IN THE SUPREME COURT OF FLORIDA

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BY

MARK POOLE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. SC11-1846

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

REPLY BRIEF OF APPELLANT

HOWARD L. "REX" DIMMIG, II
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

STEVEN L. BOLOTIN
Assistant Public Defender
FLORIDA BAR NUMBER 0236365

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(863) 534-4200

ATTORNEYS FOR APPELLANT

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PRELIMINARY STATEMENT

This reply brief is directed to Issues 1, 2, 3, and 4. As to Issue 5, Appellant will rely on his initial brief.

The state's answer brief will be referred to herein as "SB".

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. Age

The state claims on appeal that the prosecutor had no discriminatory intent, but was simply "attempting to empanel an older, experienced, mature panel of jurors that could and would impose the death penalty" (SB 13, 40). The state acknowledges that the prosecutor did not mention young age, inexperience, or (supposed) immaturity when he struck jurors Wearing and Blandin. However, the state notes that the prosecutor did assert that rationale "later in the voir dire process", and "[w]hile the State recognizes that this Court has viewed somewhat belated responses with 'some skepticism', age surely cannot be viewed as a contrived

response" (SB 20). The state further suggests - - and appellant fully agrees with the principle stated - - that the right to an impartial jury "is best safeguarded not by an arcane maze of reversible error traps, but by reason and common sense" (SB 20).

However, in the circumstances of this case, reason and common sense show that the prosecutor's offering of the jurors' age was a post hoc rationalization, and not his real reason for the strikes. It was not merely "somewhat belated." What the state ignores is that the trial judge, while considering the defense objection to the strikes based on the jurors' death penalty questions and answers, specifically asked the prosecutor, "Do you have any other race neutral reason besides that?", and the prosecutor answered "No, I don't" (8/443). If his motive, or even one of his motives, for striking Wearing and Blandin was a strategy of using his peremptories to eliminate younger jurors from the panel, he was certainly offered a golden opportunity to say so. When the prosecutor said he had no other reason, the judge accepted the reason he did give (based on the jurors' death penalty Q. and A.) as valid and allowed the strikes. And that is the issue in this Point on Appeal; i.e. whether the record supports the state's contention that these jurors expressed opposition to or discomfort with the death penalty, and whether these minority jurors were disparately questioned regarding the death penalty.

The prosecutor's effort to include age as an additional justification for striking Wearing and Blandin - - after expressly telling the trial judge that he had no additional reasons - -

unfolded in the following manner. During the selection process the first juror up was a white juror (Staresnick); the prosecutor said "Gone", the judge said "Golly, you took one of the defense's strikes", and the prosecutor said "Oh, well." As there was no objection to the peremptory challenge of Staresnick, no reason was offered (8/439). Next, jurors Moore, Day, Westcott, Shoffield, Bramlett, Faucette, and (significantly) Maruska were accepted by both the prosecution and the defense, while juror Hussey was peremptorily challenged by the defense (8/439-41). Next, the prosecutor struck Ms. Wearing, an African-American juror, and when the defense objected on Batson[1] grounds, the prosecutor asserted her death penalty answers as his only reason (and expressly disavowed having any other reason). The prosecutor also volunteered that another black juror, Mr. Blandin, had given similar death penalty answers and he intended to strike him too. The trial judge accepted the proffered reason and allowed the two strikes (8/441-45). Next both parties accepted juror Fetherlin, the state struck juror Gay, and both parties accepted jurors Saucerman, Ippert (the third African-American), Sims, and Freeman, making a total of twelve (8/445-47). The judge asked "Anybody want to backstrike?", and at that point the prosecutor peremptorily challenged Mr. Maruska (whom he had tentatively accepted prior to the discussions regarding Wearing and Blandin). Although there was no objection to the excusal of Maruska, the prosecutor gratuitously stated "He's also weak on the death penalty and young

[1] Batson v. Kentucky, 476 U.S. 79 (1986)

and white" (8/447-48). Both parties accepted juror Izzo (again making twelve), the state backstruck Ms. Shoffield, then both parties agreed to juror Gilbert and the panel of twelve was accepted (8/448). They began picking the alternates, whereupon the trial judge made a record of accepting as race-neutral the prosecutor's proffered reason for striking Wearing and Blandin based on their death penalty responses (8/450). In so doing, the judge commented, "Now, I thought the reason you were striking them was to go along with Staresnick; they were all too young to be on the panel. But you didn't mention it, so - -" (8/450). The prosecutor, scrambling, said:

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

(8/450)

[Actually, all the prosecutor said when he backstruck Maruska (after having initially accepted Maruska before the Batson issue involving Wearing and Blandin came up) was "He's also weak on the death penalty and young and white"].

The judge asked "do you want any more record made other than that?", and the prosecutor replied, "No, sir" (8/450-51). Defense counsel said "I think we've made a record regarding our objection", and advised the judge that he would renew the objection before the jury was sworn in order to comply with the requirements established by caselaw. The judge said counsel could do that if he liked, or "if not, I'll let you consider it objected right now"

(8/451). It was not until the following morning that the prosecutor chose to make an additional record, over renewed defense objection, offering young age (and their not being parents) as "another race-neutral reason to excuse those two jurors" (8/501-04).

Undoubtedly age can be a valid, race-neutral reason to peremptorily strike a juror, but it can also be an excuse or a subterfuge. The sequence of events here - - and especially the prosecutor's answer to the judge's direct question at the time he struck Wearing and Blandin that he had no other reason for striking them apart from their responses on the death penalty - - belies his later attempt to insulate his action from review. See Miller-El v. Dretke, 545 U.S. 231, 246 (2005)("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 inquiries "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").

B. Death Penalty Q. and A.

Poole does not take issue with the general proposition advanced by the state that a prosecutor may peremptorily challenge jurors who indicate their opposition to or discomfort with the death penalty, but who are not excludable for cause. However, that scenario does not accurately reflect what happened in this case. What a prosecutor may not do is selectively examine the jury panel and then eliminate minority jurors based on their answer to a hypothetical question which many jurors were never even asked, when the challenged jurors have not indicated any opposition to the death penalty, and have not equivocated regarding their ability to follow the law or their willingness to vote for death if appropriate in the particular case before them. See Miller-El v. Dretke, 545 U.S. 231 (2005) regarding disparate questioning. Miller-El is the decision which "put teeth in Batson"[2], and this Court should review Poole's claim accordingly,

The state can point to no statement by either Ms. Wearing or Mr. Blandin in which they expressed opposition to the death penalty or in which they wavered about their ability to impose it. See Nowell v. State, 998 So.2d 597, 605-06 (Fla. 2008). Both Wearing and Blandin, like the large majority of the other prospective jurors, rated themselves a 5 (on a scale of 1 to 10) as

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[2] Densey v. State, 191 S.W. 3d 296, 308 n.14 (Tex. App.-Waco 2006)(Gray, C.J., concurring).

far as their leanings for or against the death penalty (8/427-28; 436-39; 9/558-59, 563-64). Contrast Murray v. State, 3 So.3d 1108, 1121 (Fla. 2009), cited by the state at SB 26, in which the challenged juror gave an unintelligible answer when asked how he felt about the death penalty, and was unable or unwilling to rate his attitude toward the death penalty on a scale of 1 to 5.

The only possible record support for the state's claim at trial and on appeal that Wearing and Blandin were "weak" death penalty jurors comes from their answers to the prosecutor's question as to how they would vote in a hypothetical referendum on whether or not to keep the death penalty in Florida, and this reveals a textbook example of disparate questioning condemned in Miller-El. Both Wearing and Blandin said they weren't sure how they would vote. In defending his strikes against Wearing and Blandin the prosecutor said he had asked each of the jurors that question; then he 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).

As pointed out in Poole's initial brief, p. 50-54, several white jurors (including Westcott, Moore, and Sims, all of whom were accepted by the state and two of whom served on the jury) gave less than wholeheartedly enthusiastic responses to the prosecutor's general philosophical question about their feelings toward the death penalty, yet they were not asked the "how would you vote" question. Ippert, on the other hand - - an African-American woman whose answer to the general question was very

similar to Moore's and Sims' - - was asked the "how would you vote" question, as were Wearing and Blandin. But the most telling aspect of the prosecutor's behavior, as relates to the issue of disparate questioning, is that when it came time to examine the second group of jurors (which produced the jury foreman Mr. Harris, and which could easily have produced more jurors on the panel of twelve)[3], the prosecutor suddenly lost all interest in ferreting out supposedly "weak" death penalty jurors. While he asked the second group a few questions about their understanding of and willingness to follow certain aspects of the law applicable to the death penalty (an inquiry which Wearing and Blandin would have passed - - did pass - - with flying colors, see 8/395-401, 405-11, 436-37), he did not ask any of the eight in the second group either the general question about 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). Clearly, then, something else was going on other than the prosecutor's stated explanation that he was selectively asking the "how would you vote" question depending on how the jurors responded to the general philosophical question

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[3] After twelve jurors were tentatively selected, but still subject to backstrike (see 8/451-52) and not yet sworn, it became necessary to excuse Ms. Moore 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, the judge said "The first juror we're picking is obviously the twelfth juror", and noted that the state had used six of its peremptories while the defense had used one (8/565). Therefore (unless all of the eight were excused) the second group would produce at least one juror, and possibly anywhere from two to eight jurors depending on back-strikes, before the alternates would be selected.

about how they felt about the death penalty, in order to weed out "weak" death penalty jurors. The eight in the second group all indicated that they could follow the law and the trial court's instructions on the death penalty, but so did Ms. Wearing and Mr. Blandin. Seven of the eight (including the eventual jury foreman Harris) rated themselves a 5 on the 1 to 10 death penalty scale (9/563-64). So did Ms. Wearing and Mr. Blandin. Any purported distinction between these jurors was based solely on their disparate questioning, and this is an unacceptable basis for a Batson-challenged strike. Miller-El. Neither Wearing nor Blandin expressed opposition to the death penalty or anything approaching "unequivocal discomfort". See Nowell v. State, 998 So.2d 597, 605 (Fla. 1996); Wade v. State, 41 So.3d 48, 71 (Fla. 2010); San Martin v. State, 705 So.2d 1337, 1343 (Fla. 1997). Even a juror's "mixed feelings" about capital punishment in general may not be a valid race-neutral reason for his excusal, when the record confirms that the juror could impose a death sentence in a murder case depending upon the evidence and circumstances, and where the juror "never expressed uncertainty about his ability to vote for it in a proper case according to the appropriate legal standards." Nowell, 998 So.2d at 605-06. The peremptory strike of juror Ortega in Nowell was found on appeal to have been pretextual, and the prosecutor's actions in the instant case are even worse because of his disparate questioning of the jurors. [Compare also his rehabilitation of Ms. Westcott after she said "Wow, I'm not really sure on that", with his cutting off Ms. Wearing in mid-

sentence moments later when she made a substantially similar statement (8/381-82, 391-92)]. The principles of Batson, Miller-El, Nowell, and the other appellate decisions cited in Poole's initial brief make it clear that his state and federal constitutional rights were violated in the selection of his jury, and reversal of his death sentence for a new penalty trial is required.

[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

The state says "[t]his situation is not different from those wherein a defendant seeks to prevent the State from admitting photographs of the deceased murder victim" (SB 47). The state is wrong; it is entirely different. See Hickson v. State, 472 So.2d 379, 385 (Miss. 1985)(the obvious psychological impact on jurors of viewing severed anatomical parts is such that trial judges should exercise extreme caution, and if there is a reasonable alternative method of proving the point the judge should preclude admission of the anatomical part). The state largely relies on photograph caselaw (SB 44-47, 51), and the five "body part" cases cited by the state[4] (SB 48-49) are all easily distinguishable in

[4] State v. Cazes, 875 S.W.2d 253, 258-59 and 263 (Tenn. 1994); State v. Pike, 978 S.W. 2d 904, 911, 913 and 925 (Tenn. 1998); Crain v. State, 736 N.E. 2d 1223, 1233-34 (Ind. 2000); Hilbish v. State, 891 P.2d 841, 849-50 (Alaska App. 1995); Peterka v. State, 890 So.2d 219, 230-32 (Fla. 2004).

that (1) in each case the anatomical part was introduced in the guilt phase of a capital [Cazes; Pike; Peterka] or noncapital [Crain; Hilbish] trial; and (2) in each case the body part belonged to the victim of the murder for which the defendant was being tried. In Cazes, a reconstructed skull was used to illustrate the testimony of the forensic anthropologist who explained how he had found a "signature" for the murder weapon, and the appellate court found it "highly relevant in establishing identity." 875 S.W. 2d at 263. In Pike, the skull (also prepared by a forensic anthropologist) demonstrated the cause of death and the manner in which it occurred; and it was also relevant to identity because it was "used to illustrate that the piece of the [victim's] skull found in the Defendant's jacket fit perfectly into the reconstructed skull." 978 S.W. 2d at 911 and 925. In Crain the skull "was relevant given Defendant's claim of accidental death and the state's corresponding need to show those injuries occurring at the time of death and/or the absence of injuries." 736 N.E. 2d at 1234. In Hilbish (in which the appellate court emphasized that the body part did not go to the jury room during deliberations) the skull was used to assist the jury in understanding the precise location of the gunshot wound to the victim's head, and it's three-dimensionality made it more useful for this purpose then photographs would have been. 891 P.2d at 849-50. In Peterka (a postconviction appeal) it was relevant to disputed issues regarding the trajectory of the fatal bullet, the positioning of the shooter and the victim, and whether or not it was a

contact or near-contact wound. Also, the issue in Peterka had nothing to do with prejudice vs. probative value; rather, it was whether defense counsel was ineffective for failing to present expert testimony about the physical evidence. 890 So.2d at 230-32.

In the instant case, in contrast, L.W.'s fingertip in a jar of formalin was displayed to the jury, over defense objection, in a penalty phase whose only purpose was for a jury to decide whether Poole should receive the death penalty or life imprisonment for the murder of Noah Scott. At the very least the fingertip was shown to the jury during the testimony of crime scene technician Arlt (9/647, see 10/708), and (unlike Hilbish) it was included among the exhibits which went back to the jury room during deliberations. It may (although, as undersigned counsel acknowledged in his initial brief, this can't be conclusively demonstrated by the cold record) have been displayed again during the prosecutor's closing argument. [Compare appellant's initial brief, p. 60, with SB 49]. It was not relevant to show identity (nor was identity at issue in this penalty only trial); it was not relevant to the cause or manner of Noah Scott's death; and it was not relevant to the especially heinous, atrocious, or cruel aggravating factor (since that aggravator is premised on the physical or emotional suffering of the murder victim). Nor was it properly introduced to show the circumstances of the contemporaneous crimes against the surviving victim, L.W. The fingertip in a jar added nothing of substance to the six photographs (three of L.W.'s injured hand and three showing the fingertip on the floor

of the trailer) or the detailed testimony of Dr. Simmons, crime scene technician Arlt, and L.W. herself about what happened to her finger. There was simply no reason for the prosecutor to introduce and display it over objection other than to inflame or disgust the jurors and to engender additional sympathy towards L.W. See Finney v. State, 660 So.2d 674, 684 (Fla. 1995).

The state complains that Poole "attempts to turn this claim into an allegation of prosecutorial misconduct. It is not. It was an evidentiary ruling by the trial court . . . " (SB 49). Actually, it is both. The intentional introduction of irrelevant evidence for no purpose other than to inflame the jurors can amount to "inexcusable prosecutorial overkill" [Ruiz v. State, 743 So.2d 1, 8-9 (Fla. 1999); see also Nowitzke v. State, 572 So.2d 1346, 1350-56 (Fla. 1990)], while the trial court's ruling allowing the introduction of such evidence is judicial error. Ruiz and Nowitzke, like the instant case [see Issue III], involve a combination of improper prosecutorial comments and introduction of improper evidence. This combination is especially toxic to a capital penalty trial, the only purpose of which is for a jury to dispassionately weigh aggravating and mitigating factors to recommend whether the defendant should live or die. See Bertolotti v. State, 476 So.2d 130, 134 (Fla. 1985).

One thing the state (at least on appeal) and undersigned counsel for Poole agree on is that the prosecutor didn't need to do what he did. Where the parties differ is that the state thinks this means the error was harmless, while Poole believes it shows

that the fingertip was displayed for no reason other than to inflame or disgust the jurors. The state says "As appellant's counsel has recognized, the actual fingertip was cumulative to other evidence introduced in the penalty phase including photographs of the fingertip" (SB 50). To the contrary, undersigned counsel never "recognized" or conceded that the actual fingertip was cumulative; he simply argued that (in addition to being inflammatory) it was unnecessary. Far from conceding harmlessness, as the state misleadingly suggests, undersigned counsel emphasized that the prejudicial impact greatly outweighed the meager or nonexistent probative value, and gave caselaw support:

> 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

> <u>photos</u> 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 anthro-pologist); <u>Duncan v. State</u>, 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); <u>State v. Walker</u>, 675 P.2d 1310,1314 (Ariz. 1984)(obvious prejudice outweighed 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).

(Poole's Initial Brief, p. 61-62).

The fact that irrelevant and inflammatory evidence is unnecessary does not make it cumulative or harmless.

The state also makes a related "harmless error" claim in which it suggests that a death recommendation was a foregone conclusion anyway due to the aggravated nature of the crime. The state ignores the fact that there was also significant mitigating evidence, including expert testimony that Poole's ability to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was substantially impaired at the time of the offense [the trial judge ultimately found both statutory mental mitigators, giving one great weight and the other moderate to great weight]; testimony establishing that Poole suffers from severe and longstanding drug and alcohol addictions; testimony from numerous family members as to Poole's good character and close family ties before he became addicted; and expert

testimony that Poole's IQ is in the borderline 70s range, slightly above mental retardation. The state also ignores the fact that the prosecutor improperly urged the jury to consider acts which were done not to the homicide victim Noah Scott, but to the surviving victim L.W., 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)(See Appellant's Initial Brief p.75-76).

In view of the prosecutor's suggestion that acts done to L.W. could be used to support a finding of HAC or to give it additional weight, the displaying of her fingertip and the presence of the jar containing the fingertip in the jury room during deliberations was especially harmful.

The state's argument is disingenuous, and it also amounts to "heads I win, tails you lose." If the prosecutor genuinely believed that the fingertip in a jar could not have had any impact on the jurors, then why did he insist on introducing it over objection? See Gunn v. State, 78 Fla. 599, 83 So. 511 (1919);

Farnell v. State, 214 So.2d 753, 764 (Fla. 2d DCA 1968). The state should not now be heard to claim an appeal "We didn't need it anyway", especially in a case like this one which involves significant mitigation as well as significant aggravation.

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

The state mischaracterizes the prosecutor's comments as "address[ing] the evidence presented in aggravation and mitigation and fair inference therefrom" (SB 14; see SB 56, 58-61). The state says the prosecutor was simply contending that the jury should give voluntary drug and alcohol intoxication less weight than other types of mental mitigation, and therefore his argument "properly offered a fair comment on the evidence" (SB 59).

Really? In connection with the "all that crap" comment (which specifically referred to motor vehicle accidents and head injuries), the prosecutor told the jurors they didn't have to accept impaired capacity or extreme mental or emotional disturbance 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" (12/1110-11).

The Eighth Amendment demands heightened reliability in capital sentencing, and requires consideration by the sentencer (and in Florida the judge and jury are co-sentencers) of any relevant mitigating evidence proffered by a capital defendant in

order to receive a sentence less than death. Trease v. State, 768 So.2d 1050, 1055, (Fla. 2000). And Florida law recognizes drug and/or alcohol addiction, as well as intoxication - - which is nearly always voluntary - - at the time of the crime as valid mitigation (whether considered as a separate nonstatutory mitigator or as a component of the statutory mental mitigators). See, e.g. Mahn v. State, 714 So.2d 391, 401 (Fla. 1998); Clark v. State, 609 So.2d 513, 516 (Fla. 1992); Nibert v. State, 574 So.2d 1059, 1063 (Fla. 1990); Songer v. State, 544 So.2d 1010, 1011-12 (Fla. 1989). [Contrary to the state's suggestion (SB 60), these cases were not overruled by Orme v. State, 25 So.3d 536, 547-50 (Fla. 2009). Orme simply restates a proposition which was recognized and relied upon in appellant's initial brief, p. 73-74; that the sentencer may accord a proven mitigating factor no weight, but only based on circumstances unique to the particular case showing that the mitigator had no relevance to the murder].

Did the prosecutor here argue to the jury that addiction and intoxication are not mitigating factors, or did he argue (as the state insists) that these mitigators should be given no weight because Poole's intoxication on the night of the crime and his longstanding drug and alcohol addiction were voluntary? Actually, this prosecutor did both. Either way, he misled the jury. This Court has held that 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 v. State, supra, 768 So.2d at 1055; Orme v. State, supra, 25 So.3d at 548. That is a far cry from what Mr. Aguero argued to the jury:

> Yet [Dr. Kremper] said that this ability to - - or capacity to appreciate the criminality of his conduct was impaired by drugs. And what I submit to you is, that ain't mitigating. And you don't have to consider it as mitigating. They definitely put on evidence 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.[5]

(12/1113)(emphasis supplied).

The prosecutor drew a credibility distinction between Dr. Chacko (whom he said the jury should not believe) and Dr. Kremper, whom he thought they could consider:

> 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 law because he used crack. But what you don't have to do is give it any weight.

(12/1114)(emphasis supplied).

Wrong. Under the principle stated in Coday, Trease, and Orme, if the jury found that the defense reasonably proved that Poole's cocaine intoxication impaired his capacity to control his conduct, then any nexus and relevance requirements are satisfied and the jury does have to accord weight to this mitigating circum-

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[5] One line from this quote - - "And you don't have to consider it as mitigating" - - was inadvertently omitted from appellant's initial brief at p. 72

stance; how much weight can be determined by individual jurors or by the jury as a whole. Mr. Aguero offered no reason specific to this case why Poole's drug and alcohol addiction, or his intoxication at the time of the offense, or his substantially impaired impulse control and extreme mental disturbance resulting from intoxication were not mitigating in nature or should carry no weight in the jury's life-or-death decision. [In fact, the trial judge found both statutory mental mitigators, giving one great weight and the other moderate to great weight, based in part on the evidence of Poole's addiction and intoxication (5/727-28)]. Instead, the prosecutor simply misled the jury that "that ain't mitigating", apparently because nobody poured the alcohol down Poole's throat for ten years or on the night of the crime, and nobody put a gun to his head and made him smoke crack cocaine.

The state on appeal makes a further attempt to rationalize the prosecutor's denigration of the mitigators as "fair comment" by asserting that juries do not like the intoxication defense (SB59-60). However, Johnson v. State, 769 So.2d 990, 1001 (Fla. 2000) deals not with death penalty mitigation but rather with the defense (which has not existed in Florida since 1999)[6] of voluntary intoxication to a charged crime. In Cummings-El v. State, 863 So.2d 246, 267 (Fla. 2003), defense counsel was not found to be ineffective for failing to present evidence of the defendant's drug use in a capital penalty phase where (1) Cummings-El did not

[6] See Fla. Stat. §775.051; Troy v. State, 948 So.2d 635, 643 (Fla. 2006).

tell counsel about his drug use until after the trial was over, and (2)Cummings-El claimed not to have been present at the scene of the crime. The state selectively quotes the Cummings-El Appendix II for the proposition that "Counsel acknowledged that drug abuse can have a double-edged sword effect on the jury, as juries are not sympathetic to junkies generally" (SB 59-60). The state omits the very next sentence - "Further [counsel] believed that drug abuse testimony would have been helpful if the Defendant had claimed to have committed the crime while in a cocaine rage". 863 So.2d at 267.

The instant case, in contrast, has nothing to do with defense counsel's strategic choice whether to present evidence in mitigation of Poole's drug and alcohol addiction and his intoxication at the time of the offense. Defense counsel chose to do so, and the evidence was strong enough to contribute to the trial court's finding of both mental mitigators. The problem here is the prosecutor's strategy - - which he used throughout his closing argument - - of denigrating the mitigators by falsely asserting to the jury that drug and alcohol addiction and intoxication - - if voluntary - - are not mitigating. See also this Court's recent decision in Delhall v. State, 95 So.3d 134, 167-68 (Fla. 2012). Assuming arguendo that the state's comment on appeal that juries "do not like" the intoxication defense also accurately describes their instinctive reaction to drug-and-alcohol related mitigation, then that is an especially compelling reason why the prosecutor's misleading them that it is not mitigating at all is harmful error

as to their penalty verdict.

Equally egregious is the prosecutor's misleading the jury that the evidence presented through numerous family members about Poole's background - - introduced to show that he was a worthwhile person with close family ties before his life went off the rails due to his drug and alcohol addiction - - is not mitigating. Again, there can be no doubt that the prosecutor was not merely arguing about the weight the jury should accord this evidence. Instead, he was seeking to persuade the jurors - - based on the "general rules" instructions that "3, your recommendation must not be based upon the fact that you feel sorry for anyone or are angry at anyone" and "6, your recommendation should not be influenced by feelings of prejudice or racial or ethnic bias or by sympathy" (12/1159) - - that they could not lawfully consider the family members' test-imony in their weighing of aggravating and mitigating circumstances:

> 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).

Contrary to what the prosecutor told the jury, "it is well settled that evidence of family background and personal history may be considered in mitigation"; whether good, bad, or a mixture of the two. Stevens v. State, 552 So.2d 1082, 1086 (Fla. 1989). Here, the prosecutor actually misled the jurors that they would be violating the law if they did consider the extensive mitigating testimony presented by Poole's family. See Delhall, 95 So.3d at 168 (calling the mitigation "excuses" was not a comment designed to recognize the validity of the mitigation and simply urge less weight; rather it "appears designed to invalidate the mitigation entirely").

Mr. Aguero's denigration of the mitigation in this case was not an isolated comment; it was a well thought out theme of his closing argument which was designed to - - and which likely did - - influence the jury's penalty verdict. However, as he did in his initial brief, undersigned counsel must acknowledge that the prosecutorial misconduct issue is largely unpreserved, and therefore only reversible if (1) it amounted to fundamental error; or (2) any curative effect of the judge's instruction to disregard the (objected-to) "all that crap" comment was undermined by Mr. Aguero's specious "apology" for it, or (3) defense counsel's

failure to object to Aguero's repeated misstatements that Poole's family background, drug and alcohol addiction, and intoxication at the time of the crime are not mitigating amounted to ineffective assistance on the face of the record, or (4) the cumulative impact of Aguero's closing argument denied Poole a fair penalty trial. Regarding Poole's claim that the prosecutor's faux apology undermined the curative instruction, the state correctly notes that nothing required Mr. Aguero to apologize for making the error of calling mitigating evidence crap (SB 55). Poole is not claiming that an apology was required, or that it compounded the prior comment because it was insincere. Instead, it compounded the prior comment because it piled on yet another improper comment. "I apologize to you, ladies and gentlemen. I get wound up when I talk about murders, especially heinous, atrocious, or cruel murders" (12/1112). [Mr. Aguero might as well have pointed a finger at Poole and said "He made me do it"]. 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). In the midst of a closing argument largely devoted to misleading the jury about the applicable law, Mr. Aguero - - he of 25 years experience as a capital homicide prosecutor - - called mitigating evidence "crap", and when the judge tried to ameliorate the error, Mr. Aguero injected his own personal emotional response to the crime and the defendant. If, as the instruction provides, the jury's penalty recommendation must

not be based on anger (12/1159), then surely it is improper for a prosecutor to express his own personal feelings of anger to the jury, especially when done to justify why he used the term "crap" in regard to mitigating factors. Mr. Aguero's overzealous prosecution of Mark Poole has already resulted in one reversal of his death sentence, and now it should result in a second reversal. "If attorneys do not recognize improper argument, they should not be in a courtroom. If [they] recognize improper argument and persist in its use, they should not be members of the Florida Bar."[7]

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

Proportionality review consists of two distinct prongs; "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." Even when this Court determines that the aggravation prong of the proportionality test is satisfied "we are next required to determine whether [the] case also falls into the category of the least mitigated of murders for which the death penalty is reserved." Crook v. State, 908 So.3d 350, 357 (Fla. 2005)(emphasis in opinion); see also Cooper v. State, 739 So.2d 82, 85 (Fla. 1999); Almeida v. State, 748 So.2d 922, 933 (Fla. 1999). The state, in its answer brief, ignores the

[7] Luce v. State, 642 So.2d 4 (Fla. 2d DCA 1994)(Blue, J., specially concurring).

two-pronged test. It focuses its arguments entirely on the aggravating factors, and fails to even attempt to meet its burden of showing that this is among the least mitigated of first degree murders (SB 65-73). This is not surprising in light of the trial court's finding of both statutory mental mitigators (giving one great weight and the other moderate to great weight), and in light of the substantial mitigating evidence presented in this case establishing Poole's low intelligence [IQ in the 70s, just above mental retardation], his brain damage which impairs his ability to control impulsive behavior, his longstanding drug and alcohol addictions, and his intoxication on the night of the crime. This Court has recognized impaired capacity and extreme mental or emotional disturbance as two of the weightiest mitigating factors. Santos v. State, 629 So.2d 838, 840 (Fla. 1994); Rose v. State, 675 So.3d 567, 573 (Fla. 1996). So - - while the state is correct that Poole's aggravators "include two of the most weighty under Florida law, HAC and prior violent felony" (SB72)[8] - - the state blithely ignores the fact that this case also contains two of the weightiest mitigators.

The state says "What Poole is essentially asking this Court to do is reweigh the aggravating and mitigating circumstances . . ." (SB 65). No, Poole is asking this Court to apply the two-pronged proportionality test. It is the state which is ignoring the great weight and moderate-to-great weight which the trial

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[8] Poole relies on his initial brief, p. 86-92, with regard to his contention that the trial court's finding of HAC, and/or the weight afforded it, are unsupported by the evidence.

court gave the two mental mitigators. This is illustrated by the comparison cases which the state improvidently relies on at p.71-72 of its brief.[9] In Singleton, the trial court found the mental mitigators but there is no indication what weight he accorded them. 783 So.2d at 972-73. In Rose, the trial court rejected both statutory mental mitigators, and this Court found that the rejection was supported by competent, substantial evidence. 787 So.2d at 804. In Duest the trial judge neither found nor instructed the jury on the statutory mental mitigators. 855 So.2d at 38 and 41-43. In Rogers, the trial judge found and gave "some" weight to impaired capacity, and did not find the extreme mental or emotional disturbance mitigator. 783 So.2d at 987 and 994-97. In Orme the judge found both statutory mental mitigators and gave them "some" weight. 677 So.2d at 261. Similarly, in Spencer the trial judge found both statutory mental mitigators and gave them "some" weight. 691 So.2d at 1063-65. [In Spencer, this Court commented on appeal that "[i]t appears that Spencer's real complaint involves the weighing process and the weight accorded the mitigating factors". 691 So.2d at 1064. This Court determined that "[a]lthough the two statutory mental mitigators were found . . . the judge did not ascribe great weight to them based upon the other evidence present . . . ." 691 So.2d at 1065]. Finally, in Johnston, the trial court found impaired capacity, but there is no

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[9] Singleton v. State, 783 So.2d 970 (Fla. 2001); Rose v. State, 787 So.2d 786 (Fla. 2001); Duest v. State, 855 So.2d 33 (Fla. 2003); Rogers v. State, 783 So.2d 980 (Fla. 2001); Orme v. State, 677 So.2d 258 (Fla. 1996); Spencer v. State, 691 So.2d 1062 (Fla. 1996); Johnston v. State, 863 So.2d 271 (Fla. 2003).

indication what weight he gave it, and he did not find extreme mental or emotional disturbance. 863 So.2d at 278 and 286.

In contrast, Poole has no quarrel with the weight the trial judge gave the statutory mental mitigators he found. In none of the comparison cases relied on by the state did the trial judge both find and give great weight and moderate-to-great weight to the mental mitigators. By inaccurately analogizing this case to cases in which the mental mitigators were not found or were not accorded significant weight, it is the state - - not Poole - - who is essentially asking this Court to reweigh the mitigating evidence. Poole is simply asking the Court to apply the two-pronged proportionality test, without altering the trial court's attribution of weight (except as to the HAC aggravator for the reasons discussed in his initial brief), and to find that this is not among the least mitigated of first degree murders.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, and that contained in his initial brief, 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 e-mailed to Assistant Attorney General Scott A. Browne, at CrmappTPA@myfloridalegal.com, on this 6th day of February, 2013.

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,

/S/STEVEN L. BOLOTIN
Assistant Public Defender
Florida Bar Number 0236365
P. O. Box 9000 - Drawer PD
Bartow, FL 33831
appealfilings@pd10.state.fl.us
sbolotin@pd10.state.fl.us
kstockman@pd10.state.fl.us

HOWARD L. "REX" DIMMIG,II
Public Defender
Tenth Judicial Circuit
(863) 534-4200

SLB/kas