Filing # 23528155 E-Filed 02/09/2015 02:02:37 PM

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

REPLY BRIEF OF APPELLANT

JULISSA R. FONTÁN
Assistant CCRC
Florida Bar No. 0032744

MARIA E. DELIBERATO
Assistant CCRC
Florida Bar No. 664251
Capital Collateral Regional Counsel – Middle Region
3801 Corporex Park Dr., Suite 210
Tampa, FL 33619
(813)740-3544

RECEIVED, 02/09/2015 02:03:56 PM, Clerk, Supreme Court

TABLE OF CONTENTS

Page

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....iii

PRELIMINARY STATEMENT.....1

STATEMENT OF THE CASE AND FACTS.....1

ARGUMENT.....3

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.....3

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.....12

A. Failure to present an accurate picture of Abdool's life and failure to ensure a reasonably competent mental health evaluation was deficient performance which fell below prevailing norms.....13

B. Failure to present evidence of a positive adjustment in prison.22

C. Failure to present evidence of cultural dislocation.....23

D. Mr. Abdool was prejudiced by trial counsel's failures.....24

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.....27

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.....28

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.....28

ARGUMENT VI: Cumulative Error.....29

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 29

CONCLUSION AND RELIEF SOUGHT 30

CERTIFICATE OF SERVICE 30

CERTIFICATE OF COMPLIANCE.....31

TABLE OF AUTHORITIES

Cases

Abdool v. State, 53 So.3d 208 (Fla. 2010) 10

Anderson v. Secretary, Fla. Dept. of Corrections, 752 F3d 881 (11th Cir. 2014)...25

Ashcraft v. Tennessee, 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192 (1944).....7

Brownlee v. Haley, 306 F.3d 1043 (11th Cir. 2002)..... 26, 27

Cherry v. State, 659 So.2d 1069 (Fla. 1995) 3

Clemons v. Mississippi, 494 U.S. 738 (1990).....25

Clewis v. Texas, 386 U.S. 707, 87 S.Ct. 1338, 18 L.Ed.2d 423 (1967).....7

Coday v. State, 946 So.2d 988 (Fla. 2006) 19

Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986).....6

Crook v. State, 813 So. 2d 68 (Fla. 2002).....17

DeBruce v. Comm'r, 758 F.3d 1263 (11th Cir. 2014).....26

Ferrell v. State, 918 So.2d 163 (Fla. 2005) 16

Fikes v. Alabama, 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed.2d 246 (1957).....7

Greenwald v. Wisconsin, 390 U.S. 519, 88 S.Ct. 1152, 20 L.Ed.2d 77 (1968) 7

Haley v. Ohio, 332 U.S. 596, 68 S.Ct. 302, 92 L.Ed. 224 (1948) 7

Haliburton v. State, 514 So.2d 1088 (Fla. 1987)..... *passim*

Harrington v. Richter, 562 U.S. 86, 131 S.Ct. 770 (2011).....2

J.D.B. v. North Carolina, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011) 6

Jennings v. McDonough, 490 F.3d 1230 (11th Cir. 2007) 1

Leyra v. Denno, 347 U.S. 556, 74 S.Ct. 716, 98 L.Ed. 948 (1954) 7

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) 7

Ponticelli v. Secretary, Florida Dept. of Corrections, 690 F.3d 1271 (11th Cir. 2012) 25

Porter v. McCollum, 130 S.Ct. 447 (2009) 17, 18

Porter v. Singletary, 14 F.3d 554 (11th Cir. 1994) 17

Ragsdale v. State, 798 So. 2d 713 (Fla. 2001) 17

Reck v. Pate, 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed.2d 948 (1961) 7

Rose v. State, 675 So.2d 567 (Fla. 1996) 17

Sears v. Upton, 130 S.Ct. 3259 (2010) 17

State v. Allen, 548 So.2d 762 (Fla. 1st DCA 1989) 8, 11

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) ..... *passim*

Taylor v. State, 855 So.2d 1 (Fla. 2003) 6

Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527 (2003) 2, 4, 18, 23

Williams v. Allen, 542 F.3d 1326 (11th Cir. 2008) 26

Williams v. Taylor, 529 U.S. 362 (2000) 17, 18, 25

Withrow v. Williams, 507 U.S. 680, 113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993) 7

Wood v. State, 544 So.2d 1004 (Fla. 1989) 11

Constitutional Provisions

Article I, Section 9 of the Florida Constitution 12

PRELIMINARY STATEMENT

Any claims not argued are not waived and Abdool relies on the merits of his Initial Brief.

STATEMENT OF THE CASE AND FACTS

Any misstatements or misapprehensions in the State's recitation of the facts will be addressed in turn in the body of the argument.

Strickland Standard for Ineffective Assistance of Counsel

Abdool objects to the State's reliance on 11th Circuit and Supreme Court federal habeas case law to attempt to demonstrate "how difficult it is to meet *Strickland*'s ineffective assistance standard." Answer Brief of Appellee, p. 25. These cases are not instructive for this Court. Mr. Abdool is not a habeas petitioner at this time. The review undertaken by the 11th Circuit and the Supreme Court in federal habeas cases is very different than the review required by this Court at this stage. Under AEDPA, the federal courts apply a highly deferential standard to their review of state court proceedings. As such, this Court's analysis is completely different than that of a federal court reviewing a State court decision under the constraints of AEDPA. *Jennings v. McDonough*, 490 F.3d 1230, 1236 (11th Cir. 2007). Therefore, the persuasive value of any federal court decision denying relief under AEDPA is limited and does not support the State's argument that this State Court should likewise deny relief. However, if a federal court grants

relief to a capital habeas petitioner in post-conviction it is significant because the court has determined that the State Court was not only wrong in its decision but was wrong to the extent that its conclusion was an unreasonable application of Supreme Court law.

Similarly, the State also relies on *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 788 (2011) and argues that it stands for the proposition that Mr. Abdool's burden of establishing ineffective assistance in this case is an especially difficult one and the standard is a most deferential one. As noted above, it would be improper for this Court to evaluate Mr. Abdool's claims under the deferential standard of AEDPA as the State urges. Instead, this Court should look to *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), where the Court explained that to establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-688.

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*.

Mr. Abdool relies on the remainder of his original Statement of the Facts to support his arguments herein.

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.

The State, in its Answer, asserts that Abdool's trial attorneys made a reasonable tactical decision to not suppress Abdool's confession. This argument is without merit. Trial counsel did not make a reasonable tactical decision in failing to suppress Mr. Abdool's confession because trial counsel failed to fully investigate the circumstances surrounding the statement and never intended to attempt suppressing the statement. "[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 v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 2535 (2003).

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 the failure of police 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. Trial counsel Sims admitted during his testimony[1] that the issue of the attorney at the gate was a possible, viable way of suppressing the statement. R13:29-30.

The State claims that this issue is not properly before this court. That is inaccurate. The claim raised was ineffective assistance of counsel for failing to file a motion to suppress. As part of the proof to support that claim, Mr. Abdool presented to the post-conviction court the circumstances that surrounded his

[1] "I think we could have done a motion to suppress that statement. I think we might have had a shot in getting it done based on the case law of the attorney at the gate trying to get in as Mr. Barker indicated he was there and he had relayed the fact that he was going to represent Mr. Abdool or was representing at least his family at that time and was there to give him counsel." R13:30.

confession, including the fact that the family retained an attorney who attempted to see Mr. Abdool, but Mr. Abdool was never made aware of his presence. Moreover, the post-conviction court considered the testimony of Eric Barker in its analysis, stating that "[n]either family nor counsel could invoke Mr. Abdool's *Miranda* rights for him". R12:1423. To evaluate this claim, this Court must evaluate all the facts, which includes the fact that Mr. Barker was not admitted in to see his client, despite repeatedly asking to do so and that Mr. Abdool was never notified that he had an attorney to see him. The facts and, as such, the argument, are properly before this Court.

The State asserts in its Answer that Mr. Abdool was free to leave and was not in custody. However, this misstates the facts and the findings of the post-conviction court. The post-conviction court found: "Despite statements that he was not under arrest and was free to leave, he was handcuffed and the police confiscated his driver's license and cell phone."[2] R12:1420. Furthermore, the investigator's statement in the police report states that Abdool's movement in the police department was restricted and he was accompanied at all times. R36:1281. The fact that Abdool was restrained and that his driver's license and cell phone

[2] The post-conviction court stated twice in its order that Mr. Abdool was handcuffed, contrary to the State's position that Abdool was not handcuffed. See also R12:1420, 1423.

were taken away supports that at the time Abdool made his statement he was objectively in custody.

Furthermore, the police, at the time Abdool confessed, already believed that they had probable cause to arrest. R15:384-85. The fact that police attempted to comfort Abdool and make him subjectively believe he was not in custody is irrelevant to the inquiry. Whether a suspect is in custody is an *objective* inquiry. *J.D.B. v. North Carolina*, 131 S.Ct. 2394, 2402, 180 L.Ed.2d 310 (2011)(emphasis added). To find a defendant to be in custody, "it must be evident that, under the totality of the circumstances, a reasonable person in the suspect's position would feel a restraint of his or her freedom of movement, fairly characterized, so that the suspect would not feel free to leave or to terminate the encounter with police." *Taylor v. State*, 855 So.2d 1, 17-18 (Fla. 2003). Nineteen-year-old, learning disabled Abdool, handcuffed and without his cell phone, driver's license or access to a vehicle, objectively was not free to leave.

Also, in the analysis to determine if a defendant did indeed knowingly and voluntarily waive his rights, courts have looked and considered individualized, personal characteristics as relevant to the inquiry. "Under the due process approach, as we have already seen, courts look to the totality of circumstances to determine whether a confession was voluntary. Those potential circumstances include not only the crucial element of police coercion, *Colorado v. Connelly,* 479

U.S. 157, 167, 107 S.Ct. 515, 521, 93 L.Ed.2d 473 (1986); the length of the interrogation, *Ashcraft v. Tennessee*, 322 U.S. 143, 153–154, 64 S.Ct. 921, 925–926, 88 L.Ed. 1192 (1944); its location, see *Reck v. Pate*, 367 U.S. 433, 441, 81 S.Ct. 1541, 1546, 6 L.Ed.2d 948 (1961); its continuity, *Leyra v. Denno*, 347 U.S. 556, 561, 74 S.Ct. 716, 719, 98 L.Ed. 948 (1954); the defendant's maturity, *Haley v. Ohio*, 332 U.S. 596, 599–601, 68 S.Ct. 302, 303–305, 92 L.Ed. 224 (1948) (opinion of Douglas, J.); education, *Clewis v. Texas*, 386 U.S. 707, 712, 87 S.Ct. 1338, 1341, 18 L.Ed.2d 423 (1967); physical condition, *Greenwald v. Wisconsin*, 390 U.S. 519, 520–521, 88 S.Ct. 1152, 1153–1154, 20 L.Ed.2d 77 (1968) (*per curiam*); and mental health, *Fikes v. Alabama*, 352 U.S. 191, 196, 77 S.Ct. 281, 284, 1 L.Ed.2d 246 (1957)." *Withrow v. Williams*, 507 U.S. 680, 693, 113 S. Ct. 1745, 1754, 123 L. Ed. 2d 407 (1993). These factors clearly affect the "individual's…capacity for effective choice" and are relevant in determining whether the confession was coerced or compelled. See *Miranda v. Arizona*, 384 U.S. 436, 506-507, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). However, the post-conviction court failed to identify and apply clearly established federal law. Abdool's mental immaturity, brain damage and intellectual deficits should have been taken into consideration by the post-conviction court rather than found to "not affect the admissibility of his confession". R12:1423.

One of the most salient facts before the post-conviction court and not properly considered, was that Abdool's family had retained an attorney and that attorney was present at the police station and attempting to gain access Abdool. 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. Even more importantly, Abdool himself was never told there was an attorney there for him. This is a clear violation of Abdool's due process rights under the Florida Constitution.

"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 Defendant 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 Defendant, and thus denied to Defendant 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.

Finally, the failure to suppress this statement was clearly ineffective assistance of counsel, as the statement led police to other corroborating evidence and undermined Abdool's defense that the burning was accidental. It is deficient performance to present a confession that in its totality completely undermines the proposed defense. Four of the five facts identified by this Court on direct appeal as supporting premeditation came directly from his confession: 1) 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 in the crime; 2) Abdool drove to a deserted area, yanked her out of his car, wrapped her

in duct tape, and doused her with gasoline; 3) 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; 4) 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).

As this Court has noted, HAC is considered one of the weightiest aggravators in the statutory scheme. Presenting a confession which not only allows the State to successfully argue HAC, but also that the crime was premeditated is detrimental and prejudicial to any defense of accidental death. Trial counsel acknowledged this in post-conviction. R13:28; R28:2089-90. Much of the corroborating evidence against Abdool came directly from his statement. In his statement, he told the police where he purchased the gasoline and duct tape. R36:1281. Prior to that, police searched his step-father's shop for gas cans and left over gasoline and tape, not local convenience stores, thinking that's where Abdool obtained the items used in the crime. R36:1251. His confession allowed police to narrow their search and obtain the surveillance video before it was destroyed. Contrary to the State's assertion, the surveillance video of Abdool purchasing the gasoline and duct tape was not obtained until after Abdool's confession. Nor were the receipts from the purchase obtained until after the confession[3]. R36:1318. The

[3] A note on the receipt notes that it was obtained on March 14, 2006, twelve days after Abdool confessed. The purchase was made with cash, so there was nothing else to link Mr. Abdool to the purchase.

police would not have obtained this valuable evidence, but for Abdool's confession pinpointing the location of the gas station. Had trial counsel attempted to suppress the statement, they could also have attempted to suppress this evidence as fruit of the poisonous tree.

Abdool's statement was obtained through a violation of Abdool's due process rights under the Florida Constitution, and trial counsel was ineffective for failing to conduct the necessary investigation to determine whether it could be suppressed. 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, police did not allow Barker 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 *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 U.S. Constitutions.

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 was not knowing and voluntary, rendered his subsequent confession involuntary and inadmissible. 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.

A. Failure to present an accurate picture of Abdool's life and failure to ensure a reasonably competent mental health evaluation was deficient performance which fell below prevailing norms:

The State argues that trial counsel extensively investigated Abdool's background and had him evaluated by qualified mental health professionals. This is inaccurate. Trial 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 misapprehended 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. Early on in Abdool's case, there were concerns about having Abdool evaluated by mental health experts. During Mr. Sims' testimony, which both the post-conviction court and State misapprehended, he identified a document from his file that reflected a telephone call on March 31, 2006 with Dr. Berns, the psychologist who initially saw Abdool. 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 admitted during his testimony 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*. The post-conviction court, and subsequently the State in its Answer Brief, erroneously stated that "mental health professionals did not advise either Mr. Sims or Ms. Cashman that Mr. Abdool should undergo neuropsychological testing". R12:1433. The testimony on the record clearly and explicitly contradicts this statement.

Furthermore, both the State and the post-conviction court failed to consider the testimony of Ms. Maloney, the mitigation investigator at trial. She testified that she did not know why a neuropsychologist was not consulted, although the defense team had concerns regarding Dr. Gold and her evaluation. R13:195. Dr. Gold lost focus during an interview with Abdool, dropped her papers and appeared to be in a haze. R13:190. Ms. Maloney shared her concerns about Dr. Gold's evaluation of Abdool with trial counsel. R13:190. Also, Ms. Cashman had concerns regarding information Dr. Gold had developed regarding Abdool. Specifically, Dr. Gold claimed that Abdool thought the victim was trash and that he had burned trash when he was young. During post-conviction, Abdool

challenged the accuracy of this information and the accuracy of Dr. Gold's assessment of Abdool. Dr. Cunningham, when he reviewed Dr. Gold's notes, noted that Dr. Gold mixed her hypotheses, observations and diagnoses in the midst of her interview notes, so it could not be clear if the information actually came from Abdool or was simply a hypothesis. R25:1781-82. Furthermore, in post-conviction, this allegation could not be clarified because Dr. Gold was deceased at the time of the hearing and thus could not be cross-examined[4].

Although trial counsel was aware that Abdool had a traumatic birth, was in two automobile accidents where he hit his head, had a life-long learning disability, and that he was exposed to 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. Neither Ms. Maloney or Mr. Sims could provide a cogent explanation for this failure other than they could not "articulate for you now why that decision was made". R14:195.

Failure to investigate an issue is not a strategic decision. The State relies heavily on Ms. Cashman's self-serving testimony, which was contradicted on these points by her co-counsel, Mr. Sims, and her mitigation specialist. Both Mr. Sims and Ms. Maloney in their testimony revealed a singular lack of rationale for failing

[4] The State asserts that this would come in at a re-trial. Answer Brief of Appellee, p. 84. However, given that Dr. Gold is deceased and Mr. Abdool disputes that he ever made that statement, and he never had the opportunity to cross-examine Dr. Gold, it is unlikely that this hearsay within hearsay would be admitted.

to investigate the important issue of brain damage. Brain damage in this case affected Abdool's 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.

The brain damage also provided a compelling explanation for his behavior on the night of the crime, something the mitigation presented at trial was lacking. Dr. Olander diagnosed Abdool with a Cognitive Disorder NOS, also referred to as brain damage. R22:1426. The State notes in its brief, along with asserting that there was no evidence of brain damage, that Abdool had not been subject to brain scans or neuroimaging. Brain scans and neuroimaging are corroborative tools, and the absence of a scan does not preclude a finding of brain damage. *Ferrell v. State*, 918 So.2d 163, 176 (Fla. 2005). Sensitive and detailed neuropsychological testing determined Abdool has significant deficits and impairments in his frontal lobe/executive functioning. R22:1416. Dr. Olander specifically testified in post-conviction that Abdool's 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. She specifically explained that individuals with this type of brain damage and 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.

Contrary to the State's assertion, Dr. Olander provided a neuropsychological explanation for the crime, something that was absent at trial. At Abdool's trial, the testimony presented regarding Abdool's learning disability was not linked to the crime, leading the trial court to give both statutory mental health mitigators little weight. R37:1434, 1436. While, of course, there is no requirement under the Eighth Amendment that the mitigation be linked to the offense or directly rebut the evidence in aggravation, *Williams v. Taylor*, 529 U.S. 362, 399, 120 S.Ct. 1495, 1502 (2000), Mr. Abdool has now provided the Court with a direct connection between his deficits and his actions on the night of the crime.

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 unrebutted evidence of frontal lobe brain damage).

The brain damage in Mr. Abdool's case is particularly significant given the fact that his 19-year-old brain was not fully developed at the time of the crime. As such, prevailing norms require trial counsel, when aware of factors and red flags which indicate brain damage, as well as being advised to conduct neuropsychological testing, to investigate brain damage. That simply was not done in this case. "[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 v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 2535 (2003).

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).

Furthermore, the errors committed by trial counsel were compounded in Abdool's case by the portrait painted at trial of Abdool's family and his home life, which was inaccurately skewed by Nazreen Mohammed's undue influence in the mitigation investigation. Ms. Maloney, the mitigation specialist at trial, testified 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.

This is in stark contrast to the self-serving testimony of Ms. Cashman, upon whom the State relies. The mitigation was not gathered by the defense team, but by Nazreen Mohammed, and that mitigation obscured the reality of Dane Abdool's life. Worse still, as Ms. Maloney revealed in her testimony, no real independent verification of the information was actually obtained and the proper follow through was not done. R14:228.

The State essentially accuses the witnesses of intentionally lying at trial, but fails to mention that the witnesses felt intimidated or pressured by Nazreen Mohammed to give testimony they thought would paint her in a better light. Because of Ms. Mohammed's relationship with the defense team, one witness felt that "there was no confidentiality between myself and the investigators or the lawyers." R19:1026. 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*. Nazreen Mohammed herself testified that she had told the witnesses what kind of information they were expected to give from her point of view. R19:937. Several family members were afraid of angering Ms. Mohammed. R17:785; R19:1021. Because of the perceived closeness between Nazreen Mohammed and the defense team, the family did not feel comfortable

enough to reveal the truth, especially as Ms. Mohammed sat in the courtroom and watched them testify during the penalty phase of the trial.

Ms. Mohammed had a significant personality maladjustment that resulted in her inability to properly bond with her son. R25:1702. Dr. Cunningham testified and explained this in great detail during the post-conviction hearing[5]. He testified that at the time of Abdool's arrest and trial, when Ms. Mohammed 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*.

The State and the post-conviction court misapprehend Abdool's arguments relating to mitigation. Abdool is not faulting trial counsel for not obtaining better experts, instead Abdool maintains that trial counsel did not fully investigate or follow up on potential mitigation that existed in order for their experts to present an accurate portrait of Abdool's life and mental health deficits. The presentation of brain damage is not cumulative, as Abdool's jury was not told he has brain damage. The brain damage is informative as to Abdool's state of mind on the

[5] Despite the State's strangely personal and contemptuous view of Dr. Cunningham (State's Answer Brief, p. 76), nothing in the record before this Court suggests that the post-conviction court rejected Dr. Cunningham's testimony on any of the grounds improperly suggested by the State.

night of the crime. The emotional abuse and neglect he suffered is not cumulative, but instead explains how Abdool perceives stressors and how he copes or does not cope with stressful situations, which was entirely lacking at his original trial. These are pieces that are informative of Abdool's unique and individualized characteristics which a jury needs to make either a life or death recommendation. The mitigation, when taken as a whole, presents a picture that Abdool acted in a compulsive manner on the night of the crime and paints the picture of a 19-year-old with brain damage, from a dysfunctional family, unable to cope with the pressures brought to him by his relationship with the victim.

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

The State misapprehends Abdool's argument regarding positive prison adjustment. 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. 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 counsel's 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.

C. Failure to present evidence of cultural dislocation.

The State misapprehends Abdool's argument in post-conviction. Abdool does not fault trial counsel for not obtaining a cultural expert. Instead, the claim is that trial counsel failed to present *evidence* of his 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 because they failed to investigate or to consult with an expert to see what kind of information they could have presented. Trial counsel claimed they were afraid of presenting this information because they did not want to highlight the perception people from Trinidad felt superior to people from Guyana. This is not accurate, as the testimony of Dr. Selwin Cudjoe in post-conviction demonstrated. He explained that the alleged "superiority" was nothing

more than national pride on the part of both Trinidadians and the Guyanese. He explained that the tension existed on both sides and it was more akin to the differences felt between urban and rural communities because in one community, there is often times more economic opportunity than in the other. R21:1230-1231. Had trial counsel actually investigated these issues properly, they could have explained and framed the issue for the jury in such a way that those perceptions would not have been damaging at all. Instead, the jury would have understood how traumatic it was for a nine-year-old Abdool to be ripped from his biological father and his homeland and thrust into the care of a verbally abusive and emotionally neglectful mother and stepfather. Trial counsel was deficient because they failed to fully research, investigate, and present the issue, not simply because they failed to hire an expert.

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

The State argues that Abdool's burden of establishing ineffective assistance in this case is an especially difficult one as he was represented by two very experienced defense attorneys. Answer Brief, p. 21. This is an incorrect statement of the standard. As noted above, it would be improper for this Court to evaluate Abdool's claims under the deferential standard of AEDPA as the State urges. Instead, this Court should look to *Strickland v. Washington*, 466 U.S. 668, 104

S.Ct. 2052, 80 L.Ed.2d 674 (1984), where the Court explained that to establish prejudice, a petitioner must demonstrate confidence in the outcome is undermined.

Furthermore, the post-conviction court assessed the mitigation evidence in a piecemeal fashion. This is an unreasonable application of clearly established federal law. 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). *See also Anderson v. Secretary, Fla. Dept. of Corrections*, 752 F.3d 881, 910-911 (11th Cir. 2014) (Martin, J, concurring)("I have serious concerns about whether the Florida Supreme Court reweighed the totality of mitigating evidence against all the aggravating evidence, old and new…"); *Ponticelli v. Secretary, Florida Dept. of Corrections*, 690 F.3d 1271, 1304-05(11th Cir. 2012)(Martin, J., dissenting)(Dissenting from the denial of habeas relief because the Florida Supreme Court unreasonably applied *Strickland* by failing to reweigh the totality of the evidence, failing to mention the mitigation from the original trial, and also "because of the piecemeal manner in which the Florida Supreme Court weighed [the] mitigation evidence. This is demonstrated by the state court's opinion which

plainly measured the mitigating evidence presented during the postconviction hearing against the aggravating evidence in a fragmented fashion.")

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. Further, the additional evidence presented at post-conviction of his dysfunctional family and cultural dislocation, combined with his cognitive deficits paints a complete and individualized picture of who Abdool is. 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 petititioner'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 prejudices [a

petitioner's] ability to receive an individualized sentence." *DeBruce* at 35, citing *Brownlee*, 306 F.3d at 1074. This happened in Abdool's case and contrary to the State's assertion, the evidence presented in post-conviction shows both deficient performance and prejudice.

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.

The State in its Answer Brief misapprehends Abdool's argument. Abdool is not claiming that trial counsel was deficient for simply failing to obtain a jury selection expert. Instead, Abdool maintains that counsel was deficient in failing to address racial concerns that arose during jury selection and deficient in failing to select a proper jury for this case. Prevailing norms require lawyers to bring out uncomfortable topics such as racism and religious prejudice during jury selection. Mr. 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. Prevailing norms also require counsel to be familiar with pre-trial publicity about the case prior to conducting jury selection, which trial counsel failed to do.

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.

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 at least one potential juror voiced those concerns. Had trial counsel properly educated the jury on these issues, there exists a reasonable probability that Abdool 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.

Mr. Abdool relies on the arguments and facts set out in his Initial Brief for this claim.

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.

The State argues that litigation of Abdool's rights under the Vienna Convention is without merit and procedurally barred. However, the State misapprehends the claim. 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 preserve "any and all conceivable errors for each stage of appellate and post-conviction review". Commentary to ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.8(2003). "Failure to preserve an issue may result in the client being executed even though reversible error occurred at trial." *Id*. Trial counsel has to be aware of "the heightened need to fully preserve all potential issues for later review". *Id*. This means preserving issues "even if it involves challenging well-accepted practices". *Id*. Trial counsel in this case failed to preserve and litigate the issue of Abdool's rights under the Vienna Convention and therefore was deficient, and Mr. Abdool was prejudiced by counsels' failure to properly preserve this claim.

ARGUMENT VI: Cumulative Error:

Mr. Abdool relies on the arguments and facts set out in his Initial Brief for this claim.

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.

Mr. Abdool relies on the arguments and facts set out in his Initial Brief for this claim.

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 sentences 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 9th day of February, 2015.

/s/ Julissa R. Fontán
Julissa R. Fontán
Florida Bar. No. 0032744
Assistant Capital Collateral Counsel
Capital Collateral Counsel - Middle Region
3801 Corporex Park Dr., Suite 210
Tampa, FL 33619
813-740-3544
Fontan@ccmr.state.fl.us

/s/ Maria E. DeLiberato
Maria E. DeLiberato
Florida Bar No. 664251
Assistant Capital Collateral Counsel
Capital Collateral Counsel - Middle Region
3801 Corporex Park Dr., Suite 210

Tampa, FL 33619
813-740-3544
deliberato@ccmr.state.fl.us
Counsel for Petitioner

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**.**

/s/ Julissa R. Fontán
Julissa R. Fontán
Florida Bar. No. 0032744
Assistant Capital Collateral Counsel
Capital Collateral Counsel - Middle Region
3801 Corporex Park Dr., Suite 210
Tampa, FL 33619
813-740-3544
Fontan@ccmr.state.fl.us