 42 (Fla. 2010)

[ISSUE III] POOLE WAS DEPRIVED OF A FAIR PENALTY PHASE BY THE PROSECUTOR'S MISCONDUCT IN CLOSING ARGUMENT.

If it is improper in a capital penalty phase for a prosecutor to denigrate the evidence of mitigation as "excuses", how much more inexcusable is it for a prosecutor with 25 years experience as director of the homicide division of the Tenth Circuit State Attorney's Office - - in his closing argument to the jury - - to denigrate the mitigating evidence as "all that crap"? (12/1111; see 7/263). And then - - when called on it - - to "apologize" by saying "I get wound up when I talk about murders, especially heinous, atrocious, or cruel murders" (12/1112). [This is the rough equivalent of apologizing for calling someone an idiot by saying "I'm sorry you're an idiot" It conveys to the jury that the prosecutor meant exactly what he said]. It is a pretty safe bet that, given his job title, this prosecutor is often talking to jurors about murders that he believes are heinous, atrocious, or cruel; this was not a rookie mistake.

In determining whether his comments to the jury were calculated to forestall a life recommendation, the reviewing court

may consider the prosecutor's "track record." See Brooks v. State, 762 So.2d 879,905 (Fla. 2000). In the instant case, the comment contemptuously dismissing mitigating evidence as "all that crap" came from Assistant State Attorney John Aguero, the same ASA who prosecuted Mark Poole in 2005 (see 1/85,98,117; 2/162,164-65). On that occasion Mr. Aguero improperly suggested that Poole had a burden to prove his innocence by testifying (found to be error but not "so prejudicial as to vitiate the entire trial" under the mistrial standard), and then violated Poole's right to a fair penalty phase by cross-examining defense witnesses about unproven prior arrests, the unproven content of a tattoo, and lack of remorse (resulting in reversal of the death sentence). Poole v. State, 997 So.2d 382,390-94 (Fla. 2008) (1/35g-35r).

"[T]rial attorneys must avoid improper argument if the system is to work properly. If attorneys do not recognize improper argument, they should not be in a courtroom. If trial attorneys recognize improper argument and persist in its use, they should not be members of the Florida Bar." Duncan v. State, 776 So.2d 287,290 (Fla. 2d DCA 2000), quoting Judge Blue's well-known admonition specially concurring in Luce v. State, 642 So.2d 4 (Fla. 2d DCA 1994).

Here, Mr. Aguero told the jurors that they didn't have to accept the impaired capacity and extreme mental or emotional disturbance circumstances as mitigating the death penalty at all "[b]ecause both of those doctors said that the only reason [Poole] hit [the mental mitigators] was because he voluntarily drank and

did drugs. The only reason they tell you. 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 - -" (12/1110-11).

First of all, Mr. Aguero mischaracterized Dr. Kremper's testimony, because his opinion was that Poole's substantially impaired capacity was due not only to the long and short term effects of his alcohol and drug use but also due to his low intelligence (IQ in the mid 70s). It was the combination of those factors which resulted in his grossly im-paired impulse control and reasoning ability (11/889-90,902-04). Whether as a contributing factor to the two statutory mental mitigators, or as a separate nonstatutory mitigator, low intelligence (including "borderline" IQ scores in the 70s) "has been recognized as valid mitigation in capital sentencing." Ault v. State, 53 So.3d 175,191 (Fla. 2010), see also Crook v. State, 813 So.2d 68,76-78 and n.6 (Fla. 2002).

Even worse, Mr. Aguero misled the jurors by telling them they could and should refuse to accept Poole's long-term drug and alcohol dependence and his intoxication on the night of the crimes "as mitigating the death penalty at all", because he voluntarily drank and did drugs (12/1110). [Following Aguero's logic, substance abuse or intoxication would only be a mitigator for someone like Cary Grant in North by Northwest, having whiskey forcibly poured down his throat by James Mason's thugs].

To the contrary, a history of drug and alcohol abuse is a

recognized nonstatutory mitigator and/or component of the statutory mental mitigators (whether or not the defendant was under the influence at the time of the homicide). Songer v. State, 544 So.2d 1010,1011-12 (Fla. 1989)("[S]everal of the mitigating circumstances are particularly compelling. It was unrebutted that Songer's reasoning abilities were substantially impaired by his addiction to hard drugs"); Clark v. State, 609 So.2d 513,516 (Fla. 1992)(finding defendant's extensive history of substance abuse constituted strong nonstatutory mitigation); Mahn v. State, 714 So.2d 391,401 (Fla. 1998)(citing Clark and finding that the trial court erred in giving no weight to Mahn's uncontroverted history of drug and alcohol abuse as a nonstatutory mitigating circumstance). Similarly, this Court has held that a capital defendant's intoxication at the time of the offense is "supportive of the mitigating circumstances of extreme mental or emotional disturbance and substantial impairment of a defendant's capacity to control his behavior". Nibert v. State, 574 So.2d 1059,1063 (Fla. 1990).

It is in the context of misleading the jurors that Poole's longstanding drug and alcohol addiction and his intoxication at the time of the crime - - the main focus of the defense in the penalty phase (since Dr. Sesta's findings that Poole is also brain damaged were not presented until the Spencer hearing) - - need not be accepted as mitigating the death penalty at all, that Mr. Aguero came out with his "all that crap" comment (and his specious apology for it)(12/1111-12).

This was flagrantly improper denigration of the case offered by Poole in mitigation. Brooks v. State, 762 So.2d 879,903-04 (Fla. 2000); see Urbin v. State, 714 So.2d 411,422 n.14 (Fla. 1998); Williamson v. State, 994 So.2d 1000,1014-15 (Fla. 2008); Franqui v. State, 59 So.3d 82,98 (Fla. 2011). See also Merck v. State, 975 So.2d 1054,1070 (Fla. 2007)(Pariente, J., joined by Anstead and Quince, J.J., dissenting)(argument "was part of another theme the prosecutor undertook to denigrate the proffered mitigation, arguing to the jury that "alcohol is not mitigation" and that Merck's background cannot diminish what he did to the victim").

Undersigned counsel recognizes that the "all that crap" comment, while objected to, is unpreserved because trial defense counsel asked for a curative instruction and got one (12/1111-12). Therefore, while the prosecutor is subject to professional sanction [see Bertolotti, 476 So.2d at 133-34; Ruiz, 743 So.2d at 9-10] for this inexcusable comment, and for misleading the jurors about the law applicable to aggravating and mitigating circumstances (12/1102-03,1106-07,1109,1110,1113-15), and for introducing L.W.'s fingertip for no reason but to inflame the jurors' emotions, Poole cannot receive a new penalty proceeding based on the "all that crap" comment unless this Court determines that it amounted to fundamental error, or that any curative effect of the judge's instruction was undermined by the prosecutor's false apology, or that it was ineffective assistance on the face of the record for defense counsel to fail to object to the various

and assorted misstatements of law, or that the cumulative impact of the prosecutor's transgressions deprived Poole of a fair trial on the question of whether he should live or die. Regarding cumulative impact, see Merck, 975 So.2d at 1061 (opinion of the Court) and 1069 (dissenting opinion of Justice Pariente); Brooks, 762 So.2d at 898-99; Ruiz, 743 So.2d at 7.

Poole's case in mitigation focused on four main areas. (The fifth - - brain injury - - was primarily brought out in the Spencer hearing through the testimony of Dr. Sesta). These are (1) the fact that Poole came from a good, hard working, close-knit, churchgoing family; that he himself displayed those qualities until he fell into alcohol and drug dependence; and that even after his life began to deteriorate he was a strong, positive influence on his nephews and his young son; (2) his borderline intelligence; (3) his long-term addiction to alcohol and drugs; and (4) his intoxication on the night of the crimes. The experienced prosecutor, Mr. Aguero, throughout his closing argument systematically undermined the entire penalty phase defense by misleading the jurors that these matters are not mitigating. Since the cumulative effect of the prosecutor's misconduct went to the very heart of the case, they amount to fundamental error. See, e.q., Knight v. State, 672 So.2d 590 (Fla. 4th DCA 1996); Quaggin v. State, 752 So.2d 19,26-27 (Fla. 5th DCA 2000); Jacques v. State, 883 So.2d 902 (Fla. 4th DCA 2004).

For example, "it is well settled that evidence of family background and personal history may be considered in mitigation."

Stevens v. State, 552 So.2d 1082,1086 (Fla. 1989)("On the bright side, Stevens was portrayed as a responsible family man and as kind and generous to those who knew him"); see Torres-Arboledo v. Dugger, 636 So.2d 1321,1325 (Fla. 1994). This applies to a good family background as well as a bad one. See Hurst v. State, 819 So.2d 689,699 (Fla. 2002); Chavez v. State, 832 So.2d 730, 767 (Fla. 2002); Simmons v. State, 934 So.2d 1100,1110 (Fla. 2006). Yet here is what Mr. Aguero had to say:

> Yesterday, we heard from eight family members of Mr. Poole, and two doctors. This instruction right here, Number 6, which is amongst the general rules that apply to your deliberations, is exceedingly important in arriving at your legal decision in this case, because it says your recommendation should not be influenced by feeling of prejudice or by racial or ethnic bias or by sympathy.
>
> Why did you see all these pictures? Did this kid commit this crime? No. This is a seven-eight year old boy at the time. He was just a boy. Everyone, at one time, was a kid. Did his son commit this crime? The son was only three years old when his daddy went to prison. Did he go to church and do concrete work in his life? What are these pictures really for, folks?
>
> I submit to you that when you think about that evidence, you need to really think about whether that is a mitigating circumstance, whether it mitigates the penalty that you should vote to impose, or whether that goes to sympathy that you're not allowed to consider. Your recommendation must be based on the evidence and the law contained in these instructions.

(12/1102-03)(emphasis supplied)

Clearly the prosecutor was not simply suggesting - - as he had a right to argue - - that the jurors should accord the family members' testimony little weight. Rather, he was misleading them

to believe that it was not a valid mitigator; that it goes to sympathy "that you're not allowed to consider." See Lockett v. Ohio, 438 U.S. 586,604 (1978)(capital sentencing judge or jury may not be precluded from considering any evidence regarding a proffered mitigating circumstance); Merck, 975 So.2d at 1070 n.6 (Pariente, J. dissenting)(recognizing the importance of the jury's ability to consider all properly submitted, relevant mitigation).

Next the prosecutor misled the jury that impaired capacity and extreme mental or emotional disturbance need not be accepted as mitigating at all because Poole voluntarily drank and did drugs; he made the "all that crap" comment; and he undermined the judge's curative instruction by essentially blaming Poole for making him mad: "I apologize to you, ladies and gentlemen. I get wound up when I talk about murders, especially heinous, atrocious, or cruel murders" (12/1110-12).

Then the prosecutor returned to his theme that intoxication at the time of the crime is not a mitigating factor:

> So while you heard testimony from the family about [head injuries], 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. 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.

(12/1113)(emphasis supplied)

After arguing that the jury should not believe Dr. Chacko (12/1113-14), the prosecutor said:

> 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.

(12/1114)(emphasis supplied)

Once again, the prosecutor seriously misled the jurors about the law applicable to mitigating circumstances. Under Eighth Amendment constitutional principles "a sentencing jury or 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". Trease v. State, 768 So.2d 1050,1055 (Fla. 2000), citing Hitchcock v. Dugger, 481 U.S. 393,394 (1987) and Lockett v. Ohio, supra, 438 U.S. at 604. While there are occasions where a penalty jury or sentencing judge may accord a proven mitigating factor no weight, this can only be done based on circumstances unique to the particular case "such as when a defendant demonstrates he was a drug addict twenty years prior to the murder and the prior drug addiction has no real bearing on the present crime." Coday v. State, 946 So.2d 988,1002-03 (Fla. 2007); see Trease, 768 So.2d at 1055; Globe v. State, 877 So.2d

663,678-79 (Fla. 2004).

Here, in contrast, the evidence showed that Poole's alcohol and drug addiction grew progressively worse up until the time of the crime, and he was intoxicated when he committed it. Dr. Kremper found that Poole's ability to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was substantially impaired due to the combination of his low intelligence and the long-term and immediate effects of his alcohol and drug use, resulting in grossly impaired impulse control and reasoning ability (11/902-04,918). Dr. Kremper also expressed the opinion that if it were not for Poole's crack cocaine and alcohol dependence these offenses may well not have occurred at all (11/905).

Obviously the mitigating evidence established a nexus between addiction, intoxication, and the crime. Yet Mr. Aguero misled the jurors that even if they found Dr. Kremper credible and even if they believed that the defense had proved the impaired capacity mitigating factor, they could give it no weight simply because Poole voluntarily drank and did drugs. That quite simply is wrong. See Mahn, 714 So.2d at 401; Nibert, 574 So.2d at 1063.

In addition, with regard to aggravating circumstances, the prosecutor improperly argued that since the robbery and financial gain factors merge "all it really does is make you able to give more weight to the armed robbery circumstance" (12/1107). As recognized in Brooks, 762 So.2d at 903, this type of enhanced weight argument is a misstatement of law which violates the principles

set forth in Provence v. State, 337 So.2d 783,786 (Fla. 1976). And the prosecutor also argued acts which were done not to the homicide victim Noah Scott, but to the surviving victim L.W. well after Noah was unconscious, as proving an element of the HAC aggravator:

> Then the law goes a little further and tells you that the kind of crime that is intended here to be defined as heinous, atrocious, or cruel is one accompanied by additional acts that show the crime was conscienceless or pitiless, and was unnecessarily torturous to the victim.
>
> Now, when you think about the death of Mr. Scott and what was going on in total in that room, what shows consciencelessness? He put his hand between [L.W.'s] legs and said thank you, after he just beat the hell out of her and raped her. It wasn't just a rape. It was conscienceless and pitiless, and Mr. Scott was the person that suffered the death that Mr. Poole's being punished for.

(12/1109)

In order to support a finding of the HAC aggravating factor, the capital felony must be proven to be especially heinous, atrocious or cruel; not the accompanying crimes (especially when the accompanying crimes were committed against a different victim who survived). This Court has repeatedly stated that the focus of the HAC aggravator is on the homicide victim's perception of what is occurring; a finding of HAC is appropriate when the homicide victim was subjected to physical or emotional torture or prolonged anticipation of death. See, e.g., Pham v. State, 70 So.3d 485,497 (Fla. 2011); Allred v. State, 55 So.2d 1267,1279-80 (Fla. 2010); Schoenwetter v. State, 931 So.2d 857,874 (Fla. 2006). Therefore,

for example, when a murder victim is raped prior to being murdered, that victim's pain and fear during the rape is relevant to prove HAC. See, e.g., Barnes v. State, 29 So.3d 1010,1029 (Fla. 2010); Banks v. State, 700 So.2d 363,366-67 (Fla. 1997); Swafford v. State, 533 So.2d 270,277 (Fla. 1997). Here, however, the murder victim was not sexually assaulted. The only evidence upon which a finding of HAC could possibly be based was L.W.,s recovered recollection (because she recalled almost nothing about the attack during the 911 call or at the hospital, and the details she did provide were apparently inaccurate) that during the early stages of the attack she could see through the bottom of the pillow that Noah was trying to get up and the attacker would pick up the long black object and hit him in the face (10/721). It was after the beating and rape - - after the attacker left the room and L.W. put on some clothing, passed out, and went in and out of consciousness - - that she had a recollection of the attacker coming back in, touching her vaginal area, and thanking her (10/724-25). She remembers seeing a clock and it was 3:00 or 3:30. She couldn't really focus. She remembers getting up, pulling on Noah, hearing him breathe, and then she got sick again and fell back down (10/724-25).

By telling the jurors that they could find an essential element of HAC based on the rape of L.W. and on behavior towards her which occurred well after Noah Scott was rendered unconscious, the prosecutor once again misled them in the direction of a death recommendation.

Again bear in mind that Mr. Aguero, as he informed the jurors in voir dire, is the director of the homicide division of the State Attorney's Office and has been in that position for 25 years (7/263). "The power and force of the government tend to impart an implicit stamp of believability to what the prosecutor says." Ruiz v. State, supra, 743 So.2d at 4, quoting Hall v. United States, 419 F.3d 582,583-84 (5th Cir. 1969) and United States v. Garza, 608 F.2d 659,[663](5th Cir. 1979). An isolated, inadvertent mis-statement of law would be one thing, but when a capital prosecutor's closing argument is replete with statements designed to "win" a death recommendation by misleading the jurors about aggravating and mitigating circumstances - - urging the jurors to give no weight to the mental mitigators because Poole voluntarily drank and did drugs; and advising them to ignore the testimony about Poole's family background and relationships and his positive character traits before succumbing to his addictions because "that goes to sympathy which you're not allowed to consider"; and culminating in his inexcusable remark dismissing mitigating evidence as "all that crap" - - the defendant's Eighth Amendment right to a fair and reliable penalty trial is irreparably violated.

Poole's death sentence under these circumstances cannot constitutionally be carried out, and should be reversed for a new penalty proceeding.

[ISSUE IV] POOLE'S DEATH SENTENCE IS PROPORTIONALLY UNWARRANTED BASED ON THE SIGNIFICANCE AND WEIGHT OF THE MITIGATING CIRCUMSTANCES.

A. The Two-Pronged Proportionality Test

Proportionality review is a "unique and highly serious function of this Court" with a variety of sources in Florida law, including article I, section 17's express constitutional prohibition against unusual punishment. Crook v. State, 905 So.2d 350 (Fla. 2005)[Crook II]:

> Further, this Court has consistently held that because death is a unique and final punishment, the death penalty must be reserved only for those cases that are the most aggravated and least mitigated. Kramer v. State, 649 So.2d 274,278 (Fla. 1993). In Almeida v. State, 748 So.2d 922 (Fla. 1999), we explained: "Thus, our inquiry when conducting proportionality review is two-pronged: We compare the case under review to others to determine if the crime falls within the category of both (1) the most aggravated, and (2) the least mitigated of murders." Id. at 933. Hence, our proportionality review requires us to consider the facts and circumstances in Crook's case to determine whether the case is among the most aggravated and least mitigated so as to justify the imposition of death as the penalty.

Crook, 905 So.2d at 357 (emphasis supplied).

Even when this Court finds that the aggravation prong of the proportionality test is satisfied, "under our death penalty jurisprudence as stated in Almeida and other decisions, we are next required to determine whether [the] case also falls within the category of the least mitigated of murders for which the death

penalty is reserved." Crook, 908 So.2d at 357 (emphasis supplied); see Cooper v. State, 739 So.2d 82,85-86 (Fla. 1999).

B. This Case is Not Among the Least Mitigated of Murders for Which the Death Penalty is Reserved.

Undersigned counsel concedes that three of the aggravating factors found by the trial court are supported by the record, and in the event that Poole's challenge to the finding and weight of the fourth aggravator (HAC) in Part C of this Point on Appeal is unsuccessful, then the undersigned would also concede that they are sufficient to satisfy the aggravation prong of the proportionality test. See Crook, 908 So.2d at 357. However, in light of the substantial mitigation presented in this case establishing Poole's low intelligence, his brain damage which impairs his ability to control impulsive behavior, his long-term drug and alcohol addictions, and his intoxication on the night of the crimes, it cannot be said that this is among the least mitigated of murders for which the death penalty is reserved. In evaluating the mitigating evidence, it is important to recognize that any credibility questions (except perhaps as to Dr. Chacko) must be resolved in Poole's favor, since the trial judge found both Dr. Kremper and Dr. Sesta to be extremely credible expert witnesses (5/659-60) [see Hildwin v. Dugger, 654 So.2d 107,110 n.8 (Fla. 1995)]; he found that both of the statutory mental health mitigators - - impaired capacity and extreme mental or emotional disturbance - - were proven; and he assigned the former great

weight and the latter moderate to great weight (5/727-28).

Supporting his findings of and weight given the mental mitigators, the judge noted that all three doctors (including the two he found extremely credible) agreed that Poole has polysubstance dependency and was using drugs and alcohol at the time of the offense (5/727); that Dr. Sesta (the neuropsychologist) concluded that Poole has moderate brain impairment as a result of numerous head injuries, as well as dementia (significant impairment in memory) and low intelligence, and that "someone with a low IQ, dementia, and moderate brain impairment would further exacerbate their neurological impairment through the use of drugs and alcohol" (5/727-28); and that Dr. Kremper (the clinical and forensic psychologist with experience in the area of substance abuse) also found that in addition to his long-term drug and alcohol dependence Poole was functioning at a low intellectual level (5/728).

This Court has described impaired capacity and extreme mental or emotional disturbance as "two of the weightiest mitigating factors - - those establishing substantial mental imbalance and loss of psychological control." Santos v. State, 629 So.2d 838,840 (Fla. 1994); see also Rose v. State, 675 So.2d 567,573 (Fla. 1996)("we have consistently recognized that severe mental disturbance is a mitigating factor of the most weighty order").

The existence of substantial mental health mitigation, especially when related to the circumstances of the crime, has been a decisive factor in numerous cases where death sentences

have been reversed in favor of life imprisonment on proportionality grounds, including Crook, 908 So.2d 356-59; Almeida, 748 So.2d at 933-34; Cooper, 739 So.2d at 85-86; Hawk v. State, 718 So.2d 159,163-64 (Fla. 1998); Robertson v. State, 699 So.2d 1343,1347 (Fla. 1997); Knowles v. State, 632 So.2d 62,67 (Fla. 1993); Nibert v. State, 574 So.2d 1059,1062-63 (Fla. 1990); Miller v. State, 373 So.2d 882,886 (Fla. 1979).

Contrast Rodgers v. State, 948 So.2d 655,670 (Fla. 2006), in which this Court found the death sentence to be proportionate, saying:

> . . . [W]e emphasize that the trial court expressly rejected these statutory mitigators: extreme mental or emotional disturbance, impaired capacity to conform to the requirements of law, the defendant's "mental" age, and extreme duress. Further, although the trial court did find that Rodgers's intellectual functioning fell in the borderline range, it concluded this fact "did not play a role in the murder" and afforded the factor only "some weight." Thus, as recited above, the mitigation is insubstantial, making this one of the least mitigated cases.

See also Brant v. State, 21 So.2d 1276,1285 (Fla. 2009)(finding Brant's case materially distinguishable from Crook where, inter alia, the trial court did not find the mitigating evidence to carry "significant weight" as the trial court did in Crook, and where - - while there was evidence of learning and language disabilities - - "there was no evidence of borderline mental retardation, stunted personality development, and increased sensitivity to intoxication as in Crook").

The existence of brain damage has been recognized as a significant mitigating factor. Crook v. State, 813 So.2d 68,75 (Fla. 2002) [Crook I]. In Crook II, reversing for a sentence of life imprisonment on proportionality grounds, this Court said, "We are particularly influenced by the unrefuted testimony of the mental health experts that relate the rage and brutal conduct in this crime to the defendant's brain damage and mental deficiencies." While not rising to the level of insanity that would bar conviction, or mental retardation which would preclude a death sentence, "our caselaw has consistently held that those substantial mental deficiencies merit great consideration in evaluating a defendant's culpability in a proportionality assessment." 908 So.2d at 358. Most persuasive in the mitigation evidence was the doctors' "tying Crook's impairments to his functioning at the time of the murder - - which clearly supports the trial court's attribution of "significant weight" to the statutory mitigators involving Crook's diminished mental capacity [footnote omitted]."

> These circumstances, especially the testimony linking the combination of Crook's brain damage and substance abuse to his behavior at the time of the murder, counterbalance the effect of the aggravating factors. [HAC, sexual battery, and pecuniary gain]. We also find it compelling that the unrefuted expert testimony indicated that Crook would be especially uninhibited when his already damaged brain was exposed to the negative effects of alcohol and drugs. As our cases indicate, the existence of this mitigation, and especially that evidence connecting the mental mitigation to the crime, prevents us from classifying this case as among the most aggravated and least mitigated.

908 So.2d at 359

Contrast Gill v. State, 14 So.3d 946,966 (Fla. 2009), finding Crook not to be dispositive on the question of proportionality where none of the mental health experts tied Gill's mental illness to the murder, and Dr. Waldman testified that based on the circumstances of the crime, it was unlikely that Gill's brain abnormality was causally connected to the murder.

In the instant case, Dr. Kremper found that Poole was substantially impaired at the time of the offenses due to the combination of his low intelligence and the long and short term effects of his alcohol and drug use, resulting in grossly impaired impulse control and reasoning ability (11/902-04). Repeated cocaine use atrophies the frontal lobes of the brain. The frontal lobes work to inhibit impulsive behavior, and to allow for reasoning and considering different courses of action. "It's not insanity, but the ability to control one's behavior is seriously com-promised" (11/904). Dr. Kremper expressed the belief that but for Poole's crack cocaine and alcohol dependence, these offenses might well not have occurred (11/905).

Dr. Sesta concluded that - - on a continuum of severe, moderate, and mild - - Poole has a moderate degree of brain damage. However, he explained that even mild brain damage is medically substantial and can cause significant impairment in an individual's adaptive functioning (5/640-41). Dealing with new or unexpected situations "is particularly problematic when brain

injury rises above the mild level." When confronted with a situation that requires them to "think on their feet", brain damaged individuals become very stressed and frustrated, which in turn can lead to aggression (5/641, 645-56). "And that's almost a ubiquitous finding with brain injury, is that individuals have difficulty putting the brakes on to inhibit impulses. The stronger the impulses are, particularly aggressive and sexual impulses, the greater the amount of inhibition that is necessary to control them. This is where the brain-injured person really breaks down and has difficulty keeping those aggressive and sexual impulses in check" (5/646-47).

Dr. Sesta was asked about the effect that chronic cocaine and alcohol abuse would have on a person with a low IQ, brain damage, and dementia (as Dr. Sesta diagnosed Poole). Dr. Sesta answered that given Poole's history of consuming grossly excessive amounts of beer "the effect of that on a good brain would be bad enough", and on someone already suffering from brain damage it would exacerbate their neurological impairment. Similarly, cocaine addiction "would affect his behavior more because the damaged brain is more sensitive to any type of drug". [For example, whenever Dr. Sesta is medicating a brain injured patient he has to be much more careful because "they'll often have a much more exaggerated response to a lower dose of the drug because their brain has been damaged" (9/643-45).

Thus, as in Crook and unlike Gill, Poole has established a strong nexus between the homicide and the combined impact of his

brain damage and dementia, his low intelligence, and the long-term and immediate effects of his drug and alcohol dependence. [Note that Poole's most recent IQ scores of 74 and 76 place him on the borderline between mental retardation - - which would preclude a death sentence even apart from the question of proportionality[2] - - and low average (11/889-90; 5/626-30). An IQ test administered while he was still in school resulted in an even lower score of 66 (11/887-88). See Crook I, 813 So.2d at 76-78 and n.6. Note also that testing showed very severe impairment of Poole's verbal and nonverbal memory. Memory impairment is the most common and prominent characteristic of individuals who suffer from traumatic brain injury (5/631,638,642). Validity testing led Dr. Sesta to the conclusion that "Mr. Poole was not attempting to malinger signs and symptoms of neurological injury" (5/634-638].

Based on the strong and unrebutted mitigating evidence from three medical experts (two of whom were found to be extremely credible by the trial court) establishing Poole's impaired capacity and extreme mental or emotional disturbance at the time of the crime (accorded great weight and moderate to great weight by the court), this is not one of the least mitigated murders for which the death penalty is reserved.

In addition, the force of the mental mitigation is enhanced by the testimony of eight members of Poole's close family showing that he was a loving, hard-working, respectful young man until his growing addiction to alcohol and drugs got the better of him. It

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[2] Atkins v. Virginia, 536 U.S. 304 (2002)

is highly significant that Dr. Kremper and Dr. Sesta testified that, while Poole now displays some antisocial traits, he does not meet the diagnostic criteria for antisocial personality disorder due to (1) his lack of a juvenile criminal history or conduct disorder prior to age 15, and (2) he appears to have a very strong connection with multiple family members (11/893,918; 5/635-36, 647). This corroborates the overwhelming effect which the toxic combination of traumatic brain injury and spiraling drug and alcohol addiction had on Mark Poole, culminating in this sudden explosion of violence. Viewed in the context of his entire life history, life imprisonment without possibility of parole is the appropriate sentence.

C. Aggravating Factors

While four aggravating circumstances were found in this case, all of them arise out of the immediate circumstance of the offenses (and thus all of them occurred while Poole's ability to conform his conduct or control his impulses was substantially impaired, and while he was under extreme mental or emotional disturbance). Three of the aggravators are the crimes for which Poole was convicted in the 2005 guilt phase of the trial: (1) the contemporaneous attempted murder of L.W.; (2) the sexual battery of L.W., armed burglary, and armed robbery; and (3) financial gain (merged with robbery but not merged with burglary or sexual battery)(5/719-22). The fourth aggravator, HAC, also arose during

the actual commission of the crime. None of the aggravators involve violent acts which occurred prior to the charged offenses, and none of them involved planning or calculation.

Under the prevailing Florida caselaw, beating deaths appear to be presumptively HAC. See, e.g., Bright v. State, 2012 WL 1947877 (SC09-2164, opinion dated May 31, 2012), Douglas v. State, 878 So.2d 1246,1261 (Fla. 2004); Lawrence v. State, 698 So.2d 1219,1221-22 (Fla. 1997). However, that caselaw requires that the beating victim be conscious and aware of his or her impending death during at least part of the attack. Douglas, 878 So.2d at 1261. Fleeting consciousness or semiconsciousness may not be sufficient; in Elam v. State, 636 So.2d 1312,1314 (Fla. 1994) HAC was found to be inapplicable where "[a]lthough the [victim] was bludgeoned and had defensive wounds, the medical examiner testified that the attack took place in a very short period of time ("could have been less than a minute, maybe even half a minute"), the [victim] was unconscious at the end of this period, and never regained consciousness. There was no prolonged suffering or anticipation of death."

In the instant case, Noah Scott was asleep when the attack commenced, and the only piece of evidence which suggests any level of consciousness is L.W.'s testimony that during the early stages of the attack she could see through the bottom of the pillow covering her face a long, black object lying on the bed, "[a]nd every time the attacker would try to rape me, Noah would get up, and he would pick up the object and hit Noah in the face" (10/721,

see 718-19; 12/1149-50). This is plainly a recovered memory on L.W.'s part. She suffered serious head injuries including a concussion during the attack, went in and out of consciousness throughout the night, and when the 911 operator asked her the following morning whether her fiancé was assaulted she replied "I have no clue. All I know is there's blood everywhere" (10/760-61). She thought there were two black males who broke in, and she couldn't tell if they were wearing masks because they had covered her face (10/765). Asked if they had a weapon, L.W. said "All I know is one had a belt", and although she knew she had a head injury, she wasn't sure how she got it (10/762,766-68).

Dr. Simmons, the emergency room physician, testified that "[w]hen you have a severe head injury or blow of any type, it can shake the brain and kind of disturb the connections there, so there can be some memory loss, and people tend to repeat things" (10/691-92). L.W. appeared to have some of these symptoms, but she was able to recall certain things such as her name and the fact that she was pregnant (10/692). She was coherent up to a point, but "[e]xactly what happened to her, she really had minimal recollection of that at that time" (10/692). Also, "with the severity of the head injury, you don't know how much of her memory is going to come back. So once you have lost it, it's a matter of time to determine are they going to come back or not. And the only thing that can determine that is wait and see" (10/708).

During the penalty trial the prosecutor asked L.W. if she ever saw more than one person inside the trailer; she replied,

"Not that I remember" (10/772). Although she had described in the 911 call that she thought she saw a belt, the item which struck her on the back of the head felt hard (10/773-74).

L.W.'s testimony on page 10/721 of the record upon which the HAC finding entirely rests is based on a recovered recollection, the reliability of which is inherently questionable. See State v. Hungerford, 697 A.2d 916 (N.H. 1997). The trial court evidently thought that it was corroborated by physical evidence, because he stated in his sentencing order "Noah Scott was struck fifteen (15) times with a tire iron. Several of those blows were to his arms and were likely defensive wounds. He suffered thirteen (13) blows to the head, resulting in multiple skull fractures and hemorrhaging to four (4) areas of his brain" (5/723)(emphasis supplied).

However, there was no evidence to support this. The medical examiner, Dr. Nelson, testified that there were 15 areas of blunt force trauma to Noah Scott's body; 13 to the head and "[h]e has two others present on his left arm" (10/856). This is the only testimony given by Dr. Nelson (or anyone) concerning injuries to the left arm. Dr. Nelson did not express an opinion that they were defensive wounds, not did he testify that they were likely defensive wounds, or even that they were consistent with defensive wounds (see 10/843-58). Neither the prosecutor nor defense counsel (who did not cross-examine Dr. Nelson) asked him anything about defensive wounds, and the prosecutor did not argue to the jury that these might be defensive wounds (see 12/1093-1119).

Nor can the trial court's unsupported conclusion that the injuries to Noah Scott's arm were likely defensive wounds be justified as a common sense inference. People do not ordinarily sleep with their arms stiffly at their sides; often one or both arms are either spread out, or up near the sleeper's head or pillow. Also, there were no injuries to Noah's hands (in contrast to the serious injuries to L.W.'s left hand). And while the state's blood splatter expert (who concluded that approximately a dozen blows were struck and none of the blows was higher than 36 inches off the floor, 10/833, see 12/1100) may not have conclusively disproved L.W.'s recovered recollection that Noah kept trying to get up, he certainly didn't corroborate it either.

The trial court's unfounded statement, in support of his finding of HAC and the very great weight he assigned it, that the injuries on Noah Scott's arms were likely defensive wounds was neither harmless nor surplusage. The presence or absence of defensive wounds is relevant and important to the HAC analysis, and this Court has "affirmed findings of HAC where defensive wounds revealed awareness of impending death". Williams v. State, 37 So.2d 187,200 (Fla. 2010), quoting Guardado v. State, 965 So.2d 108,116 (Fla. 2007). See, e.g., Bright v. State, supra, 2012 WL 224067; Reynolds v. State, 934 So.2d 1128,1155 (Fla. 2006); Douglas v. State, 878 So.2d 1246,1262 (Fla. 2004); Rolling v. State, 695 So.2d 278,296 (Fla. 1997); Whitton v. State, 649 So.2d 861,867 (Fla. 1995); Lamb v. State, 532 So.2d 1051,1053 (Fla. 1988).

Therefore, it cannot be assumed that the trial court's conclusion, based on no evidence, that Noah Scott's arm injuries were likely defensive wounds played no part in his decision to find the HAC aggravator or his decision to accord it very great weight. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). His misapprehension that there was physical corroboration for L.W.'s recovered memory that Noah kept trying to get up may well have been what persuaded him that her recollection was accurate.

Moreover, even assuming that L.W.'s recollection of what she saw from underneath the pillow was accurate, it does not establish Noah's level of consciousness and it certainly does not prove that he was aware of his impending death. In his sentencing order the trial court states, "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 [fiancée, L.W.]" (5/723). However, L.W.'s testimony does not show that Noah was consciously aware that a rape was occurring or that he was trying to prevent it; it only shows that he kept trying to get up at the same time the rape was occurring. The state's blood splatter expert's findings show that he couldn't have gotten very far up, and L.W. - - looking from under the pillow covering her face - - could not have known what, if anything, Noah was thinking. During the night of the attack and the morning after, L.W. remembered almost nothing about what happened to her and Noah. When she later recovered memories of the events it is understandable that she would interpret Noah's movements as an attempt

to come to her aid, but she could not possibly have known that. It is just as likely that he was stunned or semiconscious, "wrestling around, trying to get up" (10/718), with no idea of what was going on and no awareness of his impending death.

Because the trial court's finding of HAC was based in large part on speculation, that finding should be stricken [see Williams v. State, 37 So.3d at 198-201] and not considered in this Court's proportionality analysis. At the very least, the trial court's speculative assumptions about defensive wounds and about the degree of conscious fear and pain experienced by the victim show that the very great weight - - indeed dispositive weight (5/723,729) - - which he accorded the HAC factor constituted an abuse of discretion. See Peterson v. State, 2012 WL 1722581 (case no. SC10-274, opinion dated May 17, 2012) (declining to impose a preservation requirement before a death-sentenced defendant can challenge a trial court's factual findings; "If a defendant disagrees with how a sentencing court weighed the evidence, the direct appeal of a sentencing order would be the first opportunity for [him] to challenge the factual findings and credibility decisions within a trial court's sentencing order).

D. Poole's Death Sentence Should be Reduced to Life Imprisonment Without Possibility of Parole on Proportionality Grounds.

For the reasons stated, this case does not fall within the category of being among both the most aggravated and least mitigated of first-degree murders. Poole's death sentence should be reduced to life imprisonment without possibility of parole on proportionality grounds. [In the alternative and at the very least, his death sentence should be reversed and the case remanded to the trial court for resentencing, due to the court's reliance on unproven factual considerations in finding and weighing the HAC aggravator, which was crucial to his decision to impose death].

[ISSUE V] 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 CONSTIUTIONALLY INVALID.

Ring v. Arizona, 536 U.S. 584 (2002) declared unconstitutional the capital sentencing schemes then used in Arizona, Colorado, Idaho, Montana, and Nebraska, in which the judge, rather then the jury, was responsible for (1) the factfinding of an aggravating circumstance necessary for imposition of the death penalty, as well as (2) the ultimate decision whether to impose a death sen-tence. Four states - - Alabama, Delaware, Florida, and Indiana - - were considered to have "hybrid" capital sentencing schemes, the constitutionality of which were called into question, but not necessarily resolved, by Ring. See 536 U.S. at 621

(O'Connor, J., dissenting).

Undersigned counsel submits that for all practical purposes Florida is a "judge sentencing" state within the meaning and constitutional analysis of Ring, and therefore its entire capital sentencing scheme violates the Sixth Amendment.[3] As this Court recognized in State v. Steele, 921 So.2d 538,548 (Fla. 2006), Florida is now the only state in the country that does not require a unanimous jury verdict in order to decide that aggravators exist and to recommend a sentence of death. See State v. Daniels, 542 A.2d 306,314-15 (Conn. 1988), which this Court cited with approval in Steele, 921 So.2d at 549, and which recognized a special need for jury unanimity in capital sentencing decisions.

Even more tellingly, this Court has forthrightly reaffirmed, post-Ring, that Florida's procedure "emphasizes the role of the circuit judge over the trial jury in the decision to impose a sentence of death". Troy v. State, 948 So.2d 635,648 (Fla. 2006). The Court also quoted and highlighted the following statement from Spencer v. State, 615 So.2d 688,690-91 (Fla. 1993): "It is the circuit judge who has the principal responsibility for determining whether a death sentence should be imposed." Troy, 948 So.2d at 648. [See also the post-Ring opinion in Williams v. State, 967 So.2d 735,751 (Fla. 2007), quoting pre-Ring decisions for the

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[3] Undersigned counsel recognizes that this Court has repeatedly rejected Ring claims, and did so in the initial 2008 appeal in this case. See, e.g., Poole v. State, 997 So.2d 382,396 (Fla. 2008); Peterson v. State, 2012 WL 1722581, p.20. However, the undersigned believes that his argument is right as a matter of federal constitutional law, and he urges reconsideration.

proposition that the trial judge "is not limited in sentencing to only that material put before the jury, is not bound by the jury's recommendation, and is given final authority to determine the appropriate sentence"].

The jury's advisory role, coupled with the lack of a unanimity requirement for either the finding of aggravating factors or for a death recommendation, is insufficient to comply with the minimum Sixth Amendment requirements of Ring. Moreover, since Florida is a weighing state in which each aggravating factor is critically important to the life-or-death determination, and in which the existence of a single aggravator is rarely sufficient to sustain a death sentence[4], former Chief Justice Anstead was right - - as a mater of constitutional law - - in concluding that the requirements of Ring apply to all aggravating factors relied on by the state to justify a death sentence. See Duest v. State, 855 So.2d 33, 52-57 (Fla. 2003)(Anstead, C.J., concurring in part and dissenting in part); Conde v. State, 860 So.2d 930,959-60(Anstead, C.J., concurring in part and dissenting in part). As he wrote in the latter opinion:

> It would be a cruel joke, indeed, if the important aggravators actually relied upon by the trial court were not subject to Ring's holding that [f]acts used to impose a death sentence cannot be determined by the trial court alone. The Ring opinion, however, focused on substance, not form, in its analysis and holding, issuing a strong message

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[4] See Jones v. State, 705 So.2d 1364,1366 (Fla. 1998)("while this Court has on occasion affirmed a single-aggravator death sentence, it has done so only where there was little or nothing in mitigation"; to rule otherwise "would put Florida's entire capital sentencing scheme at risk").

> that facts used to aggravate any sentence, and especially a death sentence, must be found by a jury.

(emphasis in opinion).

See also Justice Anstead's opinion, concurring in result only, in Bottoson v. Moore, 833 So.3d 694,710 (Fla. 2002), in which he concludes:

> In sum, in Florida, the responsibility for determining whether and which aggravating circumstances apply to a particular defendant falls squarely upon the trial judge, and it is those findings by the judge that are actually utilized to decide whether the death sentence is imposed, and that are reviewed by this Court on appeal. Like Arizona, Florida permits a judge to determine the existence of the aggravating factors which must be found to subject a defendant to a sentence of death, and it is the judge's factual findings that are then considered and reviewed by this Court in determining whether a particular defendant's death sentence is appropriate. Thus, we appear to be left with a judicial fact-finding process that is directly contrary to the U.S. Supreme Court's holding in Ring.

Because Florida uses a constitutionally impermissible method of determining who is eligible to receive the death penalty and who is actually sentenced to death, Mark Poole's death sentence imposed pursuant to these procedures is invalid.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, appellant respectfully requests that this Court grant the following relief: reverse the death sentence and remand for imposition of a sentence of life imprisonment without possibility of parole [Issues IV and V]; reverse the death sentence and remand for resentencing by the trial judge [Issue IV, alternative relief]; reverse the death sentence and remand for a new jury penalty proceeding [Issues I, II, and III].

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Assistant Attorney General Scott A. Browne, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this 28th day of June, 2012.

CERTIFICATION OF FONT SIZE

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

Respectfully submitted,

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