

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 14-582

DANE PATRICK ABDOOL

Appellant,

v.

STATE OF FLORIDA

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT OF THE NINTH JUDICIAL
CIRCUIT, IN AND FOR ORANGE COUNTY, STATE OF FLORIDA**

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal of the circuit court's denial of Mr. Abdool's motion for post-conviction relief brought pursuant to Florida Rule of Criminal Procedure 3.851.

Citations shall be as follows: The record on appeal from Mr. Abdool's trial proceedings shall be referred to as "TR" followed by the appropriate volume and page numbers. The supplemental record on appeal from Mr. Abdool's trial shall be referred to as "TRS", followed by the volume and page numbers. The post-conviction record on appeal shall be referred to as "R" followed by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

Dane Abdool has been sentenced to death. The resolution of issues involved in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims at issue and the stakes involved. Dane Abdool, through counsel, respectfully requests this Court grant oral argument.

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STATEMENT OF THE CASE

Procedural History

Mr. Abdool was convicted on a single count of first degree premeditated murder following a jury trial in February of 2008. His penalty phase took place on February 20-21st and 25th of 2008. The jury recommended death by a vote of 10 to 2. The Spencer Hearing took place on April 10, 2008 and no additional evidence was presented. On May 12, 2008, the Court sentenced Dane Abdool to death on the sole count of the indictment.

On direct appeal, this Court affirmed Abdool's convictions and sentence of death. *Abdool v. State*, 53 So.3d 208, (Fla. 2010). The United States Supreme Court denied certiorari. *Abdool v. Florida*, 132 S.Ct. 149 (2011). Abdool timely filed a Motion to Vacate Judgments of Conviction and Sentence.

The lower court conducted the evidentiary hearing on July 8-12, 2013; August 13-14, 2013; and August 27-28, 2013. The lower court denied Abdool's 3.851 Motion on January 13, 2014, and his Motion for Rehearing on February 21, 2014. This timely appeal follows.

STATEMENT OF FACTS

Dane Abdool, at the time of the crime, was a 19 year old with learning disabilities and brain damage. These deficiencies substantially affected Abdool's actions at the time of the crime and his behavior in the following days. Abdool

came from an extremely dysfunctional family background, a fact which was not presented to his jury. The picture presented at trial was skewed by trial counsel's exclusive reliance on biased information gained from Abdool's mother. Because trial counsel failed to independently investigate Abdool's mitigation, potential pretrial motions, and other issues, his jury was deprived of a full and accurate understanding of his background and the circumstances of the crime.

Facts of the Crime:

On February 25, 2006, police discovered the body of Amelia Sookdeo near State Road 545. Initially, when Ms. Sookdeo was reported missing by her mother, the police were informed that Ms. Sookdeo had plans to meet with 19 year old Dane Abdool the night she disappeared. *Abdool v. State*, So.3d 208, 212 (Fla. 2010). Police spoke with Abdool on February 28, 2006. R15:380. During that interview, police questioned Abdool regarding his relationship with Ms. Sookdeo. They also sought to obtain a DNA sample from Abdool. R15:381. The police did not inform Abdool that they had located Ms. Sookdeo's body and did not inform him that they were investigating a homicide. R29:27. They led him to believe that Ms. Sookdeo was still missing. *Id.* They discussed with him the DNA swab and discussed with him that she was pregnant.¹ *Id.* The police told Abdool that the

¹ Ms. Sookdeo had claimed that she was pregnant with Abdool's child. However, no evidence established that Ms. Sookdeo was, or ever had been, pregnant. *Abdool v. State*, 53 So.3d 208, 214 fn. 4 (Fla. 2010).

DNA swab was for paternity purposes. *Id.* They did not have a court order nor did they advise him of his right to refuse. *Id.* He asked if he needed a lawyer and the police replied “not unless you want to fight paternity”. *Id.* Eventually, Abdool agreed to give the sample. *Id.*

The Confession:

On March 2, 2006, police went to Team Redline, Abdool’s workplace, and executed a search warrant for his vehicle and the premises. R15:364. They also executed a search warrant on his mother’s home. Police believed that they had probable cause to arrest Abdool for the murder of Ms. Sookdeo. R15:384-85.

Detective Gammill spoke with Abdool at Team Redline and convinced him to come with him to the police station. Abdool agreed to go to the police station as long as Gammill informed his mother because she wanted to be present during any questioning. R15:368. On the way to the police station, Abdool was handcuffed. R17:592. Detective Gammill engaged Abdool in a conversation about cars. R29:24. During their conversation, Abdool’s cell phone rang several times. R15:367. Detective Gammill would not let Abdool answer, and instead took the phone and shut it off. *Id.* At the police station, he was placed in an interview room and given a form he was told to read over. R29:24. He was not told that it was his Miranda warnings. *Id.* At some point during Abdool’s detention, Gammill left the

police station. When he returned, he lied to Abdool and told him that the police had spoken to his mother and she was on her way. *Id.*

While the warrant was being served at Team Redline, his mother, Nazreen Mohammed was at her home, where the police were also serving a search warrant. Ms. Mohammed had tried to reach Abdool that day because she was concerned for his health; he appeared to have lost 10 pounds in a week and had dark circles under his eyes. R19:897-898.

At some point, another Ocoee police officer who knew Ms. Mohammed personally told her that her son was in custody and to get a lawyer. R19:900. Ms. Mohammed contacted Eric Barker, a lawyer with the Nejame Law Firm. R19:901. Barker was informed that Abdool was at the Winter Garden Police Department being questioned by the police. R22:1374. He was asked to go to the police station and prevent Abdool from speaking with the police. R22:1375. Barker arrived at the police station and told the front desk that he was Abdool's lawyer and that he wanted to speak to his client immediately. R22:1376. He was not allowed to see Abdool immediately. In fact, he was made to wait two or three hours². R22:1376. Barker went up to the desk officer four separate times and attempted to speak with his client. R22:1377.

² Abdool was placed in the interview room at approximately 1:25 pm. R29:24. Ms. Mohammed testified that Barker arrived at the police station at approximately 3:20pm, ten or fifteen minutes after she arrived. R19:901. In the video, a detective

While this occurred in the front lobby, Abdool, who was in an interview room, was not informed that a lawyer arrived on his behalf, even though Detective Gammill and/or Officer McGhee exited the interview room at various points during the interview. R29:24. Police continued to discuss cars with Abdool. *Id.* They eventually read him his Miranda warnings, several hours after he was put in the interrogation room. *Id.* Initially, Abdool denied having seen Ms. Sookdeo prior to her disappearance. *Id.* However, as the interview progressed, he eventually admitted he was responsible for Ms. Sookdeo's death, that they had argued and he attempted to scare her. *Id.* During the interview, he told police where he bought the duct tape and the gasoline. *Id.*

Barker was eventually allowed to see Abdool in the interview room, but by that time the questioning had concluded and Abdool was upset and crying. R22:1378. He had already given a confession with many incriminating facts, including where he purchased the duct tape and gasoline, facts the police had been unaware of up until then. Had Mr. Barker been allowed to speak with Abdool, he would have advised his client to invoke his rights. R22:1379.

The Trial:

entered the room at approximately 3:05pm. R29:24. Another officer entered shortly afterwards to photograph injuries on Abdool. *Id.* At that time, Abdool had not yet made any incriminating statements. Abdool was informed that his mother is at the station at 4:55pm. *Id.* She was allowed to see him at 4:58 pm and Mr. Barker saw him immediately afterwards. *Id.* He had already confessed.

Kelly Sims and Patricia Cashman were hired by Nazreen Mohammed to represent Abdool at trial. The defense team's theory at the guilt phase was that Abdool did not intend to kill the victim, but instead intended to scare her and that her death was an accident. R13:20.

During jury selection, some jurors had questions as to whether Abdool was a Muslim. For example, one juror got the "impression" looking at Abdool that "he's probably of a background that practices what Christian terms would be Old Testament type procedure" and went on further to state that practices such as stoning and burning are "practiced commonly among Muslim people today". STR6:618. This juror went on to express concerns regarding "his racial background". STR6:620. The juror ultimately advised the trial court that "if this were a matter of a cultural-type thing, that he was acting as a part of a cultural belief or religious belief or something, it would certainly affect me." STR6:620. The juror volunteered these statements and trial counsel did not raise race or religion as a part of their voir dire, in spite of this incident. They never questioned any other juror to see if others felt the same way or had those concerns.

The video-taped confession was the primary evidence against Abdool in the guilt phase and used to support premeditation. Further supporting the State's theory was the testimony of Juan Bailey, who the State used to argue that there was more than one application of gasoline and that the flame was likely in contact with

the victim. *Abdool v. State*, 53 So.3d 208, 212 (Fla. 2010). After hearing all of the evidence, the jury reached a verdict finding Abdool guilty of first-degree murder. *Id.* at 214.

Penalty Phase:

The defense had several of Abdool's friends and relatives testify on his behalf. *Id.* The testimony painted the picture of a loving family and a young man who was very generous and kind, somewhat shy, immature and child-like, but very hard-working. *Id.* The defense also presented the testimony of two experts: Nancy Cowardin and Dr. Karen Gold. *Id.* at 214-215. Nancy Cowardin evaluated Abdool to determine his education level. *Abdool* at 214. Ms. Cowardin testified that Abdool's IQ was in the normal range but that he had attention deficit disorder, dyslexia, and a mild learning disability. *Id.* at 215. Ms. Cowardin stated there was no connection between her conclusions regarding Abdool's educational level and the crime. *Id.*

Dr. Karen Gold, a clinical and forensic psychologist testified that Abdool was immature, is intellectually limited but not retarded, has attention deficit disorder, is hyperactive, has impulse control issues and obsessive compulsive

disorder, is meticulous, and has grandiose delusions, and that his emotional age is younger than his actual age. *Id.*³

The jury recommended death, by a vote of ten to two. *Id.* After a *Spencer* hearing where no additional evidence was presented, the trial court sentenced Mr. Abdool to death, finding two aggravators: HAC and CCP.

Facts Developed in Post-Conviction:

In post-conviction, a vastly different picture of Abdool and his family emerged, as well as evidence demonstrating that trial counsel's investigation, and the strategic decisions made after the inadequate investigation, were unreasonable.

A. Motion to Suppress:

Trial counsel's theory at the guilt phase was that Abdool did not intend to kill the victim, but instead intended to scare her and that her death was an accident. R13:20. Mr. Sims believed that by arguing accident, he would be able to create some lingering doubt in a circumstantial case. R13:32. He recognized that lingering doubt is not an actual mitigator, but he explained that "it's there underlying everything and let's see if we can get a life sentence and say this is a circumstantial case, they haven't proved everything, blah, blah, woof, woof, and then we'll go for life". R13:32-3.

³ The State countered this testimony with the testimony of Dr. Daniel Tressler, a forensic psychologist, who stated that in his opinion Abdool did not have impulse control disorder and that there was no evidence that he was substantially impaired at the time of the offense. *Abdool* at 215.

Trial counsel admitted that the video-taped confession was quite damaging, especially because Abdool appeared very detached on the video. R13:27-28; R28:2089-90. The confession allowed the police to locate where he purchased the gasoline. R28:2090. It also allowed the State to argue at trial that Abdool was cold. R13:28; R28:2089-90. In spite of this, trial counsel stated that they did not move to suppress the statement. R26:1919. They opted to keep this admittedly damaging confession because “the jury needed to hear his voice”. R26:1917.

Trial counsel testified in post-conviction proceedings that they did not interview any witnesses at Team Redline where the search warrant was served to learn the circumstances surrounding Abdool being taken into custody. R13:27. They also did not consider investigating or hiring an expert on interrogations or psychological coercion to address Mr. Abdool’s confession, either to move to suppress it or explain the circumstances to a jury. R13:27. There was no attempt to investigate or litigate a motion to suppress in any way. R13:27, 36.

Terrance Lenamon, a Florida capital trial attorney with 20 years of experience and a board certification in criminal law, testified as an expert in prevailing norms. R15:265. Mr. Lenamon testified that “prevailing norms require a lawyer to exercise all due diligence in suppressing any unfavorable evidence. And that includes statements that a defendant may have made in regards to his involvement...So the prevailing norms require you to investigate, obviously look at

and see exactly what the circumstances were, to research the issues in regards to whether there is a legal reason that you could suppress the information and then exercise due diligence in filing a motion to suppress information.” R15:289. The 2003 ABA Guidelines were in effect at the time of Abdool’s trial and they are one of the sources for prevailing norms. R15:271-272.

If a motion to suppress is not granted, trial counsel could still argue to the jury that the confession was involuntary, through the use of expert testimony if necessary. R15:292. Even if trial counsel had a reason for wanting the confession to be heard, trial counsel is not absolved of his duty to litigate the admissibility. R15:337. Mr. Lenamon further explained: “Now, ultimately, you can change your mind... remember, there’s a lot of things going on with that statement. You [exclude] that statement, it may change the perspective of the state attorney on whether they are [going to] continue to seek death or not....But...you have a responsibility to exclude that statement under the norm.” R15:337.

In post-conviction, Dr. Gregory DeClue, a forensic psychologist, testified about the confession. R16:499. Dr. DeClue is a licensed Florida psychologist who has worked in the field of police and forensic psychology since the 1980’s. He was accepted as an expert in forensic psychology, police psychology and the psychology of interrogations and confessions. R16:503. Dr. DeClue reviewed Detective Gammill’s report, Abdool’s recorded interviews and transcripts,

testimony and depositions of Drs. Gold and Cowardin, Abdool's school records, Dr. Olander's neuropsychological test results and the depositions of McGhee and Gammill. R16:512. He was also present during their post-conviction testimony. *Id.* Dr. DeClue also conducted an interview with Abdool and administered the Gudjonsson suggestibility scale. R16:513-514.

The Gudjonsson test was designed to mimic what occurs in a police interrogation and was designed by a former police officer who became a psychologist. R16:514-515. The average total suggestibility score is 7.5, but Abdool's was twice that number, at 15. R16:518. Dr. DeClue concluded that Abdool "showed considerably more suggestibility than the average person does. And that would be an indication that he is a suggestible person and that would make him vulnerable... to police deception." R16:518. Dr. DeClue noted that police told Abdool in the interview of February 28th that they were questioning him about a missing person. R16:525. As of that time, the police had already identified the body as Ms. Sookdeo. R16:524. Because of the autopsy, police were aware that the victim was not pregnant. R16:523-524.

Dr. DeClue concluded that Abdool was "vulnerable to police persuasion for a number of reasons and that police used trickery to get him to provide the biological sample." R16:530. Abdool was vulnerable because of his results on the suggestibility testing, because of his young age at 19, because he had no previous

experience in criminal cases, and because he had learning difficulties. R16:531. He also believed that police had downplayed the significance of the Miranda waiver, by giving a very simple presentation, which “desensitizes the person to the importance of it”. R17:640-41. Abdool was given the form, but the form did not indicate the charge, which Dr. DeClue states was part of the police deception at the interview. R17:642-643. Abdool was read his Miranda warnings, and signed the form without reading it himself. R17:646-7, 649.

B. Jury Selection and Arson Testimony:

Trial counsel did not raise any religious issues during voir dire as it related to Abdool being perceived as a Muslim based on his name or his appearance. R28:1926. Ms. Cashman believed that they did not need to raise the issue, even though at least one juror thought Abdool was Muslim and mentioned it. R28:1926. She believed that asking those types of questions to the panel as a whole would not elicit reliable responses. R28:1926-1927. However, during Mr. Sims’ testimony, a handwritten note from his file with a list of jury selection topics was entered into evidence. R13:43. One of the topics on the list was racial prejudice. *Id.* The list did not include the topics of religious prejudice or cultural issues. *Id.*

Trial counsel did not even consider asking the jury about religious or cultural issues during jury selection. R13:43. When asked why, Mr. Sims responded that “once we saw the jury pool and talked to everybody individually

and whatnot, then we decided not to, felt it wasn't necessary..." R13:45. He went on to clarify his answer by giving an example of another case he had tried in Seminole County "with a fellow that was just a lot bigger than Dane that looked just like him...and we did not – once the jury was there, we could see it in their eyes, we just didn't discuss that with them." R13:45. He later explained that another reason was that he wanted the jury to listen to their arguments "so we are not gonna just offend you and all you haters." R13:158.

Trial counsel did not hire a jury selection expert because "it wasn't necessary and we had compiled questions and issues that we wanted to address with the jury. And we believed that based on our collective years of trying cases and trying capital cases that [we] were competent to select a jury in this case." R26:1931. Cashman stated that trial counsel made a motion for a jury questionnaire to be used, but that motion was denied. R26:1926. Cashman further acknowledged that the trial court had invited them to submit an alternative proposed questionnaire, but counsel did not do so. R26:1927. The proposed questionnaires did not address any racial or cultural issues. TR5:406-417. The questionnaires asked only about jurors' religious preferences or whether they attended church. *Id.*

When asked about the importance of questioning jurors to find out their biases and to select an informed jury, Lenamon testified that "there is clearly

prejudice that exists out there and it's the lawyers responsibility to get to the bottom of that and to open up and ask questions about that to jurors." R15:281. Attorneys should not rely on gut instinct that the jury does not harbor feelings of prejudice. R15:280. Asking questions about religion is equally important, especially if the perception is that the client's religion is something other than Christianity. R15: 285. Prevailing norms require counsel to be familiar with pre-trial publicity about the case prior to conducting jury selection and that includes being familiar with commentary from the public on the case. R15:286-289.

At the evidentiary hearing, Toni Blake, a professor of psychology and a jury consultant testified about the importance of jury selection in order to weed out perceived biases and prejudices in order to select an unbiased and informed jury. Ms. Blake opined that, based on her review of jury selection, the guilt and penalty phase of the trial, and other materials including news media from the time, "counsel could have benefited significantly from a jury consultant". R20:1125-1126. She explained that "nationality or perceived nationality...was a major issue". R20:1127.

Ms. Blake explained that many names on the witness list, "Mohammed, Abdool, Abraham, and Hosein" would be perceived by a typical juror as being Muslim names. R20: 1127-28. "There is a perception of whether it is correct or not, there is a perception that people of the Muslim faith are more likely to punish

women... as part of a cultural experience as opposed to there's not a perception as to many of the other religions and nationalities that we deal with in the court system." R19:1130-31. She explained that it is "not reasonable based on the data, nor do I think that that would be reasonable based on the experience counsel should have by the time they do a death penalty case" for counsel to disregard any of these issues, and opined that it is important to address them either through verbal voir dire or through a questionnaire. R20:1132-33.

In Ms. Blake's review of jury selection, there were no questions designed to identify any perceived bias or prejudice against Muslims or Trinidadians or people with dark skin. R20:1140. Ms. Blake also reviewed an Orlando Sentinel Article from 2006 that described the crime and had Abdool's photograph. R20:1139. The comments after that article demonstrated anti-Muslim, anti-Trinidadian, and anti-immigration sentiments. *Id.* It is important for counsel to address these comments in light of the fact that members of the potential jury pool could have written or at least read the comments. *Id.*

Furthermore, during jury selection, a juror explained that because of Abdool's name and skin color he perceived him to be Muslim. R20:1161. Even if trial counsel had been unaware of a potential bias against Muslims, that incident should have alerted counsel to the need to ask those questions because "if one

person raises their hand and asks that question, there's always ten or twenty [others] out there thinking the same thing.” *Id.*

Compounding the religious issue was the manner of death in this case. Because the cause of death was conflagration, and the issue at trial was whether it was premeditation or an accident, the testimony of the fire marshal was critical. Juan Bailey testified that the flame would have had to be within inches of, if not in contact with, the victim. He also testified that the evidence supported multiple applications of accelerant. *Abdool v. State*, 53 So.3d 208, 212 (Fla. 2010). Trial counsel did not consult with an arson expert at all, either to assist in preparation for cross-examination or to present evidence regarding the origin of the fire. Because they did not consult with anyone, they had no knowledge of what kind of testimony an expert could have provided. R28:2105.

Mr. John Lentini, an arson expert with over 30 years of experience, was hired by post-conviction counsel to review evidence and to determine whether the testimony and arguments made at trial were an accurate reflection of the evidence. R26:1836. He has investigated more than 2,000 fires. R26:1828. The evidence from the crime scene does not support multiple applications of gasoline and instead is “absolutely” consistent with a single application of gasoline. R26:1837-8.

Additionally, the testimony of Juan Bailey at trial that Abdool would have had to be almost in contact with the victim for the gasoline to ignite is inaccurate.

R26:1839. He could have been up to a foot away and the vapors still would have ignited. *Id.* The prosecutor also argued that the victim was lying down when she was splashed a second time. R26:1842. This is also not supported by the evidence. *Id.*

C. Mitigation Investigation:

The mitigation investigation in Abdool's case was fundamentally flawed and limited due to the influence of Nazreen Mohammed and trial counsel's failure to independently investigate the information they received regarding Abdool's background. As a result, an inaccurate and whitewashed picture of Abdool's life was presented to the jury. The evidence failed to demonstrate the true dysfunctional dynamic of Abdool's family and failed to explain to the jury that 19 year old Dane Abdool suffered emotional abuse and neglect and had cognitive impairments that explain and mitigate his actions at the time of the crime.

i. Mitigation investigation prior to trial:

The defense theory for penalty phase was that Abdool was slower and childlike and had educational difficulties and lagged behind. R13:50. Sims stated that he hoped that "it would have made sense once they learned all that that maybe he doesn't understand the ramifications of his actions completely and would have made such a boneheaded move." R13:50-51. Trial counsel hired Toni Maloney for their mitigation investigation.

Maloney was tasked with “interviewing the client, collecting his social history records, interviewing his family, friends, acquaintances, traveling to his homeland to Trinidad to interview folks there. Typical mitigation investigation.” R13:177. At the time she investigated Abdool’s case, Maloney was also working on another capital case when she traveled to Trinidad with Abdool’s mom, Nazreen Mohammed. R13:183,186.

Maloney testified that it is important to develop “rapport and trust” with the family of the defendant in order to collect accurate information, because families of capital defendants often put a “spin on their family and their lives”. R13:174-75. Maloney utilized Abdool’s mother, Ms. Mohammed, to assist her in the mitigation investigation.

Ms. Mohammed was very active in her son’s case. Maloney testified that Ms. Mohammed “did a lot of independent research on her own. [S]ome of it, I guess you could describe it as legal research or issues she thought needed to be explored. [S]he did a lot – I think it must have been explained to her before I became involved in the case the kinds of things that we would want to – the team would want to know about Dane and his life and she took it upon herself to compile a lot of information. Photographs, family history, trying to tell his story.” R14:227. It was primarily Ms. Mohammed, not Maloney, who gathered important items that were later used in the penalty phase. This is supported by members of

the family. For example Shereen Ramkisson, Ms. Mohammed's sister testified, "[S]he was actually gathering all the information...and she was helping them out. She would go to the office and she would be there with them all the time." R17:780.

Ms. Mohammed advised Maloney which family members to speak to. R19:906. Ms. Mohammed arranged the interviews and places where witnesses could congregate so that Maloney could meet with them in one location. R14:223 and R19:906. Family members who were interviewed were aware that Ms. Mohammed traveled with Ms. Maloney to Trinidad. R13:186. Maloney recalled that when she interviewed family members, Ms. Mohammed was in the same location and the witnesses "knew I traveled there with her and she was there and waiting for me to finish my business and we would leave together." R14:237.

Ms. Mohammed was present for Maloney's interview of Patrick Abdool, Dane's biological father. R17:749. The interview took place at his sister's house outside on the back porch. *Id.* The porch was approximately 10 ft. by 15 to 20 ft. R17:750. Patrick, his mother, and his sister, all sat at one table on the porch and were interviewed one by one as they all sat next to each other. *Id.* Ms. Mohammed was also on the porch and could hear the questions and answers. R17:751;R19:906-907. Before his interview, Patrick Abdool was told to say that he drinks alcohol. R17:752. While he does drink alcohol, he did not consider

himself an alcoholic. R17:751. He was wondering why he was told to say that and figured that they were trying to put the blame on him for his son's situation. R17:752.

Also, Ms. Mohammed told Fayrial Hosein, another family member, that Ms. Maloney was going to ask questions about her relationship with Dane Abdool and to just talk about "the good things that Dane would do for me and the family and stuff like that." R19:1023. Ms. Mohammed told her to leave out anything bad about the family. *Id.* Ms. Mohammed's relationship with the trial lawyers affected how Ms. Hosein interacted with the trial lawyers and how she testified. R19:1026. Because of Ms. Mohammed's relationship with the defense team, Ms. Hosein felt that "there was no confidentiality between myself and the investigators or the lawyers." *Id.* This made her hesitant to tell the lawyers things about Ms. Mohammed and her husband, Bing⁴. *Id.*

Because Ms. Mohammed was present during the interviews, Rian Abdool, Dane's brother, did not feel like he could openly share information. R19:1059. He was afraid it would "stir up family turmoil, cause a lot of tension between my mother and stepfather." *Id.*

Yazeed Mohammed, Nazreen Mohammed's brother and Dane's uncle, described that whenever he met with the lawyers, Ms. Mohammed was there and

⁴Bing is the nickname for Mr. Haseeb Mohammed, Dane Abdool's stepfather.

she did most of the talking. R20:1092. Neither the lawyers nor Maloney ever sat down one on one with Yazeed to ask him questions about the family. R20:1093. Ms. Mohammed told family members that if they were asked if Patrick was an alcoholic or a gambler they should say yes. R20:1094.

Nazreen Mohammed testified that the defense team asked her to assist in gathering records and information⁵. R19:905,922. Ms. Mohammed went to the school and pulled all of Abdool's records. *Id.* She accompanied Maloney on the trip to Trinidad. R19:906. She told Maloney what family members she should talk to and she helped set up the interviews. *Id.* She was present for the interview of Patrick and his mother and sister. *Id.* She could hear the interview questions and answers. R19:906-7. Prior to the interviews, she had told the witnesses what kind of information they were expected to give from her point of view. R19:937.

Trial counsel also presented mental health mitigation, but neither Dr. Gold or Ms. Cowardin could not make a connection between their conclusions and the crime. *Id.* Trial counsel conceded the mental health experts that testified at trial failed to offer the jury a connection between Abdool's educational difficulties and the crime. R13:56.

⁵ At the time of the post-conviction evidentiary hearing, Ms. Mohammed was approximately half way through serving a five year federal sentence for bank fraud and embezzlement. *USA v. Mohammed*, 6:10-cr-276-JA-DAB.

The picture of Abdool painted at trial was of a generous and kind, somewhat shy, immature and child-like, but very hard-working young man who grew up a Christian with his mother and Muslim stepfather, who loved and cared for him and provided for his needs. The witnesses who testified to this version of Abdool's life were witnesses provided to trial counsel by Abdool's mother, Ms. Mohammed. R26:1948. In post-conviction, this picture proved to be false.

ii. Mitigation Evidence at Post-Conviction of Family History:

Post-conviction counsel discovered that the portrait painted at trial of Abdool's family and home life was actively misrepresented by Ms. Mohammed's influence in the mitigation investigation. Although Abdool does have loving family members, his family system is extremely dysfunctional and had an adverse effect on his development.

Nazreen Mohammed was raised by her Aunt Seleepha and Uncle Hawk until she was 16. R19:882. She thought Seleepha was her mother and did not know Evelyn Mohammed was her mother until she was four or five years old. R19:885. Hawk was abusive towards Seleepha. R19:882. He cheated on her, drank and partied, and hit her with his fists, tools, and a broomstick. R19:882-83. When they finally separated, Nazreen went to live with her mother. R19:886.

Patrick Abdool, Dane Abdool's father, came from a large family with six brothers and a sister. R17:734-35. He had to leave school to help support such a

large family. R17:735. He met Nazreen on a vacation on the island of Margarita when he was about 26 or 27. *Id.* They dated for a little over a year before they got married. R17:736. Patrick was described by family as an unsophisticated man who was not very smart. R17:721. For example, he did not understand what a dinner reservation was. R17:722. Patrick worked a menial job at a snack food company, where he still works to this day. *Id.* Nazreen was always ambitious and wanted so much more in life than what she had. R17: 723. Patrick, on the other hand, was content with the simple life he had with his wife and his children. *Id.* Nazreen handled the finances in their marriage and gave him an allowance from his own paycheck. R17:736-38.

By all accounts, Patrick was a good, loving father to his two sons Dane and Rian. R17:703; R17:721;R17:766. He lavished them with affection. R17:721. The children waited at the gate for their father to come home. R17:721. He did cartoon voices and always made the children laugh. R19:957.

There came a time in their marriage where Nazreen began to act differently. R17:739. She began dressing in new clothes and had a different hairstyle. *Id.* Nazreen began seeing Bing and introduced him to Patrick as a friend of hers. *Id.* They first met at a drag racing track called Waterfield. *Id.* After that, Patrick would see Bing a lot of times when he and Nazreen went out to dinner. R17:740. “Everywhere we go he [was] there. And I began to ask the question if something

is going on.” *Id.* He was concerned they were having an affair. *Id.* Those concerns were well founded.

Shameen Sookal, Nazreen’s cousin, recalled that one morning she had gotten a flat tire and went to their house unannounced to borrow a car. R17:704. Patrick was at work and she saw Bing and Nazreen cooking in the kitchen. *Id.* It was 7:00 in the morning and she thought it was strange that Bing was in the house so early when Patrick wasn’t there. *Id.* Eventually, Nazreen left Patrick and took Dane and Rian to Chaguanas. Bing moved in with Nazreen and the two boys. R19:889. Nazreen sent the boys to a Muslim school during that time. R19:890.

Patrick did not want to lose his family. R17:741-743. Dane’s Uncle Yazeed described seeing Patrick at a gas station on a Sunday morning when he dropped his daughter off at Sunday school. R19:1072. Patrick started crying and told him that Nazreen was having an affair and wanted a divorce. *Id.*

While still legally married to Patrick, Nazreen married Bing in a religious Muslim ceremony in Trinidad. R19:890. Shortly thereafter, Nazreen and Bing moved the boys to the U.S. R19:891. It was only then that Nazreen sent formal divorce papers to Patrick, which he signed because it was the only way Nazreen would allow him to have contact with his children. R17:747. After Patrick had already signed the papers, he discovered that Nazreen had written that there were

no children born of the marriage. R17:748. It was a couple more years before he was able to speak with his sons. R17:745.

Dane's life with his step-father, Bing, was markedly different from what he had experienced with his biological father. After moving to the United States, Nazreen and Bing had a child together, Evelyn, who was born in 1999. Nazreen chose to put her new husband as a higher priority than her sons Dane and Rian because Bing would threaten that he was going to take their daughter Evelyn and leave. R19:970. One family member observed Nazreen making Rian and Dane do things for Bing like get him water to take his pills. R17:711. Dane and Rian were made to massage Bing's feet and hands. R19:1080. Concerned family members observed Dane working long hours in his step-father's shop, every day after school and also on weekends until late at night. R17:711-12; R19:994;R19:1014.

Evelyn Mohammed, Dane's maternal grandmother, described one incident that occurred when the family was living with Bing in Chaguanas when the house flooded and Bing had some clothing on a line downstairs. R19:987. The family had large dogs that stayed in the basement and routinely went to the bathroom on the floor. Dane, who was 7 or 8 years old at the time of the incident, was made to wade through the dog feces-laden flood water to get the clothing for Bing. R19:988. He had to tiptoe and the water was up to his chin. *Id.* Dane cried and his grandfather told him to get hot water and bathe. R19:989.

Evelyn described that during one of her first visits to the States, there was an incident where she was lying in bed with Dane and Rian and was singing to them. R19:990. Bing came in very angry and told her not to sing to them because they were too big. *Id.* Bing would get upset when Evelyn made breakfast for the boys. R19:991. He nicknamed her “milk and banana” as a way to make fun of her. R19:992. Bing threw her out of the house after she bought the boys Pokemon cards. *Id.* She observed Bing curse at Dane when he thought Dane was not helping around the house. R19:994. On more than one occasion, Nazreen would show the wedding video of her and Patrick and would make fun of Patrick and call him stupid. R19:962. Nazreen and Bing would both laugh. R19:963. Dane was present and he was approximately 10 years old when this started to occur. *Id.*

Rian Abdool, Dane Abdool’s younger brother, testified about how his mother would speak negatively about his father Patrick. R19:1050. She would say that he was an alcoholic, a gambler and not worth anything. *Id.* She referred to him as the “sperm donor.” *Id.* Dane expressed to his brother his frustration that he was separated from Patrick and always expressed a desire to have a relationship with his father. R19:1052. Any contact that did take place with their father came through their Uncle Yazeed. R19:1049.

Yazeed Mohammed, Nazreen’s brother, described that Dane mourned for his father. R20:1077. Yazeed felt that communication was important. *Id.* He

arranged for the children to contact their father, Patrick. R20:1077. However, Nazreen and Bing found out that Yazeed was helping the boys talk to Patrick and they were furious. R19:1078. They called Yazeed and cursed at him and threatened to report him to Immigration. *Id.* They stopped allowing the boys to come and see him for a while. *Id.*

Several family members were afraid of angering Ms. Mohammed. R17:785;R19:1021. “She had the ability to make you so comfortable with her that you would divulge information, and then she would be the one to divulge that information to everyone else. And she –she would try her hardest to hurt you in the process if she was upset with you.” R19:1021. Nazreen would also use her sons, Dane and Rian, as weapons against the family and she would threaten to cut off communication with them if she was angered or upset. R17:785.

Several family members described Dane’s life-long troubles with school. Like his father Patrick, Dane was described as being simple and slow. R19:1077. Dane was never mature for his age. R17:772. He was “like a big kid.” R17:685. At age 19, Dane “would stick his head up [his grandfather’s] T-shirt, he would play with his hair, rub his chest, he was nothing like 19 years old would do.” R18:772. Dane Abdool struggled in school and when he was 16 or 17 Nazreen took him out of school. R19:963. Having a learning problem was considered an embarrassing situation for the family. R19:1015. Ms. Mohammed was ashamed to

have Dane in a special class. R19:968. As a result of the shame, she ignored the school's recommendation to get him help.

The picture that was developed in post-conviction was of a family unit dominated by Ms. Mohammed, who valued her second husband above her own sons and who was ashamed of Abdool's deficits and did nothing to help him. It also became clear that the picture of a happy, loving family presented at trial was not accurate, due to the ineffectiveness of the mitigation investigation that was so heavily steered by Nazreen Mohammed. Danielle Waller, a mitigation specialist presented by post-conviction counsel, testified as to the importance of conducting a proper mitigation investigation.

Ms. Waller was retained to review the mitigation that had been presented in Abdool's case and to look at the social history to see if there were other witnesses that were not contacted that had mitigating information that was relevant to the jury's consideration. R15:411. She testified that the goal is to "try to interview as many people as you can who had contact with the client from family and other avenues, but each witness you interview you then ask that witness, who else should I interview, who else would have knowledge of any aspect, and then you take it from there." R15:405. It is important to corroborate the information that family members are giving you to make sure you are getting an accurate picture. R15:407. It is common in capital cases for family members to minimize whatever

damage they may have inflicted upon the client and to want to cast themselves in the best possible light. *Id.*

Ms. Waller testified that it is inappropriate to allow a family member to steer a mitigation investigation. R15:409. If this happens, the information gained might not be accurate. R15:410. Also, witnesses may feel less comfortable disclosing information if they know that one particular family member is acting as a part of the mitigation investigation and the witnesses “may be worried about disclosing things that aren’t going to go along with what that person wants.” R15:411. One of the dangers of this practice of using a family member as part of the defense team is that the family member can be selective in what records they get. R15:460. This happened in Abdool’s case, where Ms. Mohammed did not gather the divorce records that showed that she perpetrated a fraud upon the court by stating there were no minor children born into her marriage to Patrick Abdool. *Id.*

Ms. Waller identified the divorce records of Abdool’s parents as relevant records that normally would be obtained as part of a capital mitigation investigation. R15:414; R29:28-59. The significance of these records is that it was a *pro se* divorce and states that there were no minor children born of the marriage. R15:416. Knowing that this was false information should have led the defense team to investigate further. *Id.* It could be relevant to family dynamics and it would also be important to let the forensic psychologist know that the client’s

mother had previously provided false information in a sworn document before a court of law. R15:417.

Ms. Waller explained that based on her review of the penalty phase and her interviews, there was a different narrative of Abdool's family that existed that was not presented to his jury. R15:420. "This was not the nuclear family that it was made out to be with this loving stepfather and a father who eventually was estranged for other reasons...I discovered that the mom was really kind of driving this narrative." *Id.*

Ms. Waller identified 14 mitigation themes that were not presented to Mr. Abdool's jury, including, but not limited to: verbal and emotional mistreatment by the stepfather; victimized by mother and father; dysfunctional priorities of the mother; parent alienation; educational abandonment; and unsupportive peer development. R15:420-21. Based on her review and all of the mitigation interviews, it was her opinion that Ms. Mohammed was perceived as a part of the defense team and that this affected the witnesses and influenced what information that they gave. R15:459-460.

Ms. Maloney, the original mitigation investigator in this case, testified that Ms. Mohammed was a strong personality. R14:225. She admitted that it was likely that the records the defense team obtained were provided by Ms. Mohammed. R13:177. Ms. Cashman, one of the trial attorneys, revealed that Ms.

Mohammed also provided the defense team with defense witnesses. R26:1948. Ms. Maloney testified that there was “an attempt for some independent verification”, but she and the defense team did not follow through. R14:228. As a result of that lack of follow through, the real picture of Abdool’s life was obscured.

iii. Mitigation Evidence in Post-Conviction about Abdool’s Mental Health:

Early on in Abdool’s case, there were concerns about having Abdool evaluated by mental health experts. Mr. Eric Barker, the first attorney hired by Abdool’s family, advised the family to hire a mental health expert. R22:1380. He gave the family several names, including Dr. Alan Berns. R22:1381. He explained that it is necessary to get a mental health expert on board immediately so that the client’s demeanor and other factors can be accurately documented. *Id.*

Mr. Sims identified a document from his file that reflected a telephone call on March 31, 2006 with Dr. Berns, the psychologist who initially saw Abdool at the recommendation of Eric Barker. R13:53; R29:15-21. Sims acknowledged that during the conversation he and Dr. Berns discussed the need for a neuropsychological battery and that Sims wrote “should do neuropsych battery” in the margin of the note. *Id.* Sims also conceded that Dr. Berland, another expert the defense consulted, was concerned that Abdool might have brain damage. R13:52. Yet, trial counsel did not retain a neuropsychologist to evaluate Abdool. *Id.* He conceded that he could have gotten a confidential neuropsychological

evaluation and kept any negative information from the State. R13:163. Trial counsel offered no strategic reason for failing to explore the possibility that Abdool might have brain damage.

Also, Abdool and Maloney raised concerns regarding Dr. Gold and her evaluation of Abdool. Dr. Gold lost focus during an interview with Abdool and dropped her papers⁶. R13:190. Abdool believed her to be in a daze. *Id.* Ms. Maloney shared her concerns about Dr. Gold's evaluation of Abdool with trial counsel. R13:190. Despite the concerns about Dr. Gold, Maloney was never asked to find another psychologist. R13:194. Nor was she asked to find a neuropsychologist to explore the concerns of potential brain damage. *Id.* Maloney did not know why a neuropsychologist was not consulted. R13:195. Although trial counsel were aware that Abdool had a traumatic birth, was in two automobile accidents where he hit his head, that he had a life-long learning disability, and that he was exposed toxic fumes at the auto body shop where he worked as a child, no neuropsychologist was retained to address and explore these concerns. R13:198-99.

Post-conviction counsel hired Dr. Jaqueline Olander to do a comprehensive neuropsychological evaluation of Abdool. R22:1406. Neuropsychology looks at the relationship between brain functioning and human behavior. R22:1397. As

⁶Dr. Gold was deceased by the time the evidentiary hearing was held.

part of her neuropsychological evaluation, she considered Abdool's developmental history. R22:1408. She discovered that Abdool was a victim of mental injury, emotional abuse, and neglect. *Id.* He was treated as a servant and the love he received was conditional upon him doing what was expected of him. R22:1409. He was denied autonomy, and there was no independence taught or granted to him. *Id.* Abdool's feelings were irrelevant because it was more important to his mother to make sure that her husband, Bing, was happy and taken care of over her children. *Id.* This type of neglect affected Abdool's coping abilities. R22:1410. It also undermined his ability to interact with others and form stable relationships. *Id.* Not only were Abdool's needs not met, but the primary people that he was supposed to trust actually perpetrated the abuse. R22:1411.

Dr. Olander also performed a series of neuropsychological tests on Abdool to assess his brain functioning. R22:1412. Her validity testing indicated that Abdool was putting forth his best effort and not malingering. R22:1414. Abdool's Full Scale IQ is 92, which is at the 38th percentile and considered average. R22:1415. However, his subtest scores went from the 9th percentile to the 84th percentile. *Id.* Because of this scatter, using an IQ test to understand a person's cognitive functioning misses the relevance of the various functioning of different areas of the brain. *Id.*

Dr. Olander diagnosed Abdool with a Cognitive Disorder NOS, also referred to as brain damage. R22:1426. Abdool has significant deficits and impairments in his frontal lobe/executive functioning. R22:1416. This is especially significant for someone of Abdool's young age because the executive skills are the last area of the brain to develop. R22:1417. This area of the brain continues to develop well into a person's twenties. *Id.* Dr. Olander's neuropsychological testing provides objective data that Abdool has brain damage. R22:1530-31. On one of the measures of executive functioning, Abdool performed in the 5th percentile. R22:1421. Dr. Olander explained that he was taking the test in an optimal setting free from distractions. R22:1420. He would show even greater deficits in executive functioning in stressful situations. R22:1421. On measures testing for impulsivity, Abdool scored in the impaired range – in the first percentile. R22:1426. This indicates that he has problems of self-control in problem solving and impaired abilities in planning, problem solving, and development of strategies. R22:1427-28. He also has a severe, nonverbal learning disability that results in “an impaired ability to process and utilize the emotional experiences...he misperceives people in social events.” R22:1439. This learning disability is considered a neurodevelopmental disorder associated with right hemisphere dysfunction. *Id.*

Dr. Olander also administered the Rorschach Ink Blot test. R22:1431. The Rorschach has been accepted by the American Psychological Association as a

valid and reliable instrument used in helping understand human behavior, particularly as it relates to personality development. R22:1433. Abdool's results showed that he has poor coping skills and poorly defined coping strategies. R22:1434. Abdool is at risk for "recurrent episodes of anxiety, tension, [and] frustration. Because he's not really effective in dealing with his activities in daily living and because of that risk, he's had increased risk of psychological deterioration because he doesn't adequately cope with the basic demand of one's life in society." R22:1434. Abdool has a passive-dependent personality. R22:1435. He "is searching for his needs to be met. He has a desire and a want for that positive social interaction and social needs. Because he was unable to have [those] social needs met as a child, he developed a maladaptive coping mechanism to get that nurturing need met." R22:1437.

Dr. Olander explained that instead of the State's theory at trial that Abdool was a "player" who had lots of girlfriends, Abdool actually used sex as a way to get his social emotional needs met as part of his passive-dependent personality. R22:1438. She also found in her review of the records and her interview that he had a limited number of relationships and partners. *Id.*

Dr. Olander reviewed Dr. Gold's work at trial. R22:1442. Dr. Olander identified three areas of concern with Dr. Gold's testing. *Id.* One, she made some scoring errors. *Id.* Two, she used tests that were outdated and not appropriate for

neuropsychological testing. *Id.* Three, she used some tests that she created on her own that were not standardized. *Id.* She miscored his IQ test, adding up the numbers incorrectly on the Comprehension Subtest and gave him eight more points, which gave him a higher overall score. *Id.* She administered the Shipley and the Slosson, both of which are outdated tests and do not meet the standards for a forensic neuropsychological evaluation. R22:1443. By using non-standardized tests, there was no reliability or validity in the scoring because there is no normative basis and there is no ability to generalize those tests to other circumstances. *Id.*

There are several potential etiologies of Abdool's brain damage. One is his traumatic birth described by his mother, which included the loss of a lot of blood. R22:1444. This causes oxygen deprivation in the baby and this type of hypoxic event is one of the more "frequent type of perinatal birth injuries that occur." R22:1445. Another potential cause is the exposure to toxic fumes from the paint and detailing equipment that he used in his stepfather's shop starting in middle school. *Id.* He also began drinking at age 13 or 14 and started having blackouts at 16. *Id.* Finally, he had a head injury at age 16 and according to the hospital records he suffered from posttraumatic amnesia. R22:1446. All of these things likely contributed to the brain damage. *Id.*

Abdool's brain damage affected his daily living. R22:1447. It particularly affected him in stressful situations, including the crime in this case. *Id.* "Because his resources are reduced to begin with, and then in a very stressful situation, [his] adaptive functioning is severely impaired." R22:1448. He was experiencing several stressors around the time of the crime such as sleep deprivation and drinking. R22:1449. He was receiving threatening phone calls and was overwhelmed with not knowing how to deal with his desire to maintain his relationship with his current girlfriend while dealing with the continuing contact from the victim in this case. R22:1449-50. Dr. Olander explained that individuals with nonverbal learning disabilities share characteristics with autistic individuals. R22:1450. "They have poor or impaired social insight into the behavior of others. They misperceive normal human interactions. They don't understand a lot of human behavior and they have this impaired ability to cope and handle and to deal effectively with emotionally related situations that require problem-solving skills." R22:1450-51.

In explaining why Abdool just couldn't break things off with the victim, Dr. Olander stated that, "he knew the importance of not continuing [to have] a relationship with the victim, but from a psychological perspective, she was meeting some of his nurturing and emotional needs and it was very hard for him to find a way to break that off even though he repeatedly told her. But for him to become

assertive in an effective way, for a passive-dependent individual who's not had those normal developmental life experiences, with a defective impaired brain is a very difficult task for him to do." R22:1453. The fact that Abdool was culturally dislocated and ripped from a father with whom he had a strong attachment also negatively impacted his development. R22:1454. It was the "perfect storm." *Id.* His cognitive impairments, his nonverbal learning disability, his sleep deprivation and alcohol use and his lack of coping resources all contributed to Abdool's actions during the crime. R22:1458. Abdool met both of the statutory mental health mitigators. R22:1448, 1458.

Post-conviction counsel also asked forensic psychologist Dr. Mark Cunningham to identify whether there were any adverse developmental factors in Abdool's background that were relevant to an analysis of his moral culpability. R24:1574. When assessing moral culpability to determine if a person is deserving of the death penalty, Dr. Cunningham looks at the developmental factors of the person to determine what was "the quality of the raw material that this person brought to bear in the their decision-making around the offense conduct." R24:1618. The weight and strength of a mental health expert's opinion is dependent on what kind of investigation the lawyer has been able to conduct. R24:1626.

It is critically important for the team to obtain basic records like divorce records. R24:1627. That type of document may help corroborate or disconfirm information that one of the parties has provided. *Id.* For example, Ms. Mohammed filed a false document with the court stating that there were no children born in the marriage. *Id.* This “goes to her credibility, that if she is going to file a false document with the court, then it raises the specter of the extent to which you can rely on what she has to say...it may even be an illegal act in taking the kids out of the country along with the illegality of filing a false report with the courts. So it raises issues about Mom’s character, about the agenda that’s going on at the time of the divorce, about her credibility in general. Very important.” R24:1627-28.

Dr. Cunningham identified several developmental factors which affected Abdool’s moral culpability in the crime. One of them was his age of 19 years and two months at the time of the offense, which was critical. R24:1652. A 19 year old has an incompletely developed brain. *Id.* Brain development continues up to age 25, with the brain development in the later teens and 20s occurring primarily in the frontal lobe. R24:1653. Characteristics associated with frontal lobe development are “judgment, impulse control, delay of gratification, appreciation of consequences, empathy, responsibility.” *Id.* All of these are factors related to Abdool’s actions during the crime. R24:1656. These things are better developed

in the 25 year old than the 19 year old and not because of accumulated experience, but the 25 year old “has a fundamentally better wired brain.” R24:1653.

Also, independent of Abdool’s age, he has brain damage. R24:1668. Dr. Cunningham deferred to Dr. Olander’s neuropsychological findings because “she has specialization in the evaluation of brain/behavior relationships and the specialized assessment instruments that are used to measure those.” R24:1668-69. “The best we can tell this brain dysfunction was present very early on because he’s having difficulties, a little bit slow in developmental milestones and then having problems in school right from the beginning. He had trouble learning things and immaturity even from early childhood. This is a special needs child. So as we think about what happens then in this family and in his cultural dislocations and the mistreatment that’s occurring in this family, that these are all things that are being inflicted and imposed on a special needs child.” R24:1676. If Dr. Cunningham, as a psychologist, was given information that a capital defendant who is 19 years old, had a traumatic birth, an exposure to toxins in a car repair shop, and a head injury after a car accident, he would recommend that a neuropsychological assessment be performed. R24:1669. These are “red flags” of potential brain damage. R24:1670.

Dr. Cunningham also addressed the significant family dysfunction experienced in Abdool’s family due to Ms. Mohammed’s personality disturbance

and her inability to bond. R24:1688-89. There was a history of disruptive parent-child bonding that happened in Abdool's family. R25:1697. It was most dramatic and immediate in Ms. Mohammed's family since she and two of her siblings were not raised by their parents. *Id.* Ms. Mohammed went to live with her Aunt Seleepha at the age of 18 months. *Id.* Taking an 18 month old child who has grown up in one family and amputating her from that family and placing her with an aunt is a "broken attachment" and "is a very serious injury to a young child." *Id.* That affects Ms. Mohammed's ability to have empathy and attach and bond to others. *Id.* The fact that this practice is common in a culture doesn't make it less injurious to the children involved. R25:1699. Damaged attachment and emotional neglect in early childhood is linked to criminal behavior in adults. R25:1711.

There was also generational family dysfunction in Abdool's family including substance abuse, domestic violence, infidelities, criminal activities, and illiteracy and intellectual deficiencies. R25:1700-1702. Ms. Mohammed had significant personality maladjustment. R25:1702. "She exploited Dane's labor for no purpose but for the appearance that Bing was a successful businessman." *Id.* At the time of Abdool's arrest and trial, when she had the potential to offer mitigation to save her son's life, instead "is giving a presentation that preserves her self-image and preserve's Bing's image, but at the potential cost of the life of her

child.” *Id.* She puts her own needs over the life of her own son. R25:1704. Ms. Mohammed was regarded as a bully and she restricted access to her children if family members crossed her. *Id.*

Dr. Cunningham explained that Dane was bonded to his father Patrick as a young child and Patrick was well-involved and well-attached to the children. R25:1713. When Ms. Mohammed married Bing and took them from Trinidad, Ms. Mohammed “affirmatively and aggressively acts to cut off contact and relationship with [Patrick], as well as to destroy any positive image that the boys may have of him, that is a profoundly callous act in terms of depriving her children of the father-figure who would love them....they lost the parent that was authentically engaged and ended up with the one that’s hollow.” R25:1713-14. Children who are neglected and damaged in this way are “at marked increased risk for psychological disorder and also markedly increases the risk for violent and criminal behavior in childhood and adulthood.” R25:1733-34.

Dr. Cunningham also identified three adverse developmental factors in Abdool’s community –cultural dislocation in religion and immigration, racial/religious prejudice and peer harassment, and corruptive older males in adolescence. R24:1631. Dr. Cunningham explained that “this is a special needs kid who is being confronted with these cultural dislocations in religion and culture and immigration, and that the family that’s transporting him through this process is

very pathological.” R25:1736-37. Abdool was corrupted by older males he worked with in the shop who were keeping alcohol on site and drinking during the day and after work and he participated in that. R25:1737. This is another example of lack of parental supervision and neglect. *Id.*

The final arena was disturbed trajectory. R25:1738. Dr. Cunningham identified five factors under this arena –school dropout with parental approval, teen onset alcohol dependence, chronic immaturity for age, interpersonal deficits, and sleep deprivation and intoxication at the time of the offense. R24:1631-32. Early alcohol abuse points to the presence of a genetic predisposition. R25:1740. Abdool began drinking at age 13 and by age 17 could be characterized as alcohol dependent. R25:1739. Teen alcohol abuse put Abdool at an increased risk for impulsivity, delinquency, criminality, and violence. R25:1741. The risk is compounded when you have an immature and/or a damaged brain. R25:1748.

Abdool met the two statutory mental health mitigating factors as well as the age mitigator. R25:1757. The mental health mitigation gives more weight to the age mitigator because he is “substantially more limited than the typical 19-year-old.” R25:1758. While Abdool may have had a choice or knew right from wrong at the time of the crime, there is substantial mitigation and impairment factors related to his moral culpability that were not presented to the jury. R25:1759.

iv. *Skipper*⁷ Evidence:

Trial counsel did not consult with a prison risk assessment or adjustment expert. R13:56. Sims admitted that he has never spoken to a prison adjustment expert so he does not know what information they might be able to provide. R13:153, 165. However, Sims claimed at the evidentiary hearing that one of the reasons he didn't want to present evidence from a prison adjustment expert in Abdool's case was because he felt that Abdool was manipulating the guards in the jail by trading free car repairs done by his family for food from the outside. R13:58, 164. Mr. Sims based this assumption on the fact that Abdool smelled different from other inmates, "almost like you know that he had eaten something different." R13:58. He acknowledged that he never saw him with a "bucket of Kentucky Fried Chicken" but based his opinion on the smell and "seeing how the CO's took care of him and how they seemed to like him and we got all the time we needed and never hassled or anything." *Id.* Sims conceded that there was nothing in Abdool's jail records that demonstrated this manipulative behavior. R13:57. There was also nothing in the records to indicate that Abdool would be a danger to anyone else in prison if he got a life sentence. R13:58.

Ms. Cashman agreed that part of their mitigation theory was that Abdool was a model inmate. R28:2129. Ms. Cashman conceded that trial counsel did not

⁷ *Skipper v. South Carolina*, 476 U.S. 1 (1986).

consult with a prison classification expert or a psychologist with expertise in prison adaptation about Abdool's ability to adapt to a life sentence in prison. *Id.* Because trial counsel never consulted with such an expert, trial counsel had no knowledge about what information that expert could have provided. *Id.*

Mr. Lenamon testified that prevailing norms require attorneys to investigate and present positive prison adjustment evidence. R15:308. This evidence should be presented with a combination of records, other inmates or guards, and/or an expert. R15:309. Only an expert with specialized experience will be able to make the kind of determination that the client is going to do well in prison if given a life sentence. *Id.* An attorney cannot know whether there is harmful information in a client's jail records without actually consulting with that expert and giving them the records. R15:359. Just because a client might appear to be getting special treatment, that might not necessarily affect his ability to adapt in prison. *Id.* "[T]he guys that you hire who do this are actually people who work for the prisons. A lot of the times they are wardens. They spent 25, 30 years doing this kind of stuff and they'll look at your situation and you'll tell them A, B, and C, and they'll be like, that's fine, don't worry about it." *Id.*

Mr. James Aiken, a former warden from the South Carolina Department of Corrections with over 40 years' experience in prisoner classification in both state and federal prisons, testified in post-conviction. R21:1233,1238. Mr. Aiken

reviewed Mr. Abdool's Orange County Jail Records, the Opinion on direct appeal, and his Florida Department of Corrections records. R21:1247. He also interviewed Mr. Abdool at Union Correctional Institution. *Id.* The interview is important because it gave him a chance to look at the person and compare that to the written record. R21:1248.

As a prison warden, the interview gave him a chance to "see what kind of games he's [going to] play. See if he's manipulative. See where his eye movements are...I gave him ample opportunity to play games with me, to try to con me, to try to manipulate me." *Id.* Mr. Aiken did not see any indication from Abdool's demeanor or verbal or nonverbal actions that would suggest that Abdool was manipulative. R21:1249. He also relied on the jail records and "saw nothing that would seem to suggest the level of manipulation that would cause me any level of concern as a prison warden." R21:1250.

If he was given information that Abdool or his family were doing special favors for guards such as fixing or cleaning their cars and that Abdool was getting some special food as a reward it would cause him concern because it would increase Abdool's level of vulnerability. *Id.* Abdool "is not a member of a gang, does not run a gang. He is not a shot caller." R21:1251. Even if he was in fact getting the guards to bring him food, that does not make him a danger. R21:1301. There's a difference between officers bringing in food versus drugs or weapons.

Id. “[W]hen you have had to negotiate getting automatic weapons out of prisons that have been smuggled in by staff, you will know the difference between that and chicken.” *Id.* Dane Abdool “can be housed and managed and secured in the Florida Department of Corrections for the remainder of his life without causing an undue risk of harm to staff, inmates, or the community.” R21:1262.

In reaching this conclusion, he considered his personal knowledge and experience with the Florida Department of Corrections and their ability to safely manage and control inmates as well as personal factors about Abdool. R21:1254. The personal factors include the fact that at Abdool’s current age of 26, he has had a favorable adjustment to incarceration. R21:1255. “[A]s he gets older, the probability of him being disruptive diminishes even more, even though he’s not demonstrating it now. So what you have is a compliant inmate.” *Id.* Abdool “knows what the program is. He’s very predictable. And even though there may be mental health issues, I found that people with certain mental health issues find solace in the prison regiment because prison regiment does not change.” R21:1256.

v. Cultural Displacement Evidence:

Another area that trial counsel failed to investigate was the effect of cultural displacement on Abdool. Dane was born and spent much of his childhood in Trinidad before being moved to the United States by his mother, Ms. Mohammed.

For young, slow Dane Abdool, this was a major life change. Post-conviction counsel presented the testimony of Dr. Selwyn Cudjoe who examined the specific cultural and societal factors that shaped Abdool and the nature of his cultural displacement and fragmentation. R21:1184. Dr. Cudjoe identified phases in Abdool's life where he experienced cultural displacement. R21:1191.

Dane Abdool was born in Trincity⁸. R21:1192. Dr. Cudjoe's father taught at the same Tacarigua Presbyterian School that Abdool attended. R21:1193. All of the schools in Trinidad are run by different religious groups. R21:1194. While Abdool was being cared for by his grandmother, Evelyn, he was exposed to the Hindu culture. *Id.* She would take them to Diwali, the Festival of Lights, and cook Hindu foods for him. R21:1195-96. During this time he also went to a Christian school. *Id.* When his parents separated, his mother moved him and his brother to Chaguanas, an area about 20 miles away, or about an hour car ride. R21:1197. He was separated from his biological father and lived with his mother and stepfather. *Id.* Because the stepfather was Muslim, Abdool switched from a Christian school to a Muslim school. R21:1198. Not only was he forced to go from one family to another at the age of 7, but he had to switch religions and culture as well, which would be tremendously stressful. R21:1199.

⁸ A map of Trinidad was introduced into evidence as an exhibit and can be found at R29:112-126.

Psychological counseling in Trinidad is frowned upon because it shows weakness so essentially Abdool “had to sink or swim.” *Id.* Also, adults in Trinidad do not feel the need to explain life changes to children, “the child has to come to grips with those problems or those challenges as best he [can].” *Id.* By way of example, Dr. Cudjoe testified that his father died when he was 11. R21:1200. When he was 13, there was a man in his house one morning. *Id.* He did not know who the man was, but learned that the man was now living with him and his mother. *Id.* He also explained that children respond to this differently. *Id.* Dr. Cudjoe was able to cope, while his brother chased the man around the block with a knife because he felt the man was displacing their father. *Id.* While not prone to violence, Abdool experienced similar difficulties in coping with the move to Chaguanas with Bing. *Id.*

The second phase in Abdool’s life where he experienced cultural displacement was when Ms. Mohammed took Abdool and his brother to the United States. R21:1202. Abdool did not want to come to the United States. R21:1203. He was called names at school like Taliban and 7-Eleven and treated as an outsider. *Id.* He found it difficult to adapt and felt alienated. *Id.* Education is important in Trinidadian culture. R21:1204. Dr. Cudjoe explained the cultural significance of being placed in the same grade as his younger brother: “By definition you are dumb and stupid. Why can’t you do as well as your younger

brother? That...rises to an amount of stigma and feelings for lesser worth and self-esteem in the person, because [the] culture...[places] that amount of emphasis on education where education is seen as a tool of upward mobility...” R21:1204-05.

When Abdool returned to Trinidad for a funeral at age 17, he wanted to stay in Trinidad. R21:1211. Abdool felt very comforted in Trinidad. *Id.* Abdool’s grandmother was willing to have him stay in Trinidad and, as is common of grandmothers in the Hindu culture, would have given “her last cent” to be sure that Abdool was well taken care of. *Id.* Nazreen prevented Abdool from remaining in Trinidad with his grandmother. R21:1212.

Phase three of Abdool’s life was his introduction to the prison system at age 19. *Id.* Throughout his life, Bing had told Abdool that he was never going to amount to anything and Abdool sees his current situation as the culmination of a self-fulfilling prophecy. R21:1213. “I really deserve nothing. And what Bing said is really true...they were right...I was nothing.” R21:1213-14. Abdool has accepted his fate, “not willingly or gleefully,” but he has accepted it. *Id.*

SUMMARY OF ARGUMENT

Trial counsel was deficient because they failed to properly investigate and litigate a meritorious motion to suppress, failed to select and educate the jury, failed to adequately challenge the State’s evidence of premeditation, and failed to present an accurate mitigation picture to the jury. Counsel had little to no rational

logic to support what they termed as strategic decisions and instead relied on post-hoc rationalizations to explain their actions and lack of investigation. As a result of these deficiencies, the jury was given the prosaic picture of a loving family and slightly immature man who coldly committed and confessed to murder. In reality, Abdool was a 19 year old brain damaged young man who was mentally and emotionally abused by his domineering mother and step-father and whose due process rights were violated in the interrogation room. Trial counsel's failure to litigate a motion to suppress and failure to present an accurate picture of Abdool undermines confidence in Abdool's conviction and sentence of death.

STANDARD OF REVIEW

The standard of review is *de novo*. *Stephens v. State*, 748 So.2d 1028, 1032 (Fla. 2000). Under *Strickland*, ineffective assistance of counsel claims are a mixed question of law and fact; with the lower court's legal rulings reviewed *de novo* and deference given to factual findings supported by competent and substantial evidence. *Sochor v. State*, 883 So.2d 766, 772 (Fla. 2004).

ARGUMENT

ARGUMENT I: Trial counsel's failure to file a Motion to Suppress was deficient performance which fell below prevailing norms. Counsel's failure prejudiced Dane Abdool to the extent that confidence in the outcome is undermined.

In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that trial counsel's performance was deficient and that the

deficient performance prejudiced the defendant so as to deprive the defendant of a fair trial. See *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984); see also *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527 (2003) (affirming the Strickland two-prong analysis for claims of ineffective assistance of counsel). As to the first prong, the defendant must establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687; see also *Cherry v. State*, 659 So.2d 1069, 1072 (Fla. 1995). For the second prong, the reviewing court must determine whether there is a reasonable probability that, but for the deficiency, the result of the proceeding would have been different. See *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687.

In order to establish prejudice as a result of trial counsel's failure to file a motion to suppress, the defendant must demonstrate that the motion to suppress had merit. See *Zakrzewski v. State*, 866 So. 2d 688, 694 (Fla. 2003) ("[W]here defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his

Fourth Amendment claim is meritorious.") (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986)).

Trial counsel had viable grounds for a motion to suppress Mr. Abdool's statement in this case, under *Haliburton v. State*, 514 So.2d 1088 (Fla. 1987) and its subsequent progeny, which states that police failure to inform a defendant that his attorney is present in the police station not only interferes with the attorney-client relationship, but is a due process violation under the Florida Constitution.

In *Haliburton*, much like the facts present in this case, police questioned Haliburton regarding a homicide. *Haliburton* at 1089. Haliburton's family retained an attorney on his behalf and the attorney went to the police station and requested to speak with his client. *Id.* Police failed to inform Haliburton of the presence of the attorney. *Id.* Haliburton was questioned and ultimately confessed, post-Miranda, while his attorney attempted to gain access to him. *Id.* This Court found that the police's failure to notify Haliburton that an attorney was present and requesting to see him deprived Haliburton of the information essential to a knowing and intelligent waiver of his right to counsel under *Miranda v. Arizona*⁹. *Id.* This Court further elaborated and stated that the police failure to inform Haliburton of the presence of his attorney was a due process violation pursuant to

⁹*Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed.2d 694, 86 S.Ct. 1602 (1966).

Article I, Section 9 of the Florida Constitution and constituted reversible error. *Id.* at 1090.

“In order for the right to counsel to be meaningful, a defendant must be told when an attorney who has been retained on his behalf is trying to advise him. If the defendant wishes to reject the opportunity for such advice, he may do so. The determination of the need for counsel is the defendant’s prerogative.” *State v. Allen*, 548 So.2d 762, 763-64 (Fla. 1st DCA 1989), citing *Haliburton v. State*, 476 So.2d 192, 194 (Fla. 1985). The main concern expressed by this Court and subsequent courts is the interference with the attorney-client relationship to the extent that due process as guaranteed by the state Constitution is denied. *Allen* at 764. The “distinction between deception accomplished by means of an omission of a critically important fact and deception by means of a misleading statement, is simply untenable.... There can be no constitutional distinction....between a deceptive misstatement and the concealment by the police of the critical fact that an attorney retained by the accused or his family has offered assistance”. *Id.*, citing *Haliburton*, 514 So.2d at 1090. “The constitutional error ... was the failure to tell the appellee that an attorney wished to speak with him.” *Id.* “Due process under the Florida Constitution requires that an accused be told that an attorney summoned in his behalf wishes to speak with him, and there is no question that the police in the instant case failed to so inform the appellee, and thus denied to

appellee the benefit of the advice of counsel to which he was entitled under both the Florida and federal constitutions.” *Id.* Under Florida law, statements obtained under these circumstances constitute a “violation of due process of law” and is “reversible error”. *Id.* at 1090.

In this case, Abdool’s family retained Mr. Eric Barker as Abdool’s attorney. R22:1374. Mr. Barker arrived at the Winter Garden Police station and demanded to speak to his client multiple times. R22:1376-1377. Abdool was already being questioned by police, who were going in and out of the interrogation room. R29:24. No one ever informed Abdool that he had an attorney at the station, despite his desire to talk to his mother to see if he needed an attorney. *Id.*

Mr. Barker testified that he informed Abdool’s trial counsel of the circumstances of his visit to the police station. R22:1379. Trial counsel was aware of a witness to and facts of a due process violation of their client’s rights. However, trial counsel never even attempted to investigate this due process violation or file any sort of motion to suppress statements, because “God forbid we won it.” R26:1865. There was no attempt to litigate this issue in any way in spite of the damaging nature of Abdool’s confession. R13:27, 36. The confession allowed the police to locate where Abdool purchased the gasoline. R28:2090. It also allowed the State to argue at trial that Abdool was cold and lacked remorse. R13:28; R28:2089-90. Not only that, the statement shows Abdool happily

discussing cars and initially lying to police regarding his involvement with the victim. R29:24. Trial counsel opted to keep this admittedly damaging confession because “the jury needed to hear his voice”. R26:1917. Instead, it allowed the State to successfully argue for premeditation and for the ultimate penalty of death.

It is not reasonable strategy to present a confession that in its totality completely undermines the proposed defense. In his confession, Abdool admits to things which completely undermine his assertion of an accident. Four of the five facts identified by this Court on direct appeal as supporting premeditation came directly from his confession.

“First, three witnesses testified that Abdool spoke of killing Amelia or her baby months before the actual killing took place. Second, on the night of the crime, while Amelia waited in his car, Abdool stopped at a convenience store and purchased duct tape, a gas can, and gasoline—the tools he eventually used to kill her. Third, Abdool drove to a deserted area, yanked her out of his car, wrapped her in duct tape, and doused her with gasoline. Fourth, he lit the flame that ignited her body—a flame that would have to have been within inches of, if not in contact with, the accelerant. Finally, Abdool did nothing to help Amelia, to put out the flames, or prevent her from burning alive.”

Abdool v. State, 53 So.3d 208, 217 (Fla. 2010). Other than the purported prior threats to kill, which were thoroughly discredited at trial, all of the remaining evidence of premeditation came from the confession.

If trial counsel’s reason for failing to file a Motion to Suppress was to have the jury hear Abdool’s version of events, the testimony of Amanda Inman would have sufficed. Ms. Inman testified for the State at trial that Abdool told her in a

conversation that he and the victim had been in an argument, were pushing and shoving and that he lit the lighter to scare her and then she caught on fire. TR10:366-371. Ms. Inman's testimony alone would have accomplished the defense goal of putting forth the defense of accident without out all the harmful details from his four hour confession that undercut that theory and instead supported premeditation and aggravation.

Although there was evidence to link Abdool to the scene of the crime, nothing the State had was more powerful than Abdool's matter-of-fact re-telling of the crime. That statement led law enforcement directly to other corroborating evidence which they did not possess and could not have found on their own. It is unreasonable when counsel is arguing an accidental means of death to fail to attempt to exclude admissions and video of the client purchasing the murder weapon in advance, explaining his negative feelings towards the victim and vividly recounting the murder. Trial counsel admitted that the confession was very damaging. The rationalization of the jury's need to hear his voice was a post-hoc attempt to justify an unreasonable decision as strategy. Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any

ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness. *Wiggins v. Smith*, 539 U.S. 510, 533, 123 S.Ct. 2527, 2535, 80 L.Ed. 2d 674(2003).

Moreover, the fact that there was an attorney actively seeking access to Abdool was not the only viable ground for a motion to suppress. Nineteen-year-old Dane Abdool's waiver of his Miranda rights was not knowing and voluntary, rendering his subsequent confession involuntary and inadmissible in violation of the Fifth Amendment and the Florida Constitution. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966); *Ramirez v. State*, 739 So.2d 568 (Fla. 1999). *Miranda* holds that a defendant may waive his rights against self-incrimination as long as the waiver is made voluntarily, knowingly and intelligently. *Moran v. Burbine*, 475 U.S. 412, 421 (1986). "The inquiry has two distinct dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *Id.* (internal citations omitted).

“The State bears the burden of proving that the waiver of the *Miranda* rights was knowing, intelligent and voluntary. Moreover, where a confession is obtained after the administration of *Miranda* warnings, the State bears a ‘heavy burden’ to demonstrate that a defendant knowingly and intelligently waived his or her privilege against self-incrimination and the right to counsel, especially where the suspect is a juvenile.” *Ramirez v. State*, 739 So. 2d 568, 575 (Fla. 1999)(citing *Colorado v. Connelley*, 479 U.S. 157, 167, 93 L.Ed. 2d 473, 107 S.Ct. 515 (1986))(internal citations omitted).

The *Ramirez* Court explained that the following factors are relevant in considering the voluntariness of the confession after a waiver of *Miranda*: “(1) the manner in which the *Miranda* rights were administered, including any cajoling or trickery, (2) the suspect’s age, experience, background and intelligence, (3) the fact that the suspect’s parents were not contacted and the juvenile was not given an opportunity to consult with his parents before questioning, (4) the fact that the questioning took place in the station house, and (5) the fact that the interrogators did not secure a written waiver of the *Miranda* rights at the outset.” *Id.* at 575-76 (internal citations omitted). Further, if a statement is not given voluntarily, a juror should disregard it. *Florida Standard Jury Instructions in Criminal Cases 3.9(e)*.

This Court has recently reiterated the factors for determining the voluntariness of a confession:

The United States Supreme Court has held that when a court assesses the totality of the circumstances and considers whether, given those circumstances, the will of a defendant has been overborne, it should take into account "both the characteristics of the accused and the details of the interrogation." *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). The factors a court may consider include the age and youth of the accused; the lack of education of the accused; the low intelligence of the accused; the duration of the detention; the lack of advice given to the accused with regard to his or her constitutional rights; the prolonged and repeated nature of questioning; and the use of physical punishment, such as the deprivation of food or sleep.

Deviney v. State, 112 So. 3d 57, 72 (Fla. 2013)(reversing a trial court's denial of a Motion to Suppress where the Defendant was 19 years old and learning disabled). See also Hayley Cleary, M.D., Police Interviewing and Interrogation of Juvenile Suspects: A Descriptive Examination of Actual Cases, 38(3) Law and Human Behavior 271, 271-272 (2014).

In *Ross v. State*, 45 So.2d 403 (Fla. 2010), this Court credited Ross' false confession expert, Dr. DeClue, in finding that these tactics undermined the prophylactic purpose of Miranda and rendered the confession unreliable. *Id.* at 80. The Court concluded that the police downplayed the significance of Ross' *Miranda* rights, assured him that he was not being arrested "at the time" despite incriminating evidence they had already obtained against him, and the police treated the pre-warning and post-warning questioning as one continuous interrogation. *Id.* Further, the Court took into account that "Ross was only twenty-

one at the time with no indication of any prior experience with the criminal justice system.” *Id.*

When the Winter Garden Police Department went to serve a search warrant at Team Redline on March 2, 2006, officers located 19 year-old Abdool and handcuffed him. R17:592. They then asked if he would be willing to come with them to the police department to answer some questions. They told him he did not have to come, yet he remained handcuffed. At some point, officers took his cell phone and driver’s license. He repeatedly asked to speak to his mother and said he would go with them as long as she knew where he was going because she had told him she wanted to be there for questioning. R15:368. Despite these conditions, the detective told Dane he was not under arrest.

Once they got to the station, for approximately 2 hours Detective Gamill and Detective McGhee kept Abdool in the interrogation room and talked to him about cars. R29:24. Abdool asked for his mother several times and wanted to know if she knew where he was. *Id.* He also asked if he would get a ride to his job later that night at Macy’s and the officers told him they would arrange that. *Id.* Unbeknownst to Abdool, there was a lawyer trying to see him.

When Abdool first came into the interrogation room, Detective Gamill handed him a *Miranda* form, but downplayed the significance of Abdool’s *Miranda* rights, saying “this is just a form we read.” R15:637. Two hours later,

Abdool was read his *Miranda* rights, but the police still lied about the nature of the interrogation saying that Amelia was still missing. R29:24.

After signing the form, the police started to pressure him for “his story,” Abdool says “Right, so is it okay if I ask to talk to my mom to you know see if I need a lawyer?” R29:24. Abdool repeatedly asked to talk to his mother to see if he should have a lawyer and the officers ignored his requests. These requests clearly indicate Abdool’s desire for questioning to cease and to speak to a lawyer. Once an individual invokes his right to speak to an attorney, questioning must cease and “any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.” *Miranda* at 474. Even if this Court does not perceive this as an invocation, the due process infirmity caused by the police’s failure to inform Abdool that an attorney retained for him was present at the station would have been sufficient grounds to suppress the statement and the evidence illegally obtained as a result from the statement.

The totality of circumstances, including Abdool’s age and low intelligence and his lack of experience with the criminal justice system, his suggestibility, brain damage, and learning disabilities, the police deception and downplaying of the significance of Abdool’s *Miranda* rights, his repeated requests to talk to his mother to see if he needed a lawyer, not informing him of the lawyer’s presence and Detective Gamill’s false information to Abdool that his mother knew where he was

and was okay with the questioning when in fact she was at the police station with a lawyer for him, demonstrate that the waiver of Abdool's *Miranda* rights were not knowing and voluntary, rendering his subsequent confession involuntary and inadmissible.

Trial counsel made no attempt to investigate the circumstances of Abdool's statement, or even attempt to litigate, despite having facts and being informed of the circumstances by attorney Eric Barker that support a due process violation. See *Wiggins v. Smith*, 539 U.S. 510, 521-522 (U.S. 2003); citing *Strickland v. Washington*, 466 U.S. 688, 690-691, 80 L Ed 2d 674, 104 S Ct 2052. As explained by the uncontradicted testimony of Mr. Lenamon, if trial counsel was successful in the Motion to Suppress, it could have changed the whole picture of the case. Without the damaging evidence, the State could have been more likely to offer a plea. Even if that did not happen, trial counsel could have always chosen to withdraw the Motion prior to trial and allowed the State to play the confession for the jury. Trial counsel then could have still argued to the jury that it was an involuntary statement and began laying the groundwork for their mitigation presentation in the penalty phase.

Abdool was prejudiced by trial counsel's failures. The admission of Abdool's confession was not harmless. The confession contained damaging evidence against Abdool. It allowed the State to argue he was cold and

remorseless because he spent so much time discussing cars. It also allowed the police to obtain the devastating video of him purchasing gasoline hours before the crime because Abdool told the police where he purchased it. The statement gave the State a detailed sequence of events that happened at the roadside. Without the confession, the police would have had less direct evidence to support a charge of premeditated first degree murder. Evidence obtained from an unlawful confession must also be suppressed. *Wong Sun v. United States*, 371 U.S. 471 (1963); U.S. Cont. Amend IV, V, VI, VIII, XIV.

Furthermore, above and beyond trial counsel's deficient performance, the admission of Abdool's statement, obtained as it was through a violation of Abdool's due process rights under the Florida Constitution, is fundamental error. Mr. Barker, the attorney initially retained to represent him appeared at the police station and requested to speak to his client. Police failed to inform Abdool of this fact. Furthermore, Barker was not allowed to see his client until *after* the statement was given.

“Our emphasis is on fairness in apprising a defendant of the recourse available to him. In order for the right to counsel to be meaningful, a defendant must be told when an attorney who has been retained on his behalf is trying to advise him.” *State v. Allen*, 548 So.2d 762, 763-64 (Fla. 1st DCA 1989), citing *Haliburton v. State*, 476 So.2d 192, 194 (Fla.1985). “The police do not have to

obey a telephone order of an attorney to cease questioning a defendant, but do have to advise a defendant that an attorney retained on his behalf wishes to speak with him.” *Id.* Due process violations “are fundamental error”. See *Wood v. State*, 544 So.2d 1004, 1005 (Fla. 1989).

In denying relief on this claim, the post-conviction court found that trial counsel made a reasonable decision not to file a Motion to Suppress to pursue their defense theory of accident. R12:1421. However, the post-conviction court failed to evaluate the testimony establishing that prevailing norms require an attorney to attempt to suppress harmful evidence. The court also ignored the trial testimony of Amanda Inman, whose testimony accomplished trial counsel’s purported goal of getting Abdool’s story before the jury. The court failed to properly evaluate the totality of the circumstances and made a clearly erroneous factual finding when it concluded that the only admission the confession produced “was that there was an accident involving gas.” R12:1424. This is a mischaracterization of the damaging nature of Abdool’s four hour statement to the police which allowed the State to portray him as a callous murderer who was more concerned about his car than human life.

In *Haliburton*, this Court recognized that statements obtained when the police fail to inform a defendant that his attorney wishes to speak with him was a violation of *Article I, Section 9 of the Florida Constitution* and violations of the

due process of law are “reversible error”. *Haliburton* 514 So.2d at 1090. The failure to inform Abdool that his attorney was present for consultation completely vitiated Abdool’s rights under both the Florida and United States’ Constitutions. Without the confession, there exists a reasonable probability that Abdool would not have been convicted of first degree murder. Mr. Abdool is entitled to a new trial.

ARGUMENT II: Trial counsel’s failure to conduct a reasonably competent mitigation investigation and failure to present mitigation, including evidence of brain damage, was deficient performance which fell below prevailing norms:

The picture the jury at trial was given of Abdool was an antiseptic picture of a good young man, from a good family, who was just slow and immature. The reality, and the picture that emerged after proper investigation, was of a brain damaged 19 year old who did not have the cognitive or emotional wherewithal to live life on his own or cope with the mounting pressures in his life. Although trial counsel attempted to explain to the jury why their client committed what they described as a “bone-headed move”, because of a failure to investigate Abdool’s family and primarily relying on his mother to provide mitigating information, trial counsel was ineffective and presented a false and misleading picture of Abdool’s life. Furthermore, they failed to link this vital mitigation to any statutory mitigator, which would have aided the jury in making a life recommendation.

This Court has recognized that “failure to investigate and present available mitigation can be prejudicial.” *Sliney v. State*, 944 So.2d 270 (Fla. 2006)(citing *Phillips v. State*, 608 So.2d 778). The United States Supreme Court held that counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversary testing process. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052 (1984). Specifically, counsel has a duty to investigate in order to make the adversarial testing process work in the particular case. *Id.* at 690. There are two prongs to an ineffective assistance of counsel claim.

First, a petitioner must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, whose result is reliable. *Id.* at 687. In addition, to establish deficient performance, a petitioner must demonstrate that counsel’s representation “fell below an objective standard of reasonableness.” *Id.* at 688.

In *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 80 L.Ed. 2d 674(2003), the Supreme Court held “*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy.

Rather a reviewing court must consider the reasonableness of the investigation said to support that strategy.” *Id.* at 2538.

“[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness.” *Wiggins* at 2535.

The United States Supreme Court has reiterated that according to “prevailing professional norms” counsel has an ‘obligation to conduct a thorough investigation of the defendant’s background.’” *Porter v. McCollum*, 130 S.Ct. 447 (2009)(citing *Williams v. Taylor*, 529 U.S. 362, 396 (2000)). In *Porter*, the Court held that a state court unreasonably applies Strickland’s prejudice standard when it fails to give weight to mitigating evidence of a capital defendant’s abusive childhood, brain damage, and post-traumatic stress disorder. *Id.*

In addressing the importance of counsel’s duty to investigate for the penalty phase, this Court has said:

Trial counsel’s obligation to zealously advocate for their client is just as important in the penalty phase of a capital proceeding as it is in the guilt phase. There is no more serious consideration in the sentencing arena than the decision concerning whether a person will live or die. When an attorney takes on the task of defending a person charged with a capital offense, the attorney must be committed to dedicate both time and resources to

thoroughly investigate the background and history, including family, school, health and criminal history of the defendant for the kind of information that could justify a sentence less than death. I believe that the constitution and the case law from this court and the United States Supreme Court requires no less.

Coday v. State, 946 So.2d 988, 1015-1016 (Fla. 2006) (Quince, J., concurring).

Further, this Court has held trial counsel renders deficient performance when his investigation involves limited contact with a few family members and he fails to provide his experts with background information. *Sochor v. Florida*, 883 So.2d 766, 772 (Fla. 2004); see also *Ragsdale v. State*, 798 So.2d 713, 718-19 (Fla. 2001).

The ABA Guidelines have been cited by the United States Supreme Court as “guides to determining what is reasonable.” *Wiggins* at 2537. The Guidelines in effect at the time of Abdool’s trial were created in 2003. Guideline 10.11 sets out the prevailing norms for presentation of the penalty phase. The Commentary to that Guideline notes that “it is critically important to construct a persuasive narrative [of mitigation], rather than to simply present a catalog of seemingly unrelated mitigating factors.” Commentary to ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.11(2003). Further the Guidelines note that “[s]ince an understanding of the client’s extended multigenerational history is often needed for an understanding of his functioning, construction of the narrative normally requires evidence that sets forth and explains

the client's complete social history from before conception to the present. Expert witnesses maybe useful for this purpose, and in any event, are almost always crucial to explain the significance of the observations.” *Id.* With respect to investigation in the penalty phase, the Guidelines stress that “[r]ecords should be requested concerning not only the client, but also his parents, grandparents, siblings, and children. A multi-generational investigation frequently discloses significant patterns of family dysfunction and may help establish or strengthen a diagnosis or underscore the hereditary nature of a particular impairment.” Commentary to ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.7(2003).

Because the right to effective assistance of counsel is so fundamental, the standard for proving prejudice is low:

An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, *even if the errors of counsel cannot be show by a preponderance of the evidence to have determined the outcome.*

* * * *

The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors...When a defendant challenges a death sentence...the question is whether there is *a reasonable probability* that, absent the errors, the sentencer – including an appellate court to the extent it independently reweighs the evidence – would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death. In making this determination, a court

hearing an ineffectiveness claim, must consider the totality of the evidence before the judge and the jury.

Strickland v. Washington, at 694-696 (emphasis added). When a court fails to consider the totality of the evidence presented at trial and at post-conviction, its decision is unreasonable within the meaning of *Strickland*. (*Terry*) *Williams v. Taylor*, 529 U.S. 362 (2000).

A. Failure to present accurate picture of Abdool's life:

The portrait painted at trial of Abdool's family and his home life was skewed by Nazreen Mohammed's influence in the mitigation investigation. Ms. Maloney, the initial mitigation investigator for Abdool, testified at trial that although investigations into Abdool's background were done and information was gathered, much of it was gathered by Ms. Mohammed and not independently verified by the defense team. R13:177;R14:228.

The "primary purpose of the penalty phase is to insure that the sentence is individualized by focusing on the particularized characteristics of the defendant". *DeBruce v. Comm'r*, 758 F.3d 1263,1276 (11th Cir. 2014), citing *Brownlee v. Haley*, 306 F.3d 1043, 1074 (11th Cir. 2002). "To ensure that the penalty phase achieves this purpose we have held that a petitioner is prejudiced where the mitigation evidence omitted by counsel's deficient investigation 'paints a vastly different picture of [the petitioner's] background than that created by' the actual penalty-phase testimony. *DeBruce* at 34-35, citing *Williams v. Allen*, 542 F.3d

1326, 1340 (11th Cir. 2008). “By failing to provide such evidence to the jury, though readily available, trial counsel’s deficient performance prejudice’s [a petitioner’s] ability to receive an individualized sentence.” *DeBruce* at 35, citing *Brownlee*, 306 F.3d at 1074.

Trial counsel’s reliance solely on Nazreen Mohammed to provide an account of Abdool’s childhood led the jury to hear an inaccurate and misleading picture of his life. Trial counsel allowed Ms. Mohammed to skew the mitigation investigation to make herself appear blameless for Abdool’s situation. She attempted to place all the blame on Abdool’s biological father, painting him as alcoholic and a gambler who abandoned his children. R17:752; R20:1094. Ms. Mohammed steered trial counsel away from any family members who would contradict her version of the events and pressured the family members who did speak to counsel to “not talk about the bad things.” R19:1023. Furthermore, Ms. Mohammed was present during the interviews, as well as in court observing the testimony during the penalty phase.

Interviewing witnesses in a group setting is below prevailing norms. Witnesses will be less likely to disclose embarrassing information in the presence of others, especially here where Ms. Mohammed was the one who was steering the mitigation investigation. Trial counsel allowed and encouraged Ms. Mohammed to

collect basic records, including school records and records from Abdool's Baker Act at Lakeside Alternatives. R19:905;922.

Relying on Ms. Mohammed for these tasks was problematic in two ways. First, it legitimized her role as part of the defense team in the eyes of the family. Several witnesses testified at the evidentiary hearing that Ms. Mohammed was the main point of contact between the family and the lawyers. Family members had to go through Ms. Mohammed to find out information about Abdool's case. Also, the defense team relied on Ms. Mohammed to contact family members, collect letters, and set up interviews.

The second problem in relying on Ms. Mohammed for collecting records was that it gave her the discretion of what records to collect and what records to avoid. The divorce records are a perfect example of this. Trial counsel never secured the divorce records, despite the fact that the divorce was done in Florida and the file was public record. Understandably, Ms. Mohammed did not want it disclosed that she had spirited the children out of Trinidad without their father's consent or knowledge or that she had falsified the record claiming that there were no minor children born of the marriage. It was a quick and easy way to obtain a divorce so that she could legally marry Bing, whom she had already married in a religious ceremony prior to leaving Trinidad. R19:890. By unreasonably allowing Ms. Mohammed to steer the mitigation investigation, trial counsel wholly failed to

uncover a wealth of mitigation about Bing and Nazreen Mohammed's neglect and emotional abuse of Abdool.¹⁰ Also, by allowing Ms. Mohammed to steer the course of the mitigation investigation, trial counsel actually fell into a pitfall they acknowledged existed with families of capital defendants: they allowed Ms. Mohammed to paint a whitewashed version of Abdool's life.

Trial counsel offered no strategic reason for their reliance on Ms. Mohammed to gather records, contact witnesses and set up interviews, travel to Trinidad, compile mitigation letters and photos, and otherwise drive the mitigation investigation. The situation created a potential conflict of interest. Ms. Mohammed was paying the legal fees and had an expectation of trial counsel's allegiance, even where her interests in protecting her own image conflicted with the goal of saving her son's life. As explained in the uncontradicted testimony of Mr. Lenamon, Ms. Waller, and Dr. Cunningham, allowing the mother of a capital defendant to play such a significant role in the mitigation investigation is so below prevailing norms that everything that flowed from such an investigation was necessarily deficient.

This situation is nearly identical to the scenario in *Cooper v. Secretary, DOC*, 646 F.3d 1328 (11th Cir. 2011), where trial counsel relied on Cooper's

¹⁰ From federal prison, Ms. Mohammed continued to threaten family members and attempt to steer the mitigation investigation in post-conviction, as evidenced by letters written by her and introduced at the evidentiary hearing. R29:76-95.

mother to describe the client's childhood. The *Cooper* Court concluded, "[h]ad counsel talked to Cooper's siblings, or as far as we can tell any family member other than Cooper's mother, counsel would have learned the extent of Cooper's traumatic background. See *Johnson v. Secretary, DOC*, 643 F.3d 907,932-33 (11th Cir. 2011); see also *Williams v. Allen*, 542 F.3d at 1340 ('By choosing to rely entirely on [the mother's] account, trial counsel obtained an incomplete and misleading understanding of [the defendant's] life history')." *Cooper v. Secretary, DOC*, 646 F.3d 1328, 1352 (11th Cir. 2011). See also *Sears v. Upton*, 130 S.Ct. 3259, 3261-62 (2010).

Family members, both in Florida and in Trinidad, were ready and available to offer the true picture of Abdool's life with Bing and Nazreen Mohammed. Abdool, a child with severe learning disabilities and brain damage, was treated as slave labor by Bing. Ms. Mohammed allowed this to go on and consistently put her husband's needs and desires ahead of Abdool's. Starting at age 13, he was made to work day and night in the car shop and his studies were ignored. R17:711-12;R19:994;R19:1014. He was made to massage Bing's feet and bring him trivial things. R17:711;R19:1080. He was forced to wade through feces-laden floodwater at the age of 7 to retrieve clothes that his stepfather wanted. R19:988. Bing assigned him age inappropriate chores to "teach him how to be a man." Ms. Mohammed ripped him from his biological father and his homeland with no

preparation or explanation and brought him to live with a man who subjected him to neglect and emotional abuse. Moreover, Ms. Mohammed cut off contact with Abdool's biological father and she and Bing ridiculed Patrick Abdool every chance they could, mocking their wedding video, tearing up a father's day card, and referring to him as the "sperm donor." R19:962;R19:1050;R20:1078.

Trial counsel failed to present the multigenerational pattern of family dysfunction and disrupted attachment. Ms. Mohammed was not a bad mother just because she chose to be. She was damaged as a child because she never formed healthy attachments or empathy. She in turn damaged Abdool. Her family criticized her for leaving Patrick and marrying Bing but she was so invested in the decision that she refused to ever admit that it might have been a mistake. She sacrificed her children for the sake of the facade that she and Bing and the boys were a successful, loving, and well-adjusted family.

The post-conviction court discounts much of this testimony and describes it as merely an elaboration of previous testimony from the penalty phase at trial and to the extent there was new information, especially the information regarding emotional abuse, counsel could not be faulted for failing to uncover it. R12:1439. The post-conviction court dismissed the new testimony as merely inconsistent with the testimony from the penalty phase of Abdool's trial. This is an unreasonable factual finding in light of the state court record.

Trial counsel conceded during post-conviction proceedings that families of clients accused of murder are not completely forthright and honest about a defendant's background. They were aware of the pitfalls and without any true justification or strategy, ignored them anyway. Trial counsel should have found it suspect when Abdool's mother provided records and a witness list of people they could speak with.

Because trial counsel unreasonably allowed Ms. Mohammed to steer the mitigation investigation, trial counsel unreasonably failed to interview essential witnesses and, of those witnesses interviewed, failed to conduct those interviews within prevailing norms. Thus, the mitigation was never gathered and never presented to Mr. Abdool's jury or sentencing judge. This was deficient performance which fell below prevailing norms.

B. Trial counsel's failure to ensure a reasonably competent mental health evaluation was deficient performance which fell below prevailing norms.

Counsel's performance fell below prevailing norms in failing to discover and present testimony of Abdool's frontal lobe and right hemisphere brain damage. The post-conviction court dismissed this important finding as merely an additional conclusion and stated that Abdool had failed to show how the enhanced mental health, along with the family background mitigation, would create a probability sufficient to undermine confidence in the outcome. R12:1435. However, the post-conviction court misapprehends the importance of the finding of brain damage, in

light of the testimony at post-conviction. The post-conviction court's conclusion that at trial the mental health professionals did not advise either Sims or Cashman "that Abdool should undergo neuropsychological testing" is an unreasonable factual finding in light of the state court record. R12:1434. First, prevailing norms require an attorney to understand the different mental health disciplines and be reasonably familiar with the various psychological or neuropsychological tests given by their experts, including the importance of not using outdated or nonstandardized tests.

Second, trial counsel ignored recommendations to get a neuropsychological evaluation by Dr. Alan Berns, who was the first mental health expert to see Abdool, and Dr. Berland, another doctor that trial counsel consulted. R13:52. Trial counsel failed to do so and gave no adequate reason for not having an evaluation done. *Id.* Trial counsel conceded that they could have obtained a confidential neuropsychological evaluation and kept the results from the State if they were unfavorable. R13:163. Furthermore, there were concerns expressed within the defense team with the quality of Dr. Gold's evaluation and the potentially negative information she possessed. As a result, trial counsel unreasonably curtailed their investigation. This was below prevailing norms because a reasonable attorney, with the quantum of evidence already known about Abdool's "red flags" for brain damage, would have consulted with a neuropsychologist. *Wiggins*, 539 U.S. at 527. As this Court noted on direct appeal,

none of the mental health mitigation presented could be tied to the crime. *Abdool v. State*, 53 So.3d 208, 221 (Fl. 2010). However, evidence uncovered in post-conviction now affirmatively links Mr. Abdool's deficits to the crime.

In post-conviction, Abdool presented unrebutted objective scientific evidence that he has significant deficits in his frontal lobe as well as a severe nonverbal learning disability, which indicates deficits in the right hemisphere. Additionally, at the age of 19, Abdool's brain was not fully developed, compounding the significance of his existing deficits. "[I]n a very stressful situation, [his] adaptive functioning is severely impaired." R22:1448. Individuals with nonverbal learning disabilities share characteristics with autistic individuals. R22:1450. "They have poor or impaired social insight into the behavior of others. They misperceive normal human interactions. They don't understand a lot of human behavior and they have this impaired ability to cope and handle and to deal effectively with emotionally related situations that require problem-solving skills." R22:1450-51. Abdool's cognitive impairments, his nonverbal learning disability, his sleep deprivation and alcohol use and his lack of coping resources all contributed to and had a direct correlation with his actions on the night of the crime. R22:1457-1458.

The Sixth Amendment requires competent mental health assistance to ensure fundamental fairness and reliability in the adversarial process. *Ragsdale v. State*,

798 So.2d 713 (Fla. 2001). Meaningful assistance of counsel in capital cases requires counsel pursue and investigate all reasonably available mitigating evidence, including brain damage and mental illness. *Frazier v. Huffman*, 343 F.3d 780 (6th Cir. 2003). Counsel renders deficient performance when he fails to ensure an adequate and meaningful mental health examination. *Ponticelli v. State*, 941 So.2d 1073, 1095 (Fla. 2006); *Sochor v. Florida*, 833 So.2d 766, 722 (Fla. 2004). Counsel’s failure to pursue mental health mitigation despite “red flags” amounts to deficient performance. *Arbelaez v. State*, 898 So.2d 25, 34 (Fla. 2005).

C. Failure to present evidence of a positive adjustment in prison.

Trial counsel failed to investigate and present evidence that Abdool would make a positive adjustment to prison and would not pose a danger if given a life sentence. At Abdool’s 2008 trial, trial counsel presented the testimony of inmate Jay Iverson to say that Abdool was a good inmate and that they were allowed out of their cells in protective custody to paint and clean for the guards. TR19:948-52. Trial counsel was therefore aware of and recognized that good prison behavior is important evidence, but trial counsel failed to consult with or experts who could put Abdool’s jail behavior record in context.

In *Skipper v. South Carolina*, 476 U.S. 1, 4, 106 S. Ct. 1669 (1986), the Court held that evidence of a defendant’s conduct in jail after the crime, but prior to trial, must be considered for purposes of mitigation. Counsel should also

address concerns of future dangerousness, even when not a statutory factor in aggravation. “Studies show that ‘future dangerousness is on the minds of most capital jurors, and is thus “at issue” in virtually all capital trials.’” American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 10.11 (Commentary, p. 113) (2003). “Evidence that the client has adapted well to prison and has had few disciplinary problems can allay jurors’ fears and reinforce other positive mitigating evidence.” *Id.*

Trial counsel admitted that Abdool’s jail records showed no disciplinary infractions. R13:57-8. However, trial counsel claimed that he thought Abdool was manipulative so he did not want to open the door to any evidence of this alleged manipulation. R13:58,164. Trial counsels’ basis for thinking that Abdool was manipulative was that he smelled different from the other inmates, leading them to believe he was getting special food from the guards. R13:58. This is inconsistent with the evidence they put on at trial that Abdool was a good inmate who was trusted with jobs inside the jail. This testimony about him getting special food “resembles more a post-hoc rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing.” *Wiggins v. Smith*, 539 U.S. 510, 526-27 (2003). Trial counsel did not consult with an expert in this area so they do not know what they would have been able to testify to or whether the perceived manipulative behavior was even a concern. Trial counsel’s failure to

present expert testimony explain Abdool's positive adjustment to prison and low risk of dangerousness "resulted from inattention, not reasoned strategic judgment." *Wiggins*, 539 U.S. at 534.

James Aiken, who has over 40 years of experience in classifying inmates to determine their risk assessment, concluded that Abdool would serve out a life sentence posing no danger to other inmates, staff, or the community. Failure to present this evidence and educate the court and the jury about the "elephant in the room" of a concern of future dangerousness or a typical juror's 250-fold overestimation of homicide rates in prison was deficient performance below prevailing norms. R24:1577-78.

D: Failure to present evidence of cultural dislocation.

Trial counsel failed to investigate and present evidence of Abdool's cultural displacement in the United States and the difficulty he had assimilating to life here. Trial counsel's failure to present the evidence of cultural displacement and difficulty assimilating was below prevailing norms. The ABA Guidelines stress when representing a foreign national, trial counsel should investigate "the circumstances of his upbringing in his county or origin, and about the difficulties the client's immigrant community faces in this country." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.7 (Commentary, p. 86)(2003).

Dr. Cudjoe explained the various ruptures in Abdool's life began when his parents first separated and he moved in with his stepfather and mother in Chaguanas. R21:1191. Nazreen and Bing Mohammed pulled him out of the Presbyterian school and enrolled him in a Muslim school because Bing was Muslim. R21:1198. There was no explanation or psychological counseling to explain this change. Another rupture was the abrupt move to the United States, for which there was also no explanation or psychological counseling. Even though counseling was frowned upon Trinidad (R21:1199), Nazreen's sister Charmaine put her son Adrian's needs before the stigma and took him for counseling after his father had left them for another woman. R21:1313. If Abdool, with his cognitive deficits and limitations, had been allowed to stay in Trinidad, with his loving and attached father, and where the pace of life was much slower, he would have thrived. While he is regarded as simple or slow, Patrick has maintained employment at the same company for 31 years. R17:722. He fits in perfectly with the island way of life. As Yazeed Mohammed explained, Dane Abdool and Patrick Abdool were like "twins." R19:1077.

In the United States, Abdool was teased in school and called names relating to his appearance. He was called "Taliban" and other kids made jokes that his family must own a 7-Eleven. R21:1203. He never attempted to become a U.S. Citizen, despite the fact that the rest of his family had. If Abdool had been allowed

to remain in Trinidad or had been allowed to return to Trinidad as his grandmother had requested, this crime never would have happened. Trial counsel conceded that they did not consult with a cultural expert so they could not know what kind of testimony or perspective such an expert could offer. This was deficient performance below prevailing norms.

E. Mr. Abdool was prejudiced by trial counsel's failures.

When assessing prejudice, this Court is required to “evaluate the totality of available mitigation evidence –both that adduced at trial, and the evidence adduced in the [post-conviction] proceeding in reweighing it against the evidence in aggravation. See *Clemons v. Mississippi*, 494 U.S. 738, 751-752(1990).” (*Terry Williams v. Taylor*, 529 U.S. 362, 397 (2000)). Had the jury heard that Abdool’s 19 year-old brain was not fully developed and was damaged in the frontal lobe and right hemisphere and that he had a severe nonverbal learning disability that impaired his ability to cope and effectively handle emotionally related situations that require problem-solving skills, there exists a reasonable probability the outcome would have been different and he would have received a life sentence.

This Court and the United States Supreme Court have recognized brain damage as a weighty mitigator, which establishes prejudice. *Ragsdale v. State*, 798 So. 2d 713, 718-19 (Fla. 2001); *Rose v. State*, 675 So.2d 567, 571 (Fla. 1996) (citing *Porter v. Singletary*, 14 F.3d 554, 557 (11th Cir. 1994)); *Porter v.*

McCollum, 130 S.Ct. 447 (2009); *Sears v. Upton*, 130 S.Ct. 3259 (2010); See also *Crook v. State*, 813 So. 2d 68 (Fla. 2002)(unpublished)(reversing a trial court’s failure to find and weigh as mitigation un rebutted evidence of frontal lobe brain damage).

There was no testimony at trial linking Abdool’s learning disability to the crime, leading the sentencing court to give both statutory mental health mitigators little weight. R37:1434,1436. There is no requirement under the Eighth Amendment for the mitigation to be linked to the offense or to directly rebut the evidence in aggravation. *Williams v. Taylor*, 529 U.S. 362, 399, 120 S.Ct. 1495, 1502 (2000). However, Abdool has now provided a direct connection between his deficits and his actions on the night of the crime. Additionally, the mental health mitigation presented in post-conviction gives more weight to the age mitigator because Abdool is “substantially more limited than the typical 19-year-old.” While Abdool may have had a choice or knew right from wrong at the time of the crime, there is substantial mitigation and impairment factors related to his moral culpability that was not presented to the jury and undermines confidence in the result.

In *Sears v. Upton*, 561 U.S.— , 130 S.Ct. 3259 (2010), the Court found it “significant” that post conviction counsel presented evidence that Sears suffered from brain damage or “deficits in mental cognition or reasoning . . . as a result of

several head injuries he suffered as a child.” *Sears* at 3262. The Court noted that Sears’ “well-credentialed expert’s assessment, based on between 12 and 16 hours of interviews, testing and observations,” established that Sears suffers from substantial cognitive impairment.” *Id.* at 3263. The Court noted the results on standardized tests and the history of head trauma as factors in establishing prejudice. *Id.*

Abdool presented un rebutted evidence that he suffers from frontal lobe and right hemisphere brain damage. Dr. Olander’s objective neuropsychological testing was not challenged or criticized. She also provided the missing link between Abdool’s cognitive deficits and his actions during the crime. She explained that was experiencing several stressors around the time of the crime. He was sleep deprived, and he was drinking. He had been receiving threatening phone calls. Because of his impaired ability to process emotional experiences and his misperceptions of people, he could not effectively handle his desire to maintain his relationship with his current girlfriend while dealing with the continuing contact from the victim. His already damaged, immature 19-year-old brain was overwhelmed and could not cope. Dr. Olander explained that Dane met both of the statutory mental health mitigators, reducing his moral culpability and tilting the balance of the aggravating and mitigating factors towards a life recommendation.

The nonstatutory mitigation argued by trial counsel and found by the

sentencing court can properly be categorized as “a catalog of seemingly unrelated mitigating factors.” Presenting a laundry list of factors with little to no evidentiary support for them does not offer a compelling reason for a sentence less than death. Commentary to ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.11(2003).

A perfect example of how Abdool was prejudiced by the presentation of a list of unrelated mitigating factors instead of a persuasive narrative is the discovery and presentation of Nazreen and Patrick’s divorce. Trial counsel listed “effect of parent’s divorce’ and “estranged from biological father” as mitigating factors in their sentencing memorandum. The trial court gave those mitigating factors “very little weight” because there was “simply no evidence presented on what effect the divorce had on the defendant” and because there “is no evidence in the record regarding the impact of this lack of contact had upon the defendant.” R37:1441.

In post-conviction, Abdool presented extensive testimony about the effect of his parents’ pathological divorce, and how his mother kidnapped the boys and moved them to the United States, falsifying court documents stating there were no minor children in order to expedite the process. Abdool presented testimony that he cried everyday for his father and missed his father very much. Dr. Cunningham talked extensively about how Nazreen’s continued verbal abuse of Patrick affected Abdool’s growth and development, and diminished his moral culpability.

As noted above, in *Sears v. Upton*, the Court reversed a death sentence where trial counsel's deficient performance resulted in an inaccurate portrayal of the defendant's childhood. Trial counsel unreasonably relied on information from family members and therefore told the jury Sears' "childhood [w]as stable, loving, [middle class], and essentially without incident." *Sears* at 3261. "The prosecutor ultimately used the evidence of Sears' stable and advantaged upbringing against him during the State's closing argument. In *Sears*, the prosecutor told the jury, '[w]e don't have a deprived child from an inner city; a person whom society has turned its back on at an early age. But, yet, we have a person, privileged in every way, who has rejected every opportunity that was afforded him.'" *Sears* at 3262 (internal citations omitted). Likewise, in Abdool's trial, defense counsel presented evidence that Abdool came from a stable and loving middle class home but had some learning difficulties. The prosecution turned this evidence against him arguing that he came from a loving family and was spoiled by his mother and stepfather. This could not be further from the truth. The true picture of Abdool was presented at the evidentiary hearing. Trial counsel completely failed to uncover the extensive neglect and emotional abuse suffered by Abdool because they allowed Ms. Mohammed to steer the mitigation investigation and determine what family member to speak to and what records to gather.

As in *Porter*, “[t]his is not a case in which the new evidence would barely have altered the sentencing profile presented to the sentencing judge. The judge and jury at [Abdool’s] original sentencing heard almost nothing that would humanize [Abdool] or allow them to accurately gauge his moral culpability...[h]ad [Abdool’s] counsel been effective, the judge and jury would have learned of the kind of troubled history we have declared relevant to assessing a defendant’s moral culpability.” *Porter v. McCollum*, 130 S.Ct. 447, 454 (2009)(internal quotations and citations omitted). *See also Cooper v. Secretary, DOC*, 646 F.3d 1328 (11th Cir. 2011) (finding prejudice despite overwhelming evidence of guilt in a triple murder case); *Mak v. Blodgett*, 970 F.2d 614 (9th Cir 1992)(finding deficient performance and prejudice for failure to present evidence of cultural dislocation despite the fact that the state presented aggravating evidence that Mak was the leader in the massacre of thirteen innocent individuals); *Debruce v. Comm’r*, 758 F.3d 1263,1276(11th Cir. 2014)(“[A]dequate investigation would have enabled counsel to correct a positively misleading sentencing profile.”).

In *Johnson v. Secretary DOC*, 643 F.3d 907, 936 (11th Cir. 2011), the Court held that “[t]he description, details and depth of abuse in [the defendant’s] background that were brought to light in the evidentiary hearing in the state collateral proceeding far exceeded what the jury was told...with a reasonable investigation, though, [trial counsel] could have painted for the jury the picture of a

young man who resembled the tormented soul in ‘The Scream.’” The *Johnson* Court found prejudice despite the fact that it was double homicide where the trial court found five aggravating circumstances, including the fact that Johnson was on parole for burglary at the time of the homicides and one month after the homicides he committed armed robbery and attempted murder in Oregon. *Johnson* at 912. The Court concluded, “[t]he evidence about Johnson’s childhood and family that the jury did not hear is similar to that which the jury did not hear in *Williams v. Taylor*, 529 U.S. at 395, 120 S.Ct. at 1514. The murders in this case were no more brutal than the murder in that case. The defendant’s criminal record and other aggravating circumstances were as bad in that case as in this one. And in that case the Supreme Court held that prejudice had been established.” *Id.* at 937 (some internal citations omitted).

Coupled with the other mitigation they had heard, had the jury known that Abdool, a 19 year old special needs child who suffers from brain damage to his frontal lobe, was emotionally abused and neglected by a pathological mother and stepfather who were so intent on getting their own needs met they sacrificed Abdool’s needs, was culturally displaced after being suddenly removed from his biological father and his homeland, and could safely be housed in the Florida Department of Corrections for the remainder of his natural life, there exists a reasonable probability that the outcome would have been different and he would

have been given a life sentence.

ARGUMENT III: Counsel’s failure to investigate and address potential jurors’ likely reaction to the manner of death in the case and the potential negative religious connotations associated with a burning was deficient performance:

Abdool presented un rebutted testimony that prevailing norms require lawyers to bring out uncomfortable topics such as racism and religious prejudice during jury selection. This questioning should be done during individual voir dire if at all possible. If a juror is asked a question in a group setting such as “can we all agree that prejudice doesn’t belong in a courtroom,” that has no value. R15:284. Prevailing norms also require counsel to be familiar with pre-trial publicity about the case prior to conducting jury selection, which includes reading the comments section below the articles that are online.

Trial counsel offered no strategic reason for failing to address these issues in voir dire. The only rationalization trial counsel offered was that after looking at the jury pool, they decided not to ask any questions about race or religion. R13:45. Trial counsel based this decision on a gut feeling and the fact that they did not want to offend the jury as a bunch of “haters.” R13:158. This is unreasonable within the meaning of *Strickland* and its progeny.

Ms. Blake identified nationality or perceived nationality as a major issue in Abdool’s case that was not addressed by trial counsel in jury selection. R20:1127. She explained that there is a perceived bias among Americans against Muslims

post 9/11 and that is something that would affect jury selection. That bias is compounded in Abdool's case when the manner of death is taken into account.

Ms. Blake explained that it would not be reasonable based on the data for trial counsel to assume in a case where an individual with a Muslim sounding name and dark skin who has been charged with burning his teenage girlfriend that jurors would be able to disregard this major hot-button issue. R20:1132. While addressing this in verbal voir dire can be uncomfortable, trial counsel has to "get people talking about it and they need to vocalize the area that they fear would elicit bias." R20:1133.

Ms. Blake referenced an Orlando Sentinel Article from 2006 that described the crime and had a picture of Abdool. R20:1139. The comments after that article demonstrated anti-Muslim, anti-Trinidadian, and anti-immigration sentiments. *Id.* Trial counsel conceded that she collected pre-trial publicity in this case. While members of the jury pool may or may not have been the ones posting the comments, it was still important for counsel to address these kind of comments.

Prior to voir dire, trial counsel submitted a questionnaire that was denied by this Court without prejudice to re-file. TR2:110-111. Trial counsel did not do so. However, in the questionnaire and/or in Abdool's actual voir dire, trial counsel did not ask any questions designed to identify any perceived bias or prejudice against Muslims or Trinidadians or people with dark skin. During jury selection, a juror

explained that because of Abdool's name and skin color he perceived him to be Muslim. TRS5:618. The juror then proceeded to connect the crime to religious practices and indicated he may have a problem with that. *Id.* As Ms. Blake explained, even if trial counsel had been somehow unaware up to that point of bias against Muslims, that should have been a red flag for trial counsel to change their questioning because "if one person raises their hand and asks that questions, there's always ten or twenty [others] out there thinking the same thing." R20:1161.

Voir dire is the only opportunity to flush out the jury's feelings and educate the jury on any stereotypical beliefs they might hold. Trial counsel failed to address the shocking nature of the manner of death as well as any racial, cultural, or religious connotations that the jury might assign to it. It is not a reasonable strategic decision to ignore potential racial or religious biases in a potential jury, especially when one member has mentioned those concerns. It is, however, reasonable that once the issue has been brought out, to investigate it with the other members of the venire. Had counsel consulted with a jury expert and properly educated the jury on these issues, there exists a reasonable probability that that Abdool would have been would have been convicted of a lesser offense or acquitted, or given a life sentence by a properly educated and vetted jury.

ARGUMENT IV: Trial counsel’s failure to conduct a reasonable investigation and consult an independent arson expert was deficient performance which fell below prevailing norms:

Trial counsel rendered deficient performance by failing to hire an arson expert to review the conclusions of the State’s arson expert with respect to the position of the victim when she was splashed with gasoline, how many applications of gasoline there were, and how far away the ignition source was from the victim. Trial counsel has a duty to conduct an adequate investigation into guilt phase issues pre-trial. *State v. Fitzpatrick*, 118 So.3d 737, 753 (Fla. 2013)(affirming a post-conviction court’s finding of ineffective assistance of counsel for failure to obtain scientific evidence from forensic or medical experts to challenge the damaging physical evidence against the defendant)(internal quotations and citations omitted).

This Court must also consider “whether cross-examination of the State’s expert brings out the expert’s weaknesses and whether those weaknesses were argued to the jury.” *State v. Reichmann*, 777 So.2d 342, 354 (Fla. 2000)(internal citations omitted). See also Commentary to ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.7(2003)(“counsel should ... aggressively re-examine all of the government’s forensic evidence, and conduct appropriate analyses of all other available forensic evidence.”).

At trial, the State used the testimony of Juan Bailey to argue that the victim was splashed with gasoline more than once in order to support a finding of premeditation in the guilt phase, as well as the aggravators of CCP and HAC in the penalty phase. “You heard the testimony from Detective Bailey that there were two scorch lines in the dirt that were trailers of the fire, one going from the gas can, melted gas can, to the midpoint of her body, and one going from her head to her arm to the dirt to her leg.... Ladies and gentlemen, that’s not from one splash of a gas can.” TR12:710. The State further argued, “Why add fuel to this fire unless Dane Abdool was determined, was set to make sure that Amelia Sookdeo burned up in flames and was left for dead.” TR12:752. Finally, the State argued, “And when she’s down, he adds fuel to the fire.” TR12:754. Additionally, on at least five separate occasions during the guilt phase closing argument, the State argued as incredible Abdool’s version of events that he did not hold the lighter within inches of the victim and it was his glove that caught fire and she caught fire from him throwing the glove. TR12:692, 693, 967, 751, 754.

Mr. Lentini testified that evidence from the crime scene does not support multiple applications of gasoline. He explained that the evidence is “absolutely” consistent with a single application of gasoline. R26:1838. Additionally, Mr. Lentini explained that testimony of Juan Bailey at trial that Abdool would have had to be almost in contact with the victim for the gasoline to ignite is inaccurate.

R26:1839. He could have been up to a foot away from the victim and the vapors still would have ignited. *Id.* This is significant because being a farther distance away tends to support Abdool's version of events and casts doubt upon the State's theory. A foot apart is approximately the distance they would be if they were having heated argument by the roadside as Abdool described. This is consistent with Abdool's statement that he did not hold the lighter right up against the victim, as the State argued, but instead just flicked it to scare her during their argument.

The trial court found that trial counsel made a reasonable strategic decision. In light of trial counsel's testimony, this is an unreasonable conclusion. Trial counsel conceded that they did not consult with an arson expert, because they do not know what type of evidence that expert would have been able to provide. Strategic decisions are not immune from attack if they are based on an unreasonable investigation. Ignorance of what an expert can provide and failure to attempt to ascertain it does not make a reasonable strategic decision; it shows a lack of investigation and failure to advocate for the client. *Wiggins v. Smith*, 539 U.S. 510, 533, 123 S.Ct. 2527 (2003).

Because trial counsel failed to consult with an expert, trial counsel failed to effectively cross examine Juan Bailey and failed to present scientific evidence to the jury that Abdool's version of events were scientifically possible, therefore creating a conflict in the evidence, which would constitute reasonable doubt.

TR12:765. Had trial counsel investigated and presented this information, there exists a reasonable possibility that Abdool would have been convicted of a lesser offense or acquitted or given a life sentence.

ARGUMENT V: Trial counsel's failure to litigate the fact that the Winter Garden Police violated Abdool's rights under the Vienna Convention was deficient performance which fell below prevailing norms.

Abdool is a Trinidadian National. He is not a citizen of the United States and only possessed a green card at the time of his arrest. The Winter Garden Police knew that Abdool was born in Trinidad. R29:24,27. According to the interview on March 2, 2006, they had actually known this for several days prior to his detention and arrest. *Id.*

Trial counsel conceded that the Winter Garden Police failed to notify the Trinidadian consulate of Abdool's detention and arrest. Trial counsel stated they did not litigate this issue because they believed the case law did not support any relief. Despite understanding the importance of preserving issues in a capital case in the event that the law changes, trial counsel conceded they did not litigate the issue. Trial counsel was deficient in failing to preserve and litigate this issue before the trial court. Prevailing norms at the time of Abdool's trial required trial counsel to be familiar with the Vienna Convention and the obligations the State had under the Convention. The 2003 ABA Guidelines, which were in effect at the time of Abdool's arrest and trial, explain that when representing a foreign national,

trial counsel should ensure that the consulate of the client's country has been notified. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.6(2003). The Commentary to that Guideline states: There is considerable evidence that American local authorities routinely fail to comply with their obligations under the Vienna Convention.

Had the Winter Garden Police Department complied with the Vienna Convention, notified Abdool of his rights, and notified the Trinidadian consulate upon his detention, there is a reasonable likelihood that Abdool would not have given an uncounseled confession to the police. This would have been an additional factor for this Court to consider in the totality of circumstances analysis that is required in a Motion to Suppress. Abdool was prejudiced by this failure because the uncounseled confession was the primary evidence used to convict him of first degree premeditated murder. Additionally, had trial counsel contacted the consulate on Abdool's behalf after he was charged, they could have received investigative assistance and support from the Trinidadian government and there exists a reasonable possibility that Abdool would have been convicted of a lesser offense or acquitted.

ARGUMENT VI: Cumulative Error:

Mr. Abdool did not receive the fundamentally fair trial to which he was entitled under the Fifth, Sixth, Eighth and Fourteenth Amendments. See *Heath v.*

Jones, 941 F.2d 1126 (11th Cir. 1991); *Derden v. McNeel*, 938 F.2d 605 (5th Cir. 1991); *Rose v. Lundy*, 455 U.S. 509, 531, 102 S.Ct. 1198, 1210 (1982). The sheer number and types of errors in Abdool's guilt and penalty phases, when considered as a whole, virtually dictated the sentence of death. While there are means for addressing each individual error, addressing these errors on an individual basis will not afford adequate safeguards required by the Constitution against an improperly imposed death sentence. Repeated instances of ineffective assistance of counsel significantly tainted Abdool's guilt and penalty phases.

Trial counsel failed to properly investigate and present mitigation, including uncovering evidence of brain damage in his immature frontal lobe, which is responsible for restraining impulsivity and exercising sound judgment. Trial counsel allowed Abdool's mother to skew the mitigation investigation, and as a result failed to uncover compelling mitigation including evidence of childhood neglect and emotional abuse. Trial counsel failed to investigate and present evidence of Abdool's cultural displacement. Trial counsel failed to file a motion to suppress and failed to conduct a constitutionally effective voir dire addressing the important issues in his case. Trial counsel failed to retain an arson expert to challenge the State's evidence of premeditation and heightened premeditation. Trial counsel failed to ensure that Abdool received a constitutionally adequate mental health evaluation, by failing to obtain a neuropsychological evaluation and

allowing Dr. Gold to administer outdated and nonstandardized tests, resulting in the failure to discover brain damage and failure to connect Abdool's cognitive deficits to the crime. Finally, trial counsel failed to present evidence that Abdool would not be a risk in prison if he received a life sentence.

These errors cannot be harmless. Under Florida and federal law, the cumulative effect of these errors denied Abdool his fundamental rights under the Constitution of the United States and the Florida Constitution. *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986); *Ray v. State*, 403 So.2d 956 (Fla. 1981).

ARGUMENT VII: Abdool's Eighth Amendment right against cruel and unusual Punishment will be violated as Abdool may be incompetent at the time of execution.

This claim was raised below and stipulated as being premature. However, it is necessary to raise it here to preserve the claim for federal review. *In Re: Provenzano*, 215 F.3d 1233 (11th Cir. June 21, 2000). Abdool suffers from brain damage. His already fragile mental condition could only deteriorate under the circumstances of death row causing his mental condition to decline to the point that he is incompetent to be executed.

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Mr. Abdool relief on his 3.851 motion. This Court should order that his sentence be vacated and remand the case for a new trial, or for such relief as the Court deems proper.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Scott A. Browne, Assistant Attorney General @ scott.browne@myfloridalegal.com and CapApp@myfloridalegal.com, on this 15th day of October, 2014.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of Appellant, was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.100 and 9.210.

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