IN THE SUPREME COURT OF FLORIDA

DANE PATRICK ABDOOL,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC08-944
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The original record on appeal comprises nineteen consecutively numbered volumes. Counsel will refer to the record on appeal using "Vol." followed by the appropriate Arabic number to designate the volume number, as denoted by the court clerk and not the transcript volume numbers given by the court reporter; followed by either the symbol "R" to denote the page numbers of the pleadings or the symbol "T" to denote the pages of the transcripts (numbered separately from the pleadings); followed by an Arabic number referring to the appropriate pages.

STATEMENT OF THE CASE

The state charged the Appellant, Dane Patrick Abdool, by indictment with the first-degree murder by conflagration of Amelia Sookdeo, in violation of Section 782.04(1)(a)1, Florida Statutes (2006). (Vol. 4, R 205-207) The state filed its Notice to Seek the Death Penalty (Vol. 4, R 240), and the defendant entered a plea of not guilty to the charges. (Vol. 4, R 210-211)

The defense unsuccessfully contested the legality of Florida's death penalty under *Ring v. Arizona*, 536 U.S. 584 (2002), contending among other things that it is unconstitutionally imposed by a judge rather than by jury, that it fails to require fact-finding by the jury, and that it fails to require jury unanimity on the recommendation and on each aggravator. (Vol. 4, R 321-324, 325-328, 329-332) The court denied the motion. (Vol.4, R 370-378) Defense also moved in limine to strike portions of the Florida Standard Jury Instructions in Criminal Cases pursuant to *Caldwell v. Mississippi*, 472 U.S. 320 (1985). (Vol. 5, R 399-401) The trial court denied the motion. (Vol. 2, T 112-113) The trial court also denied defense counsel's request for interrogatory verdicts for the penalty phase. (Vol. 4, R 394-396; Vol.2, T113)

A jury trial commenced before the Honorable Lisa T. Munyon, Circuit Judge of the Ninth Judicial Circuit of Florida, in and for Orange County, on February 13,

2008. (Vol. 8, T 1) Prior to the start of the trial, the defense orally moved in limine to preclude the state from calling the victim's father, Deollal Sookdeo, as a witness during the guilt phase of the trial. (Vol.8, T 26-29) The defense argued that Mr. Sookdeo, who did not live with the victim and her mother, did not have any relevant testimony to offer and was being called merely to evoke the sympathy of the jurors. (Vol. 8, T 26-27) The state asserted that Mr. Sookdeo's testimony was relevant, because initially the victim was listed as a missing person and Mr. Sookdeo would testify that he searched for her and establish whether the victim had previously ever run away from her mother to her father's house. (Vol. 8, T 27-28) The state further asserted that Mr. Sookdeo would testify that he provided a buccal swab for DNA testing to establish the identity of the victim's corpse and that the testimony was relevant to show the jury the lengths that law enforcement had to go to establish the victim's identity, since the victim's body could not be "there isn't anyone who can know her, that can take the stand and identify an autopsy photo because of what the defendant did." (Vol. 8, T 28) Defense counsel responded that difficulty experienced by law enforcement in establishing identity was irrelevant to the issue of guilt or innocence and such testimony was merely addressing the disfigurement of the body when the victim was found. (Vol. 8, T 29) The trial court denied the motion, held that the state had established that the

witness would offer evidence relevant to the guilt phase, and Mr. Sookdeo testified during the guilt phase. (Vol. 8, T 29, 90-94)

At the close of the state's case, defense counsel moved for a judgment of acquittal on the grounds that the state had failed to make out a prima facie case of the element of premeditation and asked that the court reduce the charge to second degree murder. (Vol. 12, T 675-678) Defense argued that the evidence only showed that Mr. Abdool's intention had been to frighten Ms. Sookdeo, not to kill her. (Vol. 12, T 675-677) The trial court denied the defendant's motion for judgment of acquittal. (Vol. 12, T 675-678)

During the testimony of Det. Bobby Gammill, over defense counsel's objection, the trial court allowed the state to ask the detective whether he believed Ms. Sookdeo's death had been an accident. (Vol. 11, T 603) Defense counsel objected to the witness giving an opinion as to the ultimate fact at issue. (Vol. 11, T 603) The state argued that the witness's personal opinion was relevant, because the jury had just viewed a video of an interview, with Mr. Abdool, in which the detective had said it was an accident (Vol. 11, T 603)

The jury returned a verdict of guilty of first degree murder. (Vol. 12, R 791) The court adjudicated the defendant guilty of the charges. (Vol. 12, R 796)

Penalty phase of the trial commenced on February 20, 2008. (Vol. 13) The defense had previously listed expert witness forensic psychologist Dr. Karen Gold, who would be testifying to mental mitigating evidence. Prior to the commencement of the penalty phase hearing, the state sought disclosure of Gold's raw data of tests administered to the defendant, over the defense objection. (Vol. 13, T 814-832) The defense contended that there was nothing in Rule 3.202, Florida Rules of Criminal Procedure, requiring the prior disclosure of the expert's raw data unless the defendant refused to cooperate with the state's expert, which the defendant had not. Fla. R. Crim. P. 3.202(e). Further, the defense cited Section 90.705, Florida Statutes, which provides that an expert may testify in terms of opinion or inferences and give reasons therefor, without the prior disclosure of the underlying facts or data (being required to disclose those only upon cross-examination). Notwithstanding, the trial court ordered the defense to disclose the raw data and test scores to the state, ruling that Rule 3.202 contemplates such a prior disclosure, even in the absence of a refusal to cooperate. (Vol. 13, T 831-832)

Also prior to commencement of the penalty phase testimony, the defense unsuccessfully moved to preclude certain "victim impact" evidence of the victim's father, wherein the father would testify about his fear of losing his other child to anger, pain, and remorse, and that was one more future that he as a father could not

afford to lose. (Vol. 13, T 844, 867, 869) Defense counsel also objected at the beginning of the father's testimony regarding him sitting in his living room with his daughter's death certificate and the outrage he felt at this crime. (Vol. 13, T 867-869) The father of the burning victim also expressed to the jury his feelings in terms of fiery metaphors: "a candle *burns* . . . her face is *seared* into his arm [a tattoo] . . . her image is *seared* into his heart . . . ." while his son "*burns* inside" with anger. (Vol. 13, T 867-869) It was noted for the record, that members of the jury were crying during the presentation of the "victim impact" evidence. (Vol. 15, T 1220)

During penalty phase testimony, the state elicited testimony before the jury that the defendant knew right from wrong (Vol. 14, T 1128; Vol. 15, T 1200), that Abdool was competent to stand trial (Vol. 14, T 1128), that he allegedly exhibited no remorse (Vol. 14, T 1133), and that he came from a family of Muslims. (Vol. 13, T 992) However, the court excluded the defendant's evidence of the effect this charge had on his family members (even though permitting the state's victim impact testimony of how it had affected the victim's family) (Vol. 13, T 984), and the court limited the defendant in the number of photographs of him and his family that he would be permitted to introduce. (Vol. 14, T 1078-1081, 1162-1167)

During its closing in support of a jury verdict of death, the state urged the jury to consider that Abdool knew right from wrong (Vol. 16, T 1260) and that he exhibited a "lacked of empathy for the crime itself," being concerned only with himself. (Vol. 16, T 1262-1263) Under the guise of asking the jurors not to let their penalty verdict be based upon sympathy for the defendant and his family, the state was permitted over objection to argue that the jury should consider that the defendant had the support of his loving family, who gave him opportunities not shared by the common teenager, including purchasing for his use a nice car with fancy racing tires, and that Abdool provided the victim with alcohol (a fact never established). (Vol. 16, T 1266-1267) The state continued, after the overruled objection, to argue that, additionally, the defendant had caused suffering to his family by his actions. (Vol. 16, T 1268)

The jury returned their advisory verdict, recommending a death sentence by a vote of 10 to 2. (Vol. 6, R 736; Vol. 16, T 1301) Following the denial of defendant's motion for new trial (Vol. 6, R 766-767, 773), the court sentenced the defendant to death, finding only two aggravating factors present: (h) heinous, atrocious, and (i) cruel; and cold, calculated, and premeditated. (Vol. 7, R 861-872, 895-896) The court also found the presence of four statutory mitigating circumstances: The trial court found that the defendant has absolutely no history

of prior criminal activity (assigning it, without any elaboration whatsoever, "moderate weight"). (Vol. 7, R 872) The court also found as a mitigating circumstance Abdool's age of 19, especially since coupled with his emotional and social maturity of a 12- to 14-year old which did not allow him "to think through the adult situation in which he found himself and arrive at a reasonable conclusion" (assigning this mitigator also "moderate weight," again without elaboration). (Vol. 7, R 878-879) Additionally, the trial court found as mitigation that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, and that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, assigning these two circumstances "little weight" and, in so doing, noting that the defendant knew right from wrong. (Vol. 7, R 873-878)

The trial court also found 48 non-statutory mitigating circumstances presented by the defendant to be established:

1. Abdool voluntarily spoke with law enforcement (little weight);

2. He ultimately took responsibility for his actions (little weight);

3. Abdool's biological father (with whom the defendant had lived as a child) was an alcoholic, which caused arguments in the household (little weight);

4. The biological father had a gambling problem and would spend the family resources on the horses, also causing family arguments (little weight);

5. The defendant suffered from hyperactivity and had features of attention deficit disorder (little weight);

6. Abdool was developmentally delayed (moderate weight);

7. The defendant was extraordinarily made to repeat a school grade in Trinidad, something that never ordinarily happened (little weight);

8. The effect of his parents' divorce in a foreign society that disapproved of divorce (little weight);

9. The influence of Abdool's move to the United States with its many cultural differences (little weight);

10. His estrangement to his biological father (little weight since no evidence regarding the impact it had on the defendant, but with no mention of uncontroverted evidence that the defendant had experienced major difficulties with his mother and step-father upon returning from a visit to his father in Trinidad);[1]

11. Abdool was intellectually dull (moderate weight);

12. The defendant was not given help via special education classes to help with his learning disability (little weight);

13. Abdool's arrested development of social skills and immaturity (moderate weight);

14. The defendant is emotionally underage (moderate weight);

15. Despite a severe mental problem, Abdool possessed islets of ability (very little weight);

16. The effect and the embarrassment of the defendant being held back in school so that he was in the same grade as his brother, two years his junior (very little weight);

17. The defendant showed no signs of racial, ethnic, or religious prejudice (very little weight);

18. Abdool was unable to successfully graduate high school or even to complete classes necessary to obtain his G.E.D. (very little weight);

19. Abdool was able to complete a welding course (very little weight);

20. Shortly after an automobile accident and an argument over a violation of his parents' curfew, Abdool was "*Baker Acted*" for suicidal ideation (very little weight);

21. Family tensions resulted in Abdool moving in with his uncle, wherein Dane repeatedly requested to be permitted to move back home (little weight);

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[1] (*See* Vol. 14, T 1056-1063)

22. Abdool suffers from Obsessive Compulsive Disorder symptoms (little weight);

23. Defendant suffers from features of a borderline personality disorder (little weight);

24. Dane suffers from grandiose delusions (very little weight);

25. Defendant suffers from a lack of impulse control (very little weight);

26. Abdool has features of a communications disorder (very little weight);

27. Defendant is a good soccer player (very little weight);

28. The defendant suffers from an attention deficit disorder (little weight);

29. Dane Abdool, according to all of the expert witnesses, has learning disabilities (moderate weight);

30. Abdool suffers from dyslexia (very little weight);

31. The defendant's learning disabilities caused processing glitches, affecting his ability to process information (moderate weight);

32. Abdool functions socially as well as academically at a 4^{th} to 6^{th} grade level, well below his biological age (moderate weight);

33. Defendant's learning disabilities cause the defendant to misthink things through (moderate weight);

34. The defendant has low self esteem (very little weight);

35. Abdool was a poor student due to his learning disabilities and low average intelligence (moderate weight);

36. Abdool has the love and support of his family (little weight);

37. Dane was taunted by his fellow students and embarrassed for being held back in school by two years and by being in the same grade as his younger brother (very little weight);

38. The defendant suffered from some problems with depression and anxiety (very little weight);

39. Dane dropped out of school because of his inability to pass the FCAT test and successfully complete high school (very little weight);

40. Abdool has a close and loving relationship with his siblings (very little weight);

41. The defendant was unable to function independently of his family (little weight);

42. Abdool suffers from anxiety separation disorder (little weight);

43. The defendant was the victim of racial bias (very little weight);

44. Dane had feelings of inadequacy when compared to his younger brother, who excelled over Dane both academically and socially (very little weight);

45. The defendant could not successfully pass the FCAT and complete high school (very little weight);

46. Dane Abdool was a responsible, trusted employee at the various jobs he held, working two jobs at once (very little weight);

47. Abdool was a model inmate who caused no difficulties in jail and who was generous with his fellow inmates, even those who treated him poorly (very little weight);

48. The defendant exhibited good behavior at trial and caused no problems for the security staff at the courthouse (very little weight).

(Vol. 7, R 879-894)

The court concluded that the two statutory aggravating circumstances outweighed the "several" statutory and non-statutory mitigating circumstances, that the jury death recommendation was supported by the record beyond a reasonable doubt, and that Abdool had "forfeited his right to live at all," imposing a sentence of death. (Vol. 7, R 895-896)

Notice of Appeal was timely filed. (Vol. 7, R 905) This appeal follows.

STATEMENT OF THE FACTS

Nineteen-year-old "child-like" Dane Abdool suffered from a life-long learning disability and personality disorder (much like his biological father), with "pretty substantial" and "highly-significant" deficits, which caused "processing glitches" in the defendant's ability to think and understand (even though he would appear to), and which can influence interpersonal behavior. (Vol. 13, T 880-890, 936; Vol. 14, T 994-995[father]; Vol. 15, T 1202-1204, 1206, 1211) Abdool had the emotional, educational, and social maturity of a 10½- to 14-year old, and could not deal well with ambiguity or crises. (Vol. 13, T 936-937; Vol. 15, T 1207, 1211-1212) By all accounts (including that of the state's own expert psychologist), when faced with such an emotionally highly-charged situation as occurred here, Dane would have difficulty operating normally, unable to process information quickly and reason through the situation. (Vol 14, T 1176; Vol. 15, T 1183-1185, 1189, 1206) This crime, the state psychologist attested, was an aberration in the Abdool's life, he having no prior history whatsoever of violence. (Vol. 15, T 1213-1216)

Shortly after the death of Amelia Sookdeo, Dane Abdool voluntarily spoke with law enforcement and told them what had happened to Amelia. (Vol.8, T 139,592) Dane had and Amelia had previously been involved in a relationship;

Dane was now in love with Denise Bhoop, a college student at the University of Florida, but Amelia was in love with Dane and wanted to hold onto him. (Vol. 10, T 499-502,543-544; Vol. 8, T 64-68) She called Dane constantly and refused to take the hint that he was no longer interested in her romantically. (Vol. 10, T 468,598) One night an argument between the two escalated and Dane decided that he would scare Amelia, but the gasoline, that he had doused her with to scare her, ignited and Amelia died. (Vol. 8, T 152; Vol. 10, T 535; Vol. 11, T569-570)

Amelia Sookdeo and her younger brother, lived with her mother, Madree Lachman; her father Deollal Sookdeo did not live with the family. (Vol. 8, T 47, 91) Ms. Lachman was from Guyana and her upbringing had been very strict, as was traditional for her culture. (Vol. 8, T 48) She tried to bring up her children as strictly as she had been raised. (Vol. 8, T 53-54) Amelia, however, was born in Orlando and she did not always appreciate her mother's approach to child rearing. (Vol. 8, T 48, 54) In particular, Amelia disagreed with her mother over the subject of boys; her mother forbid her to date and seventeen year old Amelia was in love with Dane Abdool and would often sneak out of the house to see him. (Vol. 8, T 49-50, 68)

Occasionally Ms. Lachman would discover that Amelia had snuck out, which would result in an argument between mother and daughter. (Vol. 8, T 49)

Eventually, Ms. Lachman learned that Amelia was dating Dane Abdool (Vol. 8, T 49) On Christmas Eve in 2004, Ms. Lachman called the police and reported Amelia as missing. (Vol. 8, T 51-52) The next morning they brought Amelia home; she had spent the night at Dane Abdool's house celebrating Christmas with his family. (Vol. 8, T 52, 57-58)

Starting in late 2005, Amelia spent a lot of time at the home of her best friend, Natasha Jagllal. (Vol. 8, T 63, 77) Amelia would talk to Natasha about Dane quite a bit and Natasha knew that Amelia was in love with him. (Vol. 8, T 64, 68) Natasha also knew, because Amelia told her, that Dane was dating someone else, namely Denise Bhoop, so Natasha advised her friend to find someone new, but Amelia would not listen. (Vol. 8, T 66-67) According to Natasha, the most important things in the world to Amelia were love and having someone in her life to listen to her. (Vol. 8, T 76)

Natasha believed that Amelia was a very troubled young woman and that Amelia suffered from mood swings, which would take her from happy to depressed. (Vol. 8, T 69) Several months before she died, Amelia started to seem to be slightly depressed. (Vol. 8, T 54) The conflict with her mother was continuing and her mother had taken away her cell phone and her car. (Vol. 8, T 54)

In November of 2005, Amelia told Natasha that she was pregnant. (Vol. 8, T 74) One day, Natasha went to Amelia's house unexpectedly and she walked in on Amelia trying to kill herself by drinking liquid Lysol. (Vol. 8, T 74) Natasha was able to stop her and believed that Amelia was seeking attention. (Vol. 8, T 74, 76) While Natasha never saw Amelia attempt to slit her wrists, she reported seeing marks on Amelia's wrists from attempts. (Vol. 8 , T 74-75) Amelia never said she wanted to commit suicide, but she did remark to Natasha that maybe if she was gone people would realize they miss her and have sympathy for what she was going through with her mother. (Vol. 8, T 75)

Additionally, in the months leading up to Amelia's death, her mother found a letter in her desk that she had written to Dane stating that she had been pregnant with his child and had ended the pregnancy by getting an abortion. (Vol. 8, T 49, 54-55) Ms. Lachman was shocked, since she was not aware Amelia was having sex. (Vol. 8, T 55) She yelled at Amelia and insisted that she see a counselor, but Amelia walked out of the counseling session as soon as the abortion was mentioned. (Vol. 8, T 49,55) Amelia had told Natasha that this pregnancy had ended in a miscarriage. (Vol 8, T 70-72)

In February 2006, Amelia told Natasha that she was four months pregnant and that Dane was the father. (Vol. 8, T 65, 70) Two weeks before she died,

Amelia's mother overheard her telling a friend, over the phone, that she was pregnant. (Vol. 8, T 55-56) Ms. Lachman made Amelia take a pregnancy test and the result was negative, Amelia was not pregnant. (Vol. 8, T 56)

The week before she died Amelia was feeling out-of-sorts, so her mother let her stay home and she missed the entire week of school. (Vol. 8, T 54)

The day before Amelia died, Friday, February 24, 2005, Amelia and her younger brother had gone over to Natasha's home. (Vol. 8, T 50, 63) Natasha's mother, Camroon Jagllal, drove the pair home at approximately 10:00 p.m. (Vol. 8, T 50, 67, 78) Mrs. Jagllal said Amelia seemed nervous and though she said she was going out that night, she would not say where. (Vol. 8, T 79) After she arrived home, Amelia went to bed, but the next morning when Ms. Lachman went to Amelia's room it was empty and a window was open. (Vol. 8, T 50)

Dane Abdool drove to Amelia's house Friday night after work, parked on the side of the house, and waited for Amelia to sneak out. (Vol. 10, T 509-10; Vol. 11, T 565) Before this night, Dane had not seen Amelia for more than a month, though she had repeatedly called him. (Vol. 11, T 591) During the week, Amelia had called Dane and asked him to get her some alcohol. (Vol. 10, T 509-509) Dane got some alcohol for Amanda from a coworker at Macy's. (Vol. 10, T 509)

After he picked her up, they went back to Dane's apartment, Amelia drank some of the alcohol she had asked Dane to get her, and they had sex. (Vol. 10, T 510, 566).

Later that night, as Dane was driving Amelia home, Amelia and Dane got into an argument. (Vol. 10, T 510-511; Vol. 11, 566) Once they were in the car, Amelia began to yell at Dane about how he was treating her, saying that their relationship was only based on sex. (Vol. 10, T 510-512) Dane retorted that she had hid her pregnancy from him and that now that Amelia was pregnant again he wondered if it was his child. (Vol. 10, T 510-512) Amelia told him that it was his child, but refused to submit to DNA testing. (Vol. 10, T 512) As the argument continued, Amelia started to demand that he let her out of the car, so she could walk home, saying things such as, " drop me off here and I'll go kill myself." (Vol. 10, T 511-513,561) Amelia also said, "why don't you just kill me, you know, if that's what you want. Just kill me." (Vol. 10, T 528)

Dane was annoyed by Amelia's behavior and decided he was going to scare her, " let her know what it feels like right before you die so she can - - stop acting stupid." (Vol. 11, T 561) Dane stopped at a 7/11 convenience store and bought some duct tape, planning to tape Amelia up and scare her. (Vol. 11, T 557) After buying the tape at 7/11 he continued to drive. (Vol. 11, T 566) Amelia starts cursing and yelling at him, so he pulled off the road. (Vol. 11, T 567-568) They

continued to argue and he pulled out the tape and wrapped her loosely in it (Vol. 11, T 561-562, 568). Amelia just pulled the tape off and said, "Oh are you trying to kill me?" (Vol. 11, T 569, 594) Dane told her no, he was trying to scare her so she would "stop acting like a dumbass." (Vol. 11, T 569) Amelia replied, "Oh well, why don't you just kill me?" (Vol. 11, T 569) Dane decided he would pour gasoline on her to scare her. (Vol. 11, T 569-570)

Dane pulled Amelia out of the car. (Vol. 10, T 517; Vol. 11, 556) He had a gallon of gasoline in a gas can in the back of his car; he popped the trunk and showed her the gasoline. (Vol. 10, T 527-528; Vol. 11, T 591) Amelia pulled out a lighter saying, "okay, you want to kill me, here kill me."(Vol. 11, T 593), he grabbed it from her. (Vol. 10, T 528; Vol. 11, T 593) Amelia and Dane struggled with each other and he pushed her down. (Vol. 10, T 535; Vol. 11, T 555) As she was getting up she said to "just pour it on her." (Vol. 11, T 555) Dane poured the gasoline on Amelia's shoulder as she was standing up. (Vol. 10, T 531, 544)

Dane said he did not mean to light the gasoline, but when Amelia continued to nag at him, he lit the lighter. (Vol. 10, T 529) Amelia continued to taunt Dane saying, "Do it, if you want to do it." (Vol. 10, T 529) Dane said he didn't mean to light it, he knew gas was flammable, but that it had been accident. (Vol. 10, T 531)

Dane had intended to just waive the lighter around, but apparently the fumes caught fire. (Vol. 10, T 535)

Dane's hand caught fire and then his foot. (Vol. 10; T529) The fire spread to his shorts. (Vol. 10, T 530) Amelia also caught fire; she began yelling, cursing and throwing her hands around. (Vol. 10, T 534) Amelia, her body on fire, ran towards the car and hit the front fender. (Vol. 11, T 559, 573) Dane panicked when the fire started and he was on fire himself, he hit the fire and when he thought it was out got in the car and took off. (Vol. 10, T 545-546) But he was still on fire in the car, so he pulled over and again patted it out. (Vol. 10, T 546) Dane threw the gloves out the window. (Vol. 10, T 527, 530)

Dane was worried his mom would notice the mark on his car here Amelia had bumped into it, so he ran his car through the car wash that night, just in case. (Vol. 11, T 573, 579) Dane then went straight his apartment and did not tell anyone what happened. (Vol. 10, T 547)

Later that morning, at approximately 4:15 a.m., Amelia's body was easily spotted by a law enforcement officer who was driving down the State Road 545 in Orange County, Florida. (Vol. 8, T 80-83) Her body was still on fire and was lying only 12-15 feet off the road. (Vol. 8, T 81, 88, 131) At the time, the area where the body was discovered was undeveloped and there were no street lights in the

immediate area. (Vol. 8, T 83-84, 89) Portions of the two lane road were under construction. (Vol. 8, T 130) Tire tracks and footwear tracks were clearly visible in the sandy area near the body. (Vol. 8, T 132-133) A pair of gloves had been discarded at the crime scene. (Vol. 8, T 140) Also, silver duct tape was found near the body; it did not have any burn marks. (Vol. 8, T 113; Vol. 9, 220)

The tire track left at the crime scene was that of a very rare performance tire, a Fuzion ZRI, which was the same type of tire Dane had on his car. (Vol. 9, T 326-328, 348-349) Dane's front passenger tire was matched the impression left at the scene. (T 331, 348-349)

The medical examiner determined that conflagration was the cause of Amelia's death. (Vol. 8, T 152). The medical examiner could not determine from the body whether she was conscious at the time of the fire. (Vol. 8, T 179) She also could not determine what position the body was in when the gasoline was poured on her and ignited. (Vol. 8, T 180) The medical examiner did determine that there was no evidence of binding on the body and that Amelia was not pregnant. (Vol. 8, T 180)

Instead of concealing the burns on his arm and leg, Dane showed them to four different people, giving each one a different explanation as to how he was injured. (Vol. 9, T 342; Vol. 10, T 362, 369; Vol. 12, T 644) Dane told Christian

Morgan, his older co-worker in the Macy's shipping department, that he used to belong to a gang and that several members of his former gang jumped him and one tried to throw gasoline on him and set him on fire. (Vol. 9, T 342) Mr. Morgan did not believe him, thought that Dane was acting like a typical teenager, and figured that he had burnt his leg on a tailpipe of a bike. (Vol. 9, T 342) He told Amanda Inman, another coworker at Macy's, that he had burned himself cooking in the kitchen. (Vol. 10, T 369) Dane told his girlfriend, Denise Bhoop, that the burn was from a muffler, the result of an accident at his job. (Vol. 10, T 362) Dane told Robert Lance, a coworker at Team Redline, that the burn happened while he was cooking fried chicken and that he dropped it when his jersey got caught on something on the stove. (Vol. 12, T 644-645)

Ms. Lachman called the police and reported that her daughter was missing. (Vol. 8, T 50) Officer Larry Grice responded to the call and Ms. Lachman also told him that Dane Abdool was Amelia's boyfriend. (Vol 8;T 60-61) Officer Grice called Dane on Amelia's phone and asked him if Amelia was with him. (T61) Dane said that he had not seen her for at least two days. (Vol. 8, T 61)

Detectives Rickey McGhee and Bobby Gammill questioned Dane about Amelia's disappearance at his workplace, Team Redline. (Vol. 8, T 115-116, 135) Dane admitted he had a prior relationship with Amelia and that in November 2005,

Amelia had lied and said she was pregnant when she was not. (Vol. 8, T 116-117) Dane told the detectives that he had not seen Amelia recently and that he was trying to distance himself from her, because he has a new girlfriend. (Vol. 8, T 117)

A search warrant was later obtained for Dane's Jetta. (Vol. 8, T 120) While the car was being secured, Dane agreed to go to the police station and talk to the detectives. (Vol. 8, T 138) Dane was taken to the Winter Garden Police Department and placed in an interview room. (Vol. 8, T 120-121) There he sat and waited for Det. Gammill to return from executing a search warrant, Det. McGhee sat with Dane and they chatted about cars for several hours Dane wondered aloud if he would be late for work. (Vol. 8, T120-121 ; Vol. 10, T 377-457, 458-459, 427)

After waiving his *Miranda* rights, Dane confessed to causing the death of Amelia and was arrested. (Vol. 8, T 141) Dane maintained that Amelia's death had been an accident and that he had merely intended to scare her. (Vol. 10, T 536) Dane said it was his fault, because he was the one who had the gas, he was "fucking around" and she caught on fire. (Vol. 11, T 587) Dane said it was his fault because he panicked and left her there instead of calling somebody. (Vol. 11, T 587) Dane said he hadn't planned to do any of it prior to that night, she started

pissing him off he found his gas so he did it. (Vol. 11, T 596) He gave the detectives the same account of that night that is set forth above.

After admitting what happened, Dane said he knew he was going to jail, but thought that he would only spend a few years there. (Vol. 10, T 537) Dane told the officer that he did not care what happened to him, but he asked that the officer please watch out for his mother. (Vol. 10, T 538) Dane was afraid that someone would hurt his mother as revenge for Dane's actions. (Vol. 10, T 537-538) When Dane said his mother had always been there for him and he did not want anything to happen to her. (Vol. 10, T 538)

At trial the state introduced evidence from four witness who claimed that Dane Abdool had made threats against Amelia. Pinnock and Adjoda, were friends who were together when they supposedly heard the threats made by Dane. (Vol. 9, T 223-227) Visham Adjoda is Guyanese, like Amelia, and his family is close to Amelia's family. (Vol. 9, T 231-232, 246) Pinnock did not tell the police what happened until shortly after he was arrested for possession of cocaine with intent to sell, a charge that was eventually handled through the pre-trial diversion program and later dismissed. (Vol. 9, T 230-231, 232) Adjoda was arrested at the same time as Pinnock, and spoke to a detective approximately twenty minutes after the detective spoke with Pinnock. (Vol. 9, T 231, 250)

According to Pinnock, in the fall of 2005, Dane Abdool, who had never met Pinnock before, contacted Adjoda and asked to meet with Pinnock. (Vol. 9, T 223-224) At the time, Adjoda was fourteen years old and Pinnock was seventeen (Vol. 9, T 226, 231). Pinnock and Dane Abdool had never officially met, though they both had attended the same high school. (Vol. 9, T 223) Pinnock arranged to meet with Dane at a BP gas station and Adjoda went along. (Vol. 9, T 224) According to Pinnock, once they met, Dane told him that he was having problems, because he had gotten a girl pregnant and his fiancé and family would disown him if they found out. (Vol. 9, T 225) Pinnock testified that Dane wanted to kill her and asked Pinnock to "do it for him" in exchange for $300. (Vol. 9, T 225) That seemed weird to Pinnock, since he had never met Dane before that day. (Vol. 9, T 225) Pinnock told Dane he was crazy, Dane upped the offer to $400, but Pinnock still declined the offer. (Vol. 9, T 226-227) Then Dane said he would find somebody else, but Pinnock took it for a joke and figured Dane was a spoiled rich kid. (Vol. 9, T 227) Though Pinnock found the episode shocking, he could not recognize Dane in the courtroom and he did not call the police after his encounter with Dane, nor did he call the police after he learned of Dane's arrest. (Vol. 9, T 224, 229-230) Pinnock did not tell his story to the police until six days after he was arrested. (Vol. 9, T 230-231)

Pinnock, who at the time of trial was newly married to a woman who serves in the Army and who had arranged to enlist in the Army in a couple of days, denied being offered anything from the state in exchange for his testimony and said that officers approached him. (Vol. 9, T 222-223, 228, 236) On cross-examination, Pinnock recalled that he had told law enforcement that the call from Dane Abdool had gone to his cell phone and that he had Adjoda answer it because he did not recognize the number. (Vol. 9, T 234-235)

Adjoda testified that he had met Dane Abdool, because Dane works by the shop where Adjoda gets his hair cut. (Vol. 9, T 240-241) According to Adjoda, Dane Abdool had come to him about a problem with Amelia being pregnant. (Vol. 9, T 241) Dane supposedly said that he wanted to get rid of the baby. (Vol. 9, T 241) Dane asked Adjoda to "do it," but Adjoda declined. (Vol. 9, T 242) Initially, Adjoda testified that Dane did not offer any money, but, after the state refreshed his memory, he testified that Dane offered money. (Vol. 9, T 243-244) Also initially, Adjoda testified that he ran into Dane after the meeting and that Dane did not say anything further about Amelia, but, after the state refreshed his memory, he testified that Dane said Amelia was having the baby and he would have to live with it. (Vol. 9, T 245)

Mickey Budhoo is Denise Bhoop's cousin and he was the one who first introduced Denise and Dane. (Vol. 10, T 358; Vol. 12, T 663). Previously, when Budhoo spotted Dane hanging out with Amelia, he told Denise, because she's family. (Vol. 12, T 663) According to Budhoo, Dane told him that Amelia would try to ruin his relationship with Denise by saying she's pregnant. (Vol. 12, T 664) Supposedly Dane said he wanted Amelia to have a miscarriage as the result of getting hit in the stomach and that he had arranged for two men, one of who was named Julian, to commit the act. (Vol. 12, T 665) On cross-examination, Budhoo admitted that did he not tell police about the threat until March 10, 2006. (Vol. 12, T 667).

Lalita Beekdo, a former girlfriend of Dane's, testified that Dane had said that he wanted to kill Amelia, specifically that he wanted to kill her by burning her car. (Vol. 12, T 642-643) When she was on the stand, Ms. Beekdo was unable to recall that Dane has supposedly said that he wanted to kill Amelia by burning her car; it was not until her memory was refreshed by the statement she gave police. (Vol. 12, T 642-643) Ms. Beekdo said that Dane made the first part of the statement, i.e. that he wanted to kill Amelia, when Ms. Beekdo was visiting Dane while he was working for Team Redline. (Vol. 12, T 635-636) The statement was prompted by Ms. Beekdo finding a picture of Amelia while sitting in Dane's car.

(Vol. 12, T 634-635) Ms. Beekdo said that there was never anyone else around when she would stop by to see Dane. (Vol. 12, T 639) On cross examination, Ms. Beekdo remembered that she had never gotten out of her car when she used to visit Dane at Team Redline, because she would visit after school to on her way to pick up her little sister. (Vol. 12, T 639) According to Robert Lance, who worked at Team Redline, the shop was usually busy and always had five to seven employees present during business hours. (Vol. 12, T 645)

At trial defense counsel moved in limine to preclude the state from calling Amelia's father, Deollal Sookdeo, to testify arguing that the state was merely attempting to evoke sympathy from the jury. (Vol. 8, T 26-29) Defense counsel asserted that Mr. Sookdeo had no relevant evidence to offer in the guilt phase and to allow him to try to sway the jury by sympathy was a denial of Abdool's right to a fair trial. (Vol. 8, T 26-27) The state argued that Mr. Sookdeo's testimony would show that when Amelia went missing her father was looking for her and since Mr. Sookdeo did not live in the home it was an issue whether Amelia had ever run away to her father's home. (Vol. 8, T 27-28) The state said that based on defense counsel's stipulation of the facts it appears they may want to argue that either Amelia tried to commit suicide and he was helping her, or that he was trying to scare her and it was an accident. (Vol. 8, T 28) The state further argued, that Mr.

Sookdeo had provided a buccal swab which was evidence of the lengths that law enforcement had to go to in order to identify Amelia's remains. (Vol. 8, T 26-29) The state pointed out that while case law would prevent the state from using a family member to identify a body from an autopsy photo, in Amelia's case, "there isn't anyone who can know her, that can take the stand and identify an autopsy photo because of what the defendant did." (Vol. 8, T 28) Defense counsel replied that the measures taken by law enforcement to identify the body is irrelevant to the issue of guilt or innocence and it not relevant to prove or disprove a material fact. (Vol. 8, T 26-29) Defense counsel stated that such testimony would this would simply underscoring the disfigurement of the body. (Vol. 8, T 26-29) As for proving identity, defense counsel, said that the defense is willing to stipulate, but should the state wish to establish it, then it should be done through the testimony of the medical examiner. (Vol. 8, T 26-29) The trial court denied the motion in limine and held that the state has established that the witness possessed some evidence that was relevant in guilt phase. (Vol. 8, T 29)

At trial, Mr. Deollal testified that when his daughter was missing he drove all over Winter Garden looking for her. (Vol. 8, T 91-92) He described the day that a police officer told him that his daughter had been found dead at the side of

the road. (Vol. 8, T 92) Mr. Sookdeo said that his daughter never told him that she had a boyfriend and never mentioned Dane Abdool. (Vol. 8, T 93)

At trial, after the video of Abdool's confession was played for the jury, the state asked Det. Gammill whether he believed Amelia's death had been an accident, since he had called it an accident several times in the video. (Vol. 11, T 603) Defense counsel objected to the witness giving an opinion that goes toward the ultimate fact at issue. (Vol. 11, T 603) The state argued at a bench conference that the witness would testify that he only called it an accident to get Abdool to talk about the incident and that the jury should know that it was not Det. Gammill's belief that it was actually an accident. (Vol. 11, T 603) The trial court overruled the objection. (Vol. 11, T 603) The following occurred in open court:

> Q Detective Gammill, when you questioned him and stated it was an accident, did you believe it to be an accident at the time?
> A No, ma'am.
> Q And why would you say to Mr. Abdool that it was an accident?
> A To get him to relax and provide more information.
> Q Is part of your training as a detective, are you trained on interviewing techniques?
> A Yes, ma'am.
> Q And is one of the interviewing techniques to lessen the suspect's involvement?
> A Yes, ma'am.
> Q And is that what you were using when you talked about it being an accident?

A Yes, ma'am.

(Vol. 11, T 603-604)

During the penalty phase of the trial, the state recalled the medical examiner and members of the victim's family. The medical examiner testified that the victim's burning, including burns to the trachea, would have been painful until either her nerves burned away or she lost consciousness. (Vol. 13, T 862-863) The doctor indicated that the victim would have lost consciousness within "seconds to minutes." (Vol. 13, T 864) There was no evidence of any other trauma to Ms. Sookdeo. (Vol. 13, T 864)

The defense called an expert in educational disabilities, a forensic psychologist, numerous family members, and a former cell mate of the defendant. This testimony unanimously (including that of the state's expert) revealed that the defendant suffered from a learning disability, causing him to be held back several grades in both his native Trinidad and in the United States, and also causing his inability to graduate from high school or obtain his G.E.D., despite perfect attendance and giving it his best efforts. (Vol. 13, T 890-896, 912-915, 935-936, 944-945, 961-962) Dane's mental age, according to testing and evaluation by Nancy Cowardin, an Educational Consultant who is an expert in the field of educational disabilities, varied between ages 10½ to 13. (Vol. 13, T 891-893)

These learning disabilities could spill outside the academic arena into social issues. (Vol. 13, T 903, 907) Abdool could, as a result, become erratic in his thinking; he would misthink through things, and when everything would go completely wrong, he would then be surprised because he had not seen the consequences coming. (Vol. 13, T 898, 908) Having a younger brother who excelled academically affects a child with disabilities and embarrassed Dane since he had to be held back in school until he was in his brother's class. (Vol. 13, T 900, 908; Vol. 14, T 1022-1025)

The defendant was born in Trinidad 9 months and 3 days after his impoverished parents married. (Vol. 14, T 1044) His mother worked hard at her job to earn money for the family, while his father (who also had a learning disability and worked as a machine operator) drank heavily and gambled the family's money away. (Vol. 14, T 995, 1047-1048) Suffering heavy embarrassment to her family in their country's culture, Dane's mother, Nazreen, divorced Patrick Abdool and moved back in with her family. (Vol. 14, T 1049-1050) She eventually met and married Haseeb Mohammed, who raised Dane and his brother as his own, the family moving to the United States in 1996 when Dane was 9 or 10. (Vol. 14, T 1050-1051)

His family tried to get Abdool help for his learning disabilities, but were unsuccessful. (Vol. 14, T 1052) Other children would tease him and ask him if he was retarded or just stupid. (Vol. 14, T 1057) He would compare himself to his brother, and never felt himself good enough. (Vol. 14, T 1057-1058)

After returning from a visit with his biological father in Trinidad, and because of his discussion with his father, Abdool became distant from his family and tensions rose, especially once when Dane violated his mother's curfew. (Vol. 14, T 1036, 1056-1057, 1059) When Abdool left home, saying it would be better if he were not there, his mother called the police and he was involuntarily hospitalized under the *Baker Act* for suicidal ideation. (Vol. 14, T 1059-1060) While the doctors wished to keep him hospitalized, his mother insisted that he be released and he went to live for a while with his uncle. (Vol. 14, T 1060-1063) While with his uncle, he would cry to his parents and beg them to allow him to return home, which they eventually allowed. (Vol. 14, T 1063) Later, the defendant moved into his own apartment (with his parents paying the rent) where he resided for only a short time prior to Ms. Sookdeo's death. (Vol. 15, T 1210-1211)

Even though nineteen, Dane was still a fragile, "loving child" with a low emotional, mental, and social maturity level and behavior similar to a 10½- to 14-

year old. (Vol. 13, T 891-893, 922-923, 934-937, 988-989; Vol. 14, T 1126) He could not deal with crises, but was very helpful, kind, and generous with relatives (including one who suffered from Lou Gehrig's disease and another who was mentally-challenged). (Vol. 13, T 937-938, 966, 986-990, Vol. 14, T 1032-1033, 1067-1068) He was a hard worker, putting in long hours at three jobs. (Vol. 14, T 1028-1030,)[2] Abdool would put others first, not liking to see anyone in distress, but never bragging or even taking credit for his assistance, and never thinking of the consequences to himself. (Vol. 14, 1032-1033)

While in jail awaiting trial, he was a model prisoner, given some liberties in exchange for working odd jobs. (Vol. 13, T 953) Even though other inmates would pick on him and call him racial slurs, his would not retaliate, merely isolating himself, and was helpful, nice, and generous to all, even to those who picked on him, sharing food and hygiene items from the canteen with less fortunate inmates. (Vol. 13, T 949-953)

Dr. Karen Gold, forensic psychologist, testified that the defendant suffered extensively from emotional problems and a mental disorder. (Vol. 14, T 1097-1098) Abdool was intellectually limited ("very low"), immature, and pervasively

[2] He did not earn a salary at his step-father's automobile wholesale business, where he detailed cars; instead they purchased a car, which they allowed him to drive. (Vol. 14, T 1069-

developmentally delayed. (Vol. 14, T 1108-1111) Based upon her extensive testing and interviews with the defendant and his family, Dr. Gold determined that Abdool had an impulse control disorder, wherein he would act before thinking, with obsessive-compulsive features. (Vol. 14, T 1115-1116) Lacking impulse control, a person is often unable to resist an impulse, drive, or temptation to perform an act which is harmful to that person or to others. (Vol. 14, T 1136) Anything out of the ordinary was very disturbing to him. (Vol. 14, T 1116-1117) The defendant also suffered from a delusional disorder, weaving fantastical stories. (Vol. 14, T 1119-1123) He was very, very dependent on his family, and it was upsetting to him if separated from them. (Vol. 14, T 1118)

Based on her sixteen hours of testing and interviewing Dane, and the 64+ hours spent scoring tests, reading reports, and otherwise studying his case, Dr. Gold determined within reasonable degree of psychological certainty that Abdool committed the crime while under the influence of an extreme mental and emotional disturbance, that his mental age at the time of the crime was between 12 and 14 years old, and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law were substantially impaired. (Vol. 14, T 1125-1127)

1070)

The state's psychologist, Dr. Daniel Tressler, agreed that the defendant suffered from a learning disability and a personality disorder. (Vol. 15, T 1176, 1197) Based on his review of the case and a total of under an hour-and-a-half time spent with the defendant, Tressler decided that legally Abdool was not suffering from an extreme mental or emotional disturbance at the time of the crime, nor was he substantially impaired. (Vol. 15, T 1197, 1200) Also, while opining that the defendant did not suffer from an impulse control disorder (due solely to the fact that Abdool had no prior brushes with the law), the psychologist did believe, however, that Abdool's "longstanding disturbance that interferes with [his] ability to conduct interpersonal relationships, to function in certain areas of his own life, and to generally have a hard time operating within the standards of society." (Vol. 15, T 1197) While the defendant, Tressler believed, would be able with his disability, to still handle day-to-day living, he may not if there was some other emotional problems in his life, or ambiguity which defendant had trouble processing. (Vol. 15, T 1182-1183, 1206) The situation in which Abdool found himself, with the alleged pregnancy's cause for embarrassment to and dismissal from his family (due to their culture), and the anger surrounding Abdool and Sookdeo's argument that night, certainly qualified as an "emotionally highly charged" situation. (Vol. 15, T 1189)

Additionally, Tressler, indicating that Dane's disorder *can* influence his interpersonal behavior, admitted that he could not be certain one way or the other that it did or did not influence his actions that night. (Vol. 15, T 1204) He clarified his opinion, then, that he was *not* saying that Abdool was not suffering from his disorders during those moments with Sookdeo. (Vol. 15, T 1216) Dr. Tressler also elaborated that when he said that "a mental illness did not cause the behavior," he was referring to the definition under Florida law of insanity. (Vol. 15, T 1215-1216)

Indeed, Tressler diagnosed in the defendant problems with processing certain kinds of information and the inability to reason through a problem if not given enough time, especially when emotions were high. (Vol. 15, T 1183-1185, 1206-1207, 1211) Further, Tressler remarked that he did not see the defendant as dangerous, rather this crime was "an aberration in his life." (Vol. 15, T 1213-1214)

SUMMARY OF ARGUMENTS

Point I. The trial court erred in denying the motion for judgment of acquittal where the state failed to introduce competent substantial evidence of premeditation. The Appellant asserted that the victim had been accidentally killed during an argument, and the only evidence offered by the state, four witnesses with questionable motives, failed to refute his hypothesis of innocense. The standard of review of a trial court's denial of a motion for judgment of acquittal is *de novo*. *State v. Williams*, 742 So.2d 509 (Fla. 1st DCA 1999).

Point II. The investigating officer was permitted to tell the jury that in his opinion the death of the victim was not an accident. As the only issue before the jury was whether or not the victim's was accidental, the officer was giving an opinion on the ultimate issue of the Appellant's guilt in violation of Appellant's right to a fair trial. The improper admission of evidence is reviewed under an abuse of discretion standard. *San Martin v. State*, 717 So.2d 462 (Fla.1998).

Point III. The trial court denied Appellant's motion in limine and permitted the state to play on the sympathies of the jury during the guilt phase of the trial by having the father of the victim testify, where he did not have any relevant evidence to recount. The improper admission of evidence is reviewed under an abuse of discretion standard. *San Martin v. State*, 717 So.2d 462 (Fla.1998).

Point IV. Under the statute and rules, the defense is not required to turn over any penalty phase expert's raw data pretrial or pre-penalty phase unless the defendant refuses to cooperate with the State's expert. The court erred in requiring such pre-penalty phase disclosure.

Point V. The prosecutor elicited improper, inflammatory, and irrelevant evidence in the penalty phase of the trial, rendering the defendant's death sentence constitutionally infirm.

Point VI. The death sentence is unconstitutional where the trial court permitted improper testimony under the guise of victim impact evidence.

Point VII. The trial court erred in making its findings of fact in support of the death sentence where the findings were insufficient, where the court failed to consider appropriate mitigating factors, where the court erroneously found an inappropriate aggravating circumstance, and where a comparison to other capital cases reveals that the only appropriate sentence in the instant case is a life sentence.

Point VIII. Florida's death penalty procedure violates the Sixth and Fourteenth Amendments under *Ring v. Arizona*.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHERE THE EVIDENCE FAILS TO PROVE THAT APPELLANT ACTED WITH PREMEDITATION.

At the close of the state's case, Appellant moved for a judgment of acquittal on the grounds that the state had failed to make out a prima facie case of the element of premeditation and asked that the court reduce the charge to second degree murder. (Vol. 12, T 675-678) The Appellant argued that the evidence only showed that Abdool's intention had been to frighten Ms. Sookdeo, not to kill her. (Vol. 12, T 675-677) The trial court denied the Appellant's motion for judgment of acquittal. (Vol. 12, T 675-678) Further, the Due Process Clause protects the accused against convictions except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he is charged. *In re: Winship*, 397 U. S. 358, 364 (1970).

Premeditation is the essential element that distinguishes first-degree murder from second-degree murder, in cases in the defendant is not charged with violating an underlying statutorily enumerated felony See *Green v. State*, 715 So.2d 940, 943 (Fla.1998). Premeditation is defined as:

> more than a mere intent to kill; it is a fully formed conscious purpose to kill. This purpose to kill may be formed a moment before the act but must also exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act.

Wilson v. State, 493 So.2d 1019, 1021 (Fla.1986).

Premeditation may be established by circumstantial evidence. *Preston v. State*, 444 So.2d 939, 944 (Fla.1984). This Court has held that premeditation may be inferred from evidence such as:

> ...the nature of the weapon used, the presence or absence of adequate provocation, previous problems between the parties, the manner in which the murder was committed, the nature and manner of the wounds inflicted, and the accused's actions before and after the homicide.

Id. at 944. If the state relies on circumstantial evidence to prove premeditation, the evidence must be inconsistent with any reasonable hypothesis of innocence. *Dupree v. State*,615 So.2d 713, 715 (Fla. DCA 1st 1993) (citing *Cochran v. State*, 547 So.2d 928, 930 (Fla.1989). Where the state's proof fails to exclude a reasonable hypothesis that the homicide occurred other than by premeditated design, a verdict of first-degree murder cannot be sustained. *Green*, 715 So.2d at 944; *Coolen v. State*, 696 So.2d 738, 741 (Fla.1997); *Kirkland v. State*, 684 So.2d 732, 734 (Fla.1996).

In the instant case, the state failed to introduce competent substantial evidence that Dane had acted with premeditation that could exclude the Appellant's reasonable hypothesis of innocence that he had merely intended to scare the victim. Amelia's charred body was found only 12- 15 feet from the road, lying on sand by a construction site. (Vol. 8, T 81, 88, 131) It was determined that gasoline, had been poured on her body while she was still alive and that the cause of death was conflagration. (Vol. 8, T 180) There was no evidence introduced that any effort had been made to conceal the body. The state argued that Dane had killed Amelia intentionally and with premeditation. The Appellant argued that, while Dane had splashed the gasoline on Amelia and lit the lighter which started the fire that led to her death, his intention, at that time, was to scare her not to kill her.

The Appellant and Amelia had a contentious relationship. They had previously had an intimate relationship, but the Appellant was no longer interest in being Amelia's boyfriend, though he would occasionally have sex with her. (Vol. 10, T 499-502,543-544; Vol. 8, T 55-56,64-68) Amelia believed she was in love with the Appellant and clung to the relationship, calling him constantly even though she knew he had a new girlfriend. (Vol. 8, T 66-67; Vol. 10, T 468,598)

The night that Amelia died she had snuck out her house to see Dane Abdool. (Vol. 8, T 49-50). Before this night, Dane had not seen Amelia for more than a month. (Vol. 11, T 591)

After Dane picked her up, they went back to his apartment, where Amelia drank some of the alcohol she had asked Dane to get her, and they had sex. (Vol. 10, T 510, 566).

Later that night, as Dane was driving Amelia home, Amelia and Dane began to argue. (Vol. 10, T 510-511; Vol. 11, 566) Amelia yelled at Dane about how he was treating her, saying that their relationship was only based on sex. (Vol. 10, T 510-512) Dane retorted that she had hid an earlier her pregnancy from him and that now that Amelia was pregnant again he wondered if it was his child. (Vol. 10, T 510-512) Amelia told him that it was his child, but refused to submit to DNA testing. (Vol. 10, T 512)

As the argument continued to escalate, Amelia started to demand that he let her out of the car, so she could walk home, saying things such as, “drop me off here and I’ll go kill myself.” (Vol. 10, T 511-513,561) Amelia also said, “why don’t you just kill me, you know, if that’s what you want. Just kill me.” (Vol. 10, T 528)

In the months leading up to that night, Amelia had show signs of depression and suicidal gestures. (Vol. 8, T 54,69,74) Amelia's best friend had walked in Amelia trying to kill herself by drinking liquid Lysol. (Vol. 8, T 74-76) She was a troubled young woman whose wrists showed signs of attempts to commit suicide. (Vol. 8, T 74-75). Amelia had previously expressed a belief that maybe if she were dead people would miss her and feel sorry for her. (Vol. 8, T 75)

Dane was frustrated by Amelia's behavior and decided he was going to scare her, " let her know what it feels like right before you die so she can - - stop acting stupid." (Vol. 11, T 561) He stopped at a 7/11 convenience store and bought some duct tape, planning to tape Amelia up and scare her. (Vol. 11, T 557) After buying the tape at 7/11 he continued to drive. (Vol. 11, T 566) Amelia starts cursing and yelling at him, so he pulled off the road. (Vol. 11, T 567-568) They continued to argue and he pulled out the tape and wrapped her loosely in it (Vol. 11, T 561-562, 568). The medical examiner reporter there was no evidence of binding on the body. (Vol. 8, T 180) Amelia just pulled the tape off and said, "Oh are you trying to kill me?" (Vol. 11, T 569, 594) Dane told her no, he was trying to scare her so she would "stop acting like a dumbass." (Vol. 11, T 569) Amelia replied, "Oh well, why don't you just kill me?" (Vol. 11, T 569) Dane decided he would pour gasoline on her to scare her. (Vol. 11, T 569-570)

Dane pulled Amelia out of the car. (Vol. 10, T 517; Vol. 11, 556) He had a gallon of gasoline in a gas can in the back of his car; he popped the trunk and showed her the gasoline. (Vol. 10, T 527-528; Vol. 11, T 591) Amelia pulled out a lighter saying, "okay, you want to kill me, here kill me."(Vol. 11, T 593), he grabbed it from her. (Vol. 10, T 528; Vol. 11, T 593) Amelia and Dane struggled with each other and he pushed her down. (Vol. 10, T 535; Vol. 11, T 555) As she was getting up she said to "just pour it on her." (Vol. 11, T 555) Dane poured the gasoline on Amelia's shoulder as she was standing up. (Vol. 10, T 531, 544)

Dane said he did not mean to light the gasoline, but when Amelia continued to nag at him, he lit the lighter. (Vol. 10, T 529) Amelia continued to taunt Dane saying, "Do it, if you want to do it." (Vol. 10, T 529) Dane said he didn't mean to light it, he knew gas was flammable, but that it had been accident. (Vol. 10, T 531) Dane had intended to just waive the lighter around, but apparently the fumes caught fire. (Vol. 10, T 535)

Dane's hand caught fire and then his foot. (Vol. 10; T529) The fire spread to his shorts. (Vol. 10, T 530) Amelia also caught fire; she began yelling, cursing and throwing her hands around. (Vol. 10, T 534) Amelia, her body on fire, ran towards the car and hit the front fender. (Vol. 11, T 559, 573) Dane panicked

when the fire started and he was on fire himself, he hit the fire and when he thought it was out got in the car and took off. (Vol. 10, T 545-546)

Instead of concealing the burns on his arm and leg, Dane showed them to four different people, giving each one a different explanation as to how he was injured. (Vol. 9, T 342; Vol. 10, T 362, 369; Vol. 12, T 644)

The only evidence offered by the State to try to prove premeditation were four highly suspect witnesses, Beekbo, Pinnock, Adjoda, and Budhoo, who claimed that Dane Abdool had made threats against Amelia. Pinnock and Adjoda, were friends who were together when they supposedly heard the threats made by Dane. (Vol. 9, T 223-227) Visham Adjoda is Guyanese, like Amelia, and his family is close to Amelia's family. (Vol. 9, T 231-232, 246) Pinnock did not tell the police what happened until shortly after he was arrested for possession of cocaine with intent to sell, a charge that was eventually handled through the pre-trial diversion program and was later dismissed. (Vol. 9, T 230-231, 232) Adjoda was arrested at the same time as Pinnock, and spoke to a detective approximately twenty minutes after the detective spoke with Pinnock. (Vol. 9, T 231, 250)

According to Pinnock, in the fall of 2005, Dane Abdool, who had never met Pinnock before, contacted Adjoda and asked to meet with Pinnock. (Vol. 9, T 223-224) At the time, Adjoda was fourteen years old and Pinnock was seventeen (Vol.

9, T 226, 231). Pinnock and Dane Abdool had never officially met, though they both had attended the same high school. (Vol. 9, T 223) Pinnock arranged to meet with Dane at a BP gas station and Adjoda went along. (Vol. 9, T 224) According to Pinnock, once they met, Dane told him that he was having problems, because he had gotten a girl pregnant and his fiancé and family would disown him if they found out. (Vol. 9, T 225) Pinnock testified that Dane wanted to kill her and asked Pinnock to "do it for him" in exchange for $300. (Vol. 9, T 225) That seemed weird to Pinnock, since he had never met Dane before that day. (Vol. 9, T 225) Pinnock told Dane he was crazy, Dane upped the offer to $400, but Pinnock still declined the offer. (Vol. 9, T 226-227) Then Dane said he would find somebody else, but Pinnock took it for a joke and figured Dane was a spoiled rich kid. (Vol. 9, T 227) Though Pinnock found the episode shocking, he could not recognize Dane in the courtroom and he did not call the police after his encounter with Dane, nor did he call the police after he learned of Dane's arrest. (Vol. 9, T 224, 229-230) Pinnock did not tell his story to the police until six days after he was arrested. (Vol. 9, T 230-231) Pinnock, who at the time of trial was newly married to a woman who serves in the Army and who had arranged to enlist in the Army in a couple of days, denied being offered anything from the state in exchange for his testimony and said that officers approached him. (Vol. 9, T 222-223, 228, 236)

Adjoda testified that he had met Dane Abdool, because Dane works by the shop where Adjoda gets his hair cut. (Vol. 9, T 240-241) According to Adjoda, Dane Abdool approached him about a problem with Amelia being pregnant. (Vol. 9, T 241) Dane supposedly said that he wanted to get rid of the baby and asked Adjoda to "do it," but Adjoda declined. (Vol. 9, T 241-242) Adjoda appeared to have difficulty remembering the facts of his story, initially, Adjoda testified that Dane did not offer any money, but, after the state refreshed his memory, he testified that Dane offered money. (Vol. 9, T 243-244) Also initially, Adjoda testified that he ran into Dane after the meeting and that Dane did not say anything further about Amelia, but, after the State refreshed his memory, he testified that Dane said Amelia was having the baby and he would have to live with it. (Vol. 9, T 245)

Mickey Budhoo is Denise Bhoop's cousin and he was the one who first introduced Denise and Dane. (Vol. 10, T 358; Vol. 12, T 663). Budhoo was protective of his cousin and had previously snitched on Dane to Denise when he spotted hanging out with Amelia. (Vol. 12, T 663) According to Budhoo, Dane told him that Amelia would try to ruin his relationship with Denise by saying she's pregnant. (Vol. 12, T 664) Supposedly Dane said he wanted Amelia to have a miscarriage as the result of getting hit in the stomach and that he had arranged for

two men, one of who was named Julian, to commit the act. (Vol. 12, T 665) On cross-examination, Budhoo admitted that did he not tell police about the threat until March 10, 2006. (Vol. 12, T 667).

Lalita Beekdo, a former girlfriend of Dane's, testified that Dane had said that he wanted to kill Amelia, specifically that he wanted to kill her by burning her car. (Vol. 12, T 642-643) When she was on the stand, Ms. Beekdo was unable to recall that Dane has supposedly said that he wanted to kill Amelia by burning her car; it was not until her memory was refreshed by the statement she gave police. (Vol. 12, T 642-643) Ms. Beekdo said that Dane made the first part of the statement, i.e. that he wanted to kill Amelia, when Ms. Beekdo was visiting Dane while he was working for Team Redline. (Vol. 12, T 635-636) The statement was prompted by Ms. Beekdo finding a picture of Amelia while sitting in Dane's car. (Vol. 12, T 634-635) Ms. Beekdo said that there was never anyone else around when she would stop by to see Dane. (Vol. 12, T 639) On cross examination, Ms. Beekdo remembered that she had never gotten out of her car when she used to visit Dane at Team Redline, because she would visit after school to on her way to pick up her little sister. (Vol. 12, T 639) According to Robert Lance, who worked at Team Redline, the shop was usually busy and always had five to seven employees present during business hours. (Vol. 12, T 645)

Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. *State v. Law*, 559 So.2d 187,188 (Fla. 1989). This principle has most recently been reaffirmed in *Lindsey v. State*, 2009 WL 1955053 (Fla., July 9, 2009). Appellant submits that the state's evidence fails to prove the essential element that Appellant acted with premeditation. As such, the trial court clearly erred in denying Appellant's motion for judgment of acquittal. This Court must reverse that conviction and remand with instructions to reduce Appellant's conviction to second degree murder.

POINT II.

THE TRIAL COURT ERRED IN ALLOWING THE WITNESS TO STATE HIS OPINION ON WHETHER THE VICTIM'S DEATH WAS ACCIDENTAL, WHICH WAS THE ULTIMATE AND ONLY ISSUE BEFORE THE TRIER OF FACT.

A witness's opinion as to the guilt or innocence of a criminal accused is not admissible. *Martinez v. State,* 761 So. 2d 1074, 1079 (Fla. 2000). In *Martinez,* the supreme court acknowledged Section 90.703, Florida Statutes (1997), which provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it includes an ultimate issue to be decided by the trier of fact;" the supreme court noted that that statutory language on its face would appear to allow opinion testimony of a criminal defendant's guilt. However, the supreme court expressly held that testimony that a defendant is guilty is precluded by 90.403, Florida Statutes (1997), which excludes relevant evidence on the grounds that its probative value is substantially outweighed by unfair prejudice to the defendant. Id.

In *Martinez* this Court recognized that there is a greater danger of prejudice when a law enforcement officer states his/ her opinion of a defendant''s guilt. *Martinez,* 761 So.2d at 1080. Of particular concern to this Court, was the impression such testimony from an investigating officer may leave on the jury,

namely that there is evidence that has not been presented to the jury that supports the officers opinion of the defendant''s guilt:

> ... [T]his Court has expressed its concern that error in admitting improper testimony may be exacerbated where the testimony comes from a police officer. See *Rodriguez v. State*, 609 So.2d 493, 500 (Fla.1992). In *Rodriguez*, a police officer corroborated a story told by a testifying witness by discussing the witness's prior consistent statements, which were not properly admissible. See id. We cautioned that "[w]hen a police officer, who is generally regarded by the jury as disinterested and objective and therefore highly credible, is the corroborating witness, the danger of improperly influencing the jury becomes particularly grave." Id. (quoting *Carroll v. State*, 497 So.2d 253, 257 (Fla. 3d DCA 1985)).

Martinez v. State 761 So.2d at 1080.

In *United States v. Young*, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), the United States Supreme Court, in the context of an improper prosecutorial argument to the jury, explained the danger of a representative of the state giving their opinion as to the guilt of the accused, providing:

> The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's

> opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

See also *Berger v. United States*, 295 U.S. 78, 88-89, 55 S.Ct. 629, 79 L.Ed. 1314 (1935) (finding prosecutorial argument to be improper because it suggested to the jury that the prosecution had personal knowledge of the defendant's guilt).

At trial, after the video of Abdool''s confession was played for the jury, the state asked Det. Gammill whether he believed Amelia''s death had been an accident, since he had called it an accident several times in the video. (Vol. 11, T 603) Defense counsel objected to the witness giving an opinion that goes toward the ultimate fact at issue. (Vol. 11, T 603) The state argued at a bench conference that the witness would testify that he only called it an accident to get Abdool to talk about the incident and that the jury should know that it was not Det. Gammill''s belief that it was actually an accident. (Vol. 11, T 603) The trial court overruled the objection. (Vol. 11, T 603) The following occurred in open court:

> Q Detective Gammill, when you questioned him and stated it was an accident, did you believe it to be an accident at the time?
> A No, ma'am.
> Q And why would you say to Mr. Abdool that it was an accident?
> A To get him to relax and provide more information.
> Q Is part of your training as a detective, are you trained on interviewing techniques?

A Yes, ma'am.
Q And is one of the interviewing techniques to lessen the suspect's involvement?
A Yes, ma'am.
Q And is that what you were using when you talked about it being an accident?
A Yes, ma'am.

(Vol. 11, T 603-604)

In *Ruth v. State*, 610 So. 2d 9, 11 (Fla. 2d DCA 1992), an expert testified that in his opinion a defendant''s plane had been used to smuggle narcotics, which was the gravamen of the charge against him; the Second District Court reversed the conviction, basing its decision on *Town of Palm Beach v. Palm Beach County*, 460 So. 2d 879 (Fla. 1984), as follows:

> In Town of Palm Beach, the issue was whether certain benefits to municipalities were "real and substantial." The supreme court held that while an expert could testify to whether certain benefits received by the municipality were important, he was precluded from giving his opinion that a particular benefit was "real and substantial."

Ruth v. State, 610 So. 2d at 11.

In the instant case, the Appellant conceded that he had caused the death of the victim, but argued that he had not acted with premeditation and that the victim''s death was an accident. Since Appellant''s defense necessarily conceded

all elements, save premeditation, the only issue before the jury was whether the was the result of a premeditated act, as argued by the state, or an accident. Det. Gammill''s opinion that the death of the victim was not an accident is indistinguishable, on any principled basis, from literal testimony that the defendant was guilty on that count. See *Ruth*; cf. *Hamilton v. State*, 696 So. 2d 914 (Fla. 2d DCA 1997) (testimony that defendant was headed in wrong direction did not amount to testimony that defendant was guilty of DUI); *Chesnoff v. State*, 840 So. 2d 423 (Fla. 5th DCA 2003) (characterization of victim''s injuries as "severe" did not amount to testimony that defendant was guilty of aggravated battery causing great bodily harm.) The trial court''s error in admitting this testimony denied Appellant''s right to a fair trial and cannot be considered harmless. Amends. VI and XIV, U.S. Const.; Art. I, §16, Fla. Const.

POINT III.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION IN LIMINE TO PRECLUDE THE STATE FROM CALLING AS A WITNESS IN THE GUILT PHASE THE FATHER OF THE VICTIM, WHERE HE HAD NO RELEVANT EVIDENCE TO OFFER.

Appellant moved in limine to preclude the state from calling the victim's father, Deollal Sookdeo, to testify during the guilt phase of the trial. (Vol. 8, T 26-29). Defense counsel asserted that Mr. Sookdeo had no relevant evidence to offer in the guilt phase and that the state was seeking to denial Abdool's right to a fair trial by playing on the sympathies of the jurors. (Vol. 8, T 26-27)

The state argued that Mr. Sookdeo's testimony would show that when Amelia went missing her father was looking for her and since Mr. Sookdeo did not live in the home it was an issue whether Amelia had ever run away to her father's home. (Vol. 8, T 27-28) The state said that based on defense counsel's stipulation of the facts it appears they may want to argue that either the victim tried to commit suicide and he was helping her, or that he was trying to scare her and it was an accident. (Vol. 8, T 28) The state further argued, that Mr. Sookdeo had provided a buccal swab which was evidence of the lengths that law enforcement had to go to in order to identify the victim's remains. (Vol. 8, T 26-29) The state pointed out that while case law would prevent the state from using a family member to identify

a body from an autopsy photo, in victim's case, "there isn't anyone who can know her, that can take the stand and identify an autopsy photo because of what the defendant did." (Vol. 8, T 28) Defense counsel replied that the measures taken by law enforcement to identify the body is irrelevant to the issue of guilt or innocence and it not relevant to prove or disprove a material fact. (Vol. 8, T 26-29) Defense counsel stated that such testimony would this would simply underscoring the disfigurement of the body. (Vol. 8, T 26-29) As for proving identity, defense counsel, said that the defense is willing to stipulate, but should the state wish to establish it, then it should be done through the testimony of the medical examiner. (Vol. 8, T 26-29) The trial court denied the motion in limine and held that the state has established that the witness possessed some evidence that was relevant in guilt phase. (Vol. 8, T 29)

At trial, Mr. Sookdeo testified that when his daughter was missing he drove all over Winter Garden looking for her. (Vol. 8, T 91-92) He described the day that a police officer told him that his daughter had been found dead at the side of the road. (Vol. 8, T 92) Mr. Sookdeo said that his daughter never told him that she had a boyfriend and never mentioned Dane Abdool. (Vol. 8, T 93)

Under the Florida Evidence Code, all relevant evidence is admissible, except as provided by law. §90.402, Fla. Stat. (2008). Relevant evidence is defined as

evidence tending to prove or disprove a material fact. §90.401, Fla. Stat. (2008). The evidence offered by Mr. Sookdeo did not prove any material fact. His search for his missing daughter, who was ultimately found dead, while heart-wrenching, is ultimately irrelevant to any material fact. Any slight probative value of his testimony was outweighed by the unfair prejudice engendered by this inflammatory material. §90.403, Fla.Stat. (2008). If anything, Mr. Sookdeo's testimony clearly illustrated that the state must have been fully aware that he did not have anything relevant to offer. Mr. Sookdeo did not live with his daughter, he did not know she was dating, and he had never hear her mention the name of Dane Abdool. He was completely ignorant of the events in his daughter's life which immediately preceded her death. In oppopsing the motion in limine, the state had argued that Mr. Sookdeo had relevant evidence as to whether the victim had run away or was suicidal. At trial, however, the state did not ask Mr. Sookdeo a single question about the victim's mental health or whether she had ever run away.

The state's true motive for offering the testimony is found in their remarks about showing family members autopsy photos to identify the decease. In *Thompson v. State*, 565 So.2d 1311, 1314 (Fla.1990), this Court stated:

> Courts of this state have followed a long-standing rule that relatives may not be called solely to identify their deceased victims when unrelated, credible witnesses are

> available to make an identification. The rule is based on the theory that the testimony of relatives is likely to be inflammatory and may arouse unwarranted jury sympathy for the victim, interjecting matters not germane to the issue of guilt or punishment.

Here, the state called a family member for no reason other than arouse the sympathy of the jury. The trial court's error in permitting Mr. Sookdeo denied him his right to a fair trial. Amends. VI and XIV, U.S. Const.; Art. I, §16, Fla. Const.

POINT IV.

THE DEATH SENTENCES MUST BE REVERSED, UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16, 17, AND 22, FLORIDA CONSTITUTION, WHERE THE TRIAL COURT IMPROPERLY REQUIRED THE DEFENSE TO TURN OVER RAW DATA USED BY ITS MENTAL HEALTH EXPERT PRIOR TO THE PENALTY PHASE OF THE TRIAL.

Prior to the penalty phase of the trial, the state sought to have the defense turn over its mental health expert's raw data to the state. The court, despite clear language in the statute and rule ordered the defendant to do so, over his objections. By so doing, the court committed reversible error. As this issue is strictly a question of law, it should be reviewed *de novo*.

Under Rule 3.202, Florida Rules of Criminal Procedure, a defendant must notify the state of the names of any mental health experts it expects to call during the penalty phase of the trial. Subsection (e) of that rule clearly specifies that if, and only if, the defendant refuses to cooperate with the state's mental health experts is the defense required to turn over the raw data, test results and evaluations to the state. Further, Section 90.705, Florida Statutes, also indicates that "an expert witness may testify in terms of his or her opinion or inferences and give reasons therefore, without prior disclosure of the underlying facts or data." It

is upon cross-examination, that the expert shall be required, for the first time, to specify the facts or data upon which his testimony was based.

In discussing the requirements of that section and Rule 3.202, the district court, in *Gore v. State*, 614 So.2d 1111, 1115 (Fla. 4th DCA 1992) said,

> That section, as we can readily deduce from its text, supplies no foundation if applied literally for pretrial disclosure of the facts on which the expert's opinion is based. If anything, it delays such a disclosure until the witness is in court and testifying at the trial or proceeding.

Thus, the court clearly erred in requiring the defendant to turn over his data prematurely. The death sentence, imposed after this violation of law, is thus infirm and must be vacated.

POINT V

THE PROSECUTOR'S REPEATED IMPROPER AND INFLAMMATORY ELICITATION OF IRRELEVANT EVIDENCE TAINTED THE PENALTY PHASE TRIAL AND RENDERED THE ENTIRE PROCEEDING FUNDAMENTALLY UNFAIR. IN VIOLATION OF THE DEFENDANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ART. I, §§ 9, 16, 17, AND 22 OF THE FLORIDA CONSTITUTION.

It is axiomatic that a prosecutor may not make statements calculated only to arouse passions and prejudice or to place irrelevant matters before the jury. *Vierick v. United States*, 318 U.S. 236, 247 (1943). As stated long ago:

> [W]hile [the prosecuting attorney] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935).

The Supreme Court's admonition applies with particular force in a capital sentencing proceeding: "Because of the surpassing importance of the jury's penalty determination, a prosecutor has a heightened duty to refrain from conduct designed to inflame the sentencing jury's passions and prejudices." *Lesko v. Lehman*, 925 F.2d 1527, 1541 (3d Cir.); *see also Hall v. Wainwright*, 733 F.2d 766

(11th Cir. 1984) ("it is of critical importance that a prosecutor not play on the passions of a jury with a person's life at stake").

The elicitation by the prosecutor here of totally irrelevant and inflammatory evidence which could only serve to confuse the jury and arouse their passions renders the death sentence fundamentally unfair. The prosecutor, in examining the mental mitigating circumstances, repeatedly elicited testimony from expert witnesses that the defendant knew right from wrong, was competent to stand trial, and exhibited no remorse for the killing. (Vol. 14, T 1128, 1128, 1133; Vol. 15, T 1200) These matters are all totally irrelevant to the jury's consideration of the appropriate punishment for the defendant in his capital trial.

As recounted in Point VII of this brief, *infra*, inquiries into the defendant's sanity or competency are irrelevant to the mental mitigating circumstances in a capital trial. The test for those factors is not a "knew right from wrong" or "is able to understand the proceedings and assist in the preparation of his defense." *See e.g. Ferguson v. State*, 417 So.2d 631 (Fla. 1982). As such, this evidence, deliberately elicited by the prosecutor, could only serve to confuse the jury and get them to base their sentencing decision on irrelevant and inflammatory matters.

Additionally, and especially in today's political climate in the United States, it was highly inflammatory and totally irrelevant for the prosecutor to elicit

testimony that the defendant was raised in a Muslim home. (Vol. 13, T 992) This fact could only serve to inflame the passions of the jury, many of whom could have been affected adversely to the defendant because of this irrelevant testimony. Research studies have repeatedly found that there is a large segment of Americans who view Muslims with fear and prejudice.[3]

This Court has long recognized that the comments of the prosecutor can "so deeply implant seeds of prejudice or confusion" that reversal is required even in the absence of an objection. *Pait v. State*, 112 So. 2d 380 (Fla. 1959); *see also Urbin v. State*, 714 So.2d 411, 419-420 (Fla. 1998); *Garron v. State*, 528 So. 2d 353 (Fla. 1988).

Here, the prosecutor's improper remarks were so egregious and pervasive that "neither rebuke nor retraction [would] destroy their influence." *Robinson v. State*, 520 So. 2d 1, 7 (Fla. 1988); *Pait*, 112 So. 2d at 385. There can be little doubt the prosecutor's argument prejudiced Abdool. The prosecutor's actions rendered the capital trial proceeding fundamentally unfair and denied the defedant

[3] For example, *see*: http://www.gallup.com/poll/24073/antimuslim-sentiments-fairly-commonplace.aspx;
http://www.usatoday.com/news/nation/2006-08-09-muslim-american-cover_x.htm; and
http://www.harrisinteractive.com/harris_poll/index.asp?PID=801.

due process of law and rendered his death sentence cruel or unusual punishment. A new trial is required.

POINT VI

REVERSIBLE ERROR OCCURRED WHEN THE COURT PERMITTED THE VICTIM IMPACT EVIDENCE TO INCLUDE IRRELEVANT AND PREJUDICIAL MATTERS SUCH THAT IT DENIED DUE PROCESS, FUNDAMENTAL FAIRNESS, AND A RELIABLE JURY RECOMMENDATION.

The admissibility of victim impact evidence, as with all evidence, is within the sound discretion of a trial court. *State v. Maxwell*, 647 So.2d 871 (Fla. 4th DCA 1994), *aff.*, 657 So.2d 1157 (Fla.1995); *Schoenwetter v. State*, 931 So.2d 857, 869 (Fla. 2006).

In the abstract, "victim impact" evidence does not necessarily violate the Eighth or Fourteenth Amendments. *Payne v. Tennessee*, 501 U.S. 808 (1991). In Florida, such evidence is authorized by Section 921.141(7), Florida Statutes, which states:

> **(7) Victim Impact evidence**. - Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as part of victim impact evidence.

The potential unfair prejudice that attends this evidence has been recognized by the courts. In that regard, "unfair prejudice" is the type of evidence that would

logically tend to inflame emotions and which would tend to distract jurors and the court from conducting an impartial and reasoned sentencing analysis:

> A verdict is an intellectual task to be performed on the basis of the applicable law and facts. It is difficult to remain unmoved by the understandable emotions of the victim's family and friends, even when the testimony is limited to identifying the victim. Thus, the law insulates jurors from the emotional distraction which might result in a verdict based on sympathy and not on the evidence presented.

Jones v. State, 569 So.2d 1234, 1239 (Fla.1990). *See Urbin v. State*, 714 So.2d 411, 419 (Fla.1998) (Court has responsibility to monitor practices and control improper influences in imposing death penalty, noting, "Although this legal precept – and indeed the rule of objective, dispassionate law in general – may sometimes be hard to abide, the alternative – a court ruled by emotion – is far worse."). Particularly when presiding over a capital trial, judges are cautioned to be "vigilant [in the] exercise of their responsibility to insure a fair trial." *Bertolotti v. State*, 476 So.2d 130, 134 (Fla.1985).

As argued below, the misuse of victim impact evidence here denied Due Process and a fair and reliable sentencing proceeding. Art. I, §§ 2, 9, 16, 17 and 22, Fla. Const.; U.S. Const., Amend. V, VIII, XIV. The defense objected to and sought to have precluded portions of the Deollal Sookdeo (the victim's father) victim impact testimony, including the statement that he fears losing his remaining

son now and expressing both his and his son's outrage and anger over the crime, in fiery metaphors. (Vol. 13, T 844, 867-869) However, the trial court permitted these inflammatory and improper references, thereby tainting the jury's recommendation and the resultant sentence of death.

Pursuant to Section 90.403, Florida Statute, in ruling on the admissibility of all evidence, including victim impact testimony, the trial court must analyze the individual elements of this evidence with regard to the character of the evidence the State intended to present to the jury. *See State v. Johnston,* 743 So.2d 22, 23 (Fla. 2d DCA 1999). Trial courts must monitor victim impact evidence closely and prevent it from becoming a feature to the extent that it denies a fair proceeding. *Id*.

In *Sexton v. State*, 775 So.2d 923, 932-933 (Fla. 2000) this Court noted that "Although the United States Supreme Court and this Court have ruled that victim impact testimony is admissible, such testimony has specific limits." The Court thus held that testimony of victim's aunt relating to the death of a person not the victim in this case was erroneously admitted because aunt did not limit her testimony to murder victim Joel Good's "uniqueness as an individual human being and the resultant loss to the community's members"). *See also Windom v. State*, 656 So. 2d 432, 438 (Fla. 1995) (holding that under section 921.141(7) testimony "about the effect on children in the community other than the victim's two sons

was erroneously admitted because it was not limited to the victim's uniqueness and the loss to the community's members by the victim's death").

The evidence introduced here over objection was inadmissible under these standards. The witness improperly relayed his and his son's characterizations and opinions about the crime, a direct violation of *Payne*. They were permitted to relay to the jury effects of the crime beyond the permissible, as decried in *Windom*, *supra*, and in *Sexton v. State*, *supra.* His outrage and his fiery metaphors improperly aroused the passions of the jury, passions which have no place in the capital sentencing determination.

The presentation of this type of information can serve no other purpose then to inflame the jury and to divert it from deciding the case on relevant evidence concerning the crime and the defendant. This death penalty must be reversed.

POINT VII.

THE APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE FEDERAL AND FLORIDA CONSTITUTIONS.

Abdool's sentence of death must be vacated. The trial court made factual errors in its sentencing order, found an improper aggravating circumstance, and abused its discretion by failing to consider (or improperly minimizing the weight given to) highly relevant and appropriate mitigating circumstances and in finding that the aggravating circumstances outweighed the mitigating factors. These errors render the defendant's death sentence unconstitutional in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Art. I, §17 of the Florida Constitution.

Aggravating circumstances must be proven beyond a reasonable doubt to exist and review of those factors is by the competent substantial evidence test. Where evidence exists to reasonably support a mitigating factor (either statutory or non-statutory), the court must find as mitigating that factor. Review of the weight given to mitigation is subject to the abuse-of-discretion standard. *Merck v. State* 975 So.2d 1054, 1065-1066 (Fla. 2007); *Cole v. State*, 701 So.2d 845, 852 (Fla. 1997). Factual errors in a sentencing order are subject to a harmless error analysis.

See Merck v. State, *supra* at 1066 n. 5; *Lawrence v. State*, 846 So.2d 440, 450 (Fla. 2003); *Hartley v. State*, 686 So.2d 1316, 1323 (Fla. 1996). It is submitted that this Court's proportionality review, being a question of law, must be *de novo*. *See Blanco v. State*, 706 So.2d 7 (Fla. 1997) (whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by this Court); *Harvard v. State*, 375 So.2d 833 (Fla. 1977) ("When the sentence of death has been imposed, it is this Court's responsibility to *evaluate anew* the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate." [*citing State v. Dixon*, 283 So.2d 1 (Fla. 1973)]).

A. The Trial Court's Sentencing Order Is Fraught with Factual Errors and Is Not Supported by the Evidence, Negating An Aggravating Factor and Establishing Weighty Mitigation.

Aggravating circumstances must be proven beyond a reasonable doubt by competent, substantial evidence. *Martin v. State*, 420 So.2d 583 (Fla. 1982); *State v. Dixon*, *supra* at 9. The state has failed in this burden with regard to one of the aggravating circumstances found by the trial court, that of CCP. The court's findings of fact, based in part upon matters not proven by substantial, competent evidence beyond a reasonable doubt, and upon erroneous findings, do not support the circumstances as found and weighed by the trial court and thus cannot provide the bases for the death sentence.

Initially, it has to be noted that the trial court made some clear factual errors in its sentencing order:

Aggravation:

On page 11 of the order, in discussing the aggravating circumstance of cold, calculated and premeditated, the court discounts the defendant's version of how Ms. Sookdeo accidentally got ignited: he lit the flame during their heated, highly emotional argument in order to scare her and the glove he was wearing (which had been splashed with gasoline) "caught fire, and, in discarding the flaming glove, Miss Sookdeo was accidentally ignited." (Sentencing Order, Vol. 7, R 871) The court incorrectly says that the fire marshal Juan Bailey's testimony does not support the defendant's claim, since he indicated that "the heat source would have to be within inches of the fuel for ignition." (Sentencing Order, Vol. 7, R 971-872) However, the court's order completely overlooks Bailey's specific testimony wherein he indicated that the defendant's account of ignition is entirely consistent with the evidence and does not contradict it at all:

> Q: So let me ask you this. If I took a half gallon or gallon of gasoline and I splashed it all over this desk and splashed it in a very haphazard fashion and got some on -- let's say if I was wearing a glove and I lit a lighter with that glove and my hand caught on fire, could it have been my hand on fire that causes the fire that would ignite here were I to throw my hand out or get close to that area?

A [Fire Marshall Bailey]: Yes.

(Vol. 9, T 302)

The court also recalls only a portion of the insubstantial and less than competent testimony of 17-year-old Julian Pinnock and Visham Adjoda (a 14-year-old close family friend of the victim) that "Mr. Abdool discussed hiring someone to *kill* Miss Sookdeo . . . sometime before the murder but was unsuccessful." (Sentencing Order, Vol. 7, R 871) Pinnock, who did not report the conversation to the police until after they were arrested for a felony (for which they were permitted to enter a diversion program), testified that the defendant did not seem at all serious in the way he was acting. (Vol. 9, T 227, 230-232) He also claimed that this conversation occurred some four to six months *prior* to the defendant's arrest for the killing. (Vol. 9, T 223-224) Since Ms. Sookdeo had only recently allegedly become pregnant (and could obviously not have passed herself off to Dane as six months pregnant at the time of the argument and offense), Pinnock's time frame does not fit the evidence and is thus neither competent nor substantial.

Additionally, there is much confusion over what exactly was purportedly asked of Pinnock and Adjoda. While Pinnock ultimately uses the word "kill" in

his testimony, he initially claimed that the request for some type of action was quite vague:

> Q [by prosecutor]: Did he talk to you about how he wanted to handle that [his problem]?
>
> A: With not so many words, yes.

(Vol. 9, T 225)

Adjoda, on the other hand, testified that Abdool merely said that he wanted "to get rid of the baby" and wanted them "to take care of it." (Vol. 7, T 241-242) Further, Mickey Budhoo, a *state* witness whose testimony is absent from the court's sentencing order, testified that Adjoda had informed him that the defendant wanted Adjoda and Pinnock to punch Sookdeo in the stomach to cause a miscarriage:

> Q: Okay. Now, the detectives came to see you again on January 22, 2007, correct?
>
> A [Mickey Budhoo]: Yes.
>
> Q: And at that time, they asked you how you found out about Dane trying to harm Amelia, correct?
>
> A: Yes.
>
> Q: And you told them at that time that it was through this kid that lives in your neighborhood named Vishman [sic], right?
>
> A: Yes.

Q: Or Visham?
A: Visham.

Q: Visham. And you said that one day he just happened to drive by and you saw -- you were going to talk to -- is it Visham, his sister, or Vishman?

A: Visham.

Q: That's his sister. So you had gone by to talk to his sister, right?

A: Yes.

Q: And Visham came out and told you that Dane called him and Julian?

A: Yes.

Q: And they were trying to -- he was trying to get them to get the -- the abortion by a punch to the stomach, correct?

A: Yes.

(Vol. 9, T 668-669)

Because of the factual errors and omissions in the court's sentencing order, this aggravating circumstance is not supported with competent and substantial evidence. Further, there is no evidence to disprove the defendant's account of the events, that during an emotionally-charged argument with Sookdeo (purportedly over her desire to be with Abdool and her continuous contact with him), he was

merely attempting to scare her, when he accidentally ignited the glove which, in turn, caught her on fire. (*See additionally* Point I, *supra*.)

There is no cold, calculated and heightened premeditation here under the competent facts. The court erred in finding the aggravating circumstance of Cold, Calculated, and Premeditated. Four elements must be satisfied to support a finding of CCP: The murder must have been the product of cool and calm reflection and *not an act prompted by emotional frenzy or panic*. Furthermore, the murder must have been the product of a *careful* plan or *prearranged* design to commit murder before the fatal incident. The murder must also have resulted from *heightened* premeditation – i.e., premeditation over and above what is required for unaggravated first-degree murder. And finally, there must not have been any pretense of legal or moral justification for the murder. *See Walls v. State*, 641 So.2d 381, 388-89 (Fla.1994). Under the competent evidence of this case, the state cannot prove beyond a reasonable doubt the existence of these elements; there is nothing to disprove the defendant's desire to merely scare the victim or to simply cause a miscarriage, and nothing to show the cold, calm reflection and pre-arranged plan during this "emotionally highly charged" situation.

Under CCP's elements, the test for this aggravator must evaluate the mental state of the perpetrator rather than looking merely at the manner of the killing.

Banda v. State, 536 So.2d 221, 225 (Fla. 1988); *Johnson v. State*, 465 So.2d 499, 507 (Fla. 1985); *Mason v. State*, 438 So.2d 374 (Fla. 1983); *Cannady v. State*, 427 So.2d 723 (Fla. 1983). Thus, the evidence offered in support of the mental mitigating circumstances negates the CCP aggravator.

In *Spencer v. State*, 645 So.2d 377 (Fla. 1994), this Court reversed a finding of CCP based upon the evidence of the defendant's mental mitigation, ruling that his mental impairments negated the necessary aspects of this aggravator, despite evidence of some pre-planning on Spencer's part:

> However, we find that the evidence does not support the trial court's finding of CCP. Although there is evidence that Spencer contemplated this murder in advance, we find that the evidence offered in support of the mental mitigating circumstances also negates the cold component of the CCP aggravator. During the penalty phase, a clinical psychologist testified that Spencer thought that Karen was trying to steal the painting business, which was a recapitulation of a similar situation with his first wife. The psychologist also testified that Spencer's ability to handle his emotions is severely impaired when he is under such stress. A neuropharmocologist agreed that Spencer has "very limited coping capability," "manifests emotional instability when he is confronted with [sudden shocks and stresses]," and "is going to become paranoid when stressed." This expert opined that Spencer's personality structure and chronic alcoholism rendered him "impaired to an abnormal, intense degree." In light of this evidence, we find that the trial court erred in finding that the murder was CCP.

Spencer v. State, *supra* at 384 -385.

So here does the evidence of Abdool's mental and emotional disabilities negate the finding of CCP. Looking to the facts of the instant case, we discover that the trial court, in finding heightened premeditation, totally ignored the evidence presented by all the expert witnesses that the defendant was suffering from a learning disability and personality disorder which could spill over into the social arena.[4] He suffered from "processing glitches" in his ability to think and understand, and which can influence interpersonal behavior. (Vol. 13, T 880-890, 936; Vol. 15, T 1202-1204, 1206, 1211)

In fact, all the doctors specifically negated the factor of cold, calculated, and premeditated by stating that, because of his mental and emotional disabilities, when faced with such an emotionally highly-charged situation as occurred here, Dane would have difficulty operating normally, unable to process information quickly and reason through the situation. (Vol 15, T 1176, 1183-1185, 1189, 1206)

[4] Studies have consistently found a link between learning disabilities (such as the defendant suffered, including low intelligence, ADHD, and dyslexia) and interpersonal social interaction. Also studies have indicated a definite link between these disabilities and crime, especially violent crime and particularly arson. *See, e.g.*, Amar, Angela Frederick & Clements, Paul Thomas, *The Intersection of Violence, Crime, and Mental Health*, **Journal of the American Psychiatric Nurses Association**; Vol 14(6) (Dec-Jan 2009), pp. 410-412; Hartas, Dimitra & Donahue, Mavis L., *Conversational and Social Problem-solving Skills in Adolescents with Learning Disabilities*, **Learning Disabilities Research & Practice**, Vol 12(4) (Fall 1997) pp. 213-220; Baker, Susannah F. & Ireland, Jane L., *The Link Between Dyslexic Traits, Executive Functioning, Impulsivity and Social Self-esteem among an Offender and Non-offender Sample*; **International Journal of Law and Psychiatry**; Vol 30(6) (Nov-Dec 2007) pp. 492-503.

Abdool would become erratic in his thinking; misthinking things through, and not seeing the consequences coming. (Vol. 13, T 898, 908) He was intellectually limited, immature, and pervasively developmentally delayed (Vol. 14, T 1108-1111), negating the calculated aspect of this aggravator. Dr. Gold determined that Abdool had an impulse control disorder, wherein he would act before thinking, unable to resist an impulse, drive, or temptation even if harmful to himself or to others. (Vol. 14, T 1136) Anything out of the ordinary was very disturbing to him. (Vol. 14, T 1116-1117) Even the state's psychologist did believe that Abdool has "longstanding disturbance that interferes with [his] ability to conduct interpersonal relationships, to function in certain areas of his own life, and to generally have a hard time operating within the standards of society." (Vol. 15, T 1197) While the defendant may be able, with this disability, to handle normal day-to-day living, he may not if there was some other emotional problems in his life, or ambiguity which defendant had trouble processing. (Vol. 15, T 1182-1183, 1206) Abdool cannot process certain kinds of information and cannot reason through a problem, especially when emotions are high. (Vol. 15, T 1183-1185, 1206-1207, 1211)

This uncontroverted evidence firmly establishes that Dane Abdool was suffering from severe mental or emotional disabilites which would preclude him

from the type of "careful plan or prearranged design" necessary for this aggravating circumstance. The situation in which Abdool found himself certainly qualified as an "emotionally highly charged" situation (Vol. 15, T 1189), negating CCP. There was no careful pre-planning of the killing; all the activities were done during and under the influence of a heated argument and anger. The trial court's findings regarding this aggravator are incomplete and fatally flawed, and do not address these important negators of cold, calculated and premeditated. This aggravator must be stricken.

Mitigation:

In *Campbell v. State*, 571 So.2d 415 (Fla. 1990), this Court reiterated the correct standard and analysis which a trial court must apply in considering mitigating circumstances presented by the defendant, reminding courts that the sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence. *See Eddings v. Oklahoma*, 455 U.S. 104, 114-115 (1982); *Rogers v. State*, 511 So.2d 526 (Fla. 1987). Where evidence exists to reasonably support a mitigating factor (either statutory or non-statutory), the court *must* find it as mitigating. In *Trease v. State*, 768 So.2d 1050 (Fla. 2000), though, this Court recognized that there are some circumstances where a mitigating circumstance may be found to be supported by the record but, for additional reasons or circumstances

unique to that case, be entitled to no weight. However, it still must be considered by the sentencer and its findings detailed as to the reasons for the lack of weight.

For a trial court's weighing process and its sentencing order to be sustained, that weighing process must be detailed in the findings of fact and must be supported by the evidence. The trial judge should expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. The court *must* find as a mitigating circumstance each proposed factor that is mitigating in nature. This is a question of law. *Campbell v. State*, *supra*. This Court summarized the *Campbell* standards of review for mitigating circumstances:

> (1) Whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by this Court;
>
> (2) Whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent substantial evidence standard;
>
> (3) The weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard.

Blanco v. State, *supra*; *Cave v. State*, 727 So.2d 227 (Fla.1998).

The trial court's sentencing order here totally fails to meet this standard necessitated by the capital sentencing scheme. The trial court was mistaken in its recollection of facts, glossed over the statutory and non-statutory mitigating factors and improperly rejected them or abused its discretion in giving them only little or moderate weight, with no explanations why. Without some particularized and specified analysis by the trial court, appellate review is hampered in determining whether the court abused its discretion in assigning little weight to these factors. *See Trease v. State*, *supra*.

In its consideration of extreme mental or emotional disturbance and impaired capacity mitigation, the trial court made incomplete and erroneous findings of fact. First it must be noted that the trial court, in giving these factors "little weight" considered the fact that "the defendant knew right from wrong" (Vol. 7, R 876, 878), a totally irrelevant consideration in this mitigating factor. *Ferguson v. State*, 417 So.2d 631 (Fla. 1982) (the consideration of this mitigating circumstances is entirely independent of a finding of sanity); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (error to consider as mitigating evidence only that which would tend to excuse criminal liability, i.e. insanity); *Knowles v. State*, 632 So.2d 62 (Fla. 1993) (rejection of insanity and voluntary intoxication defenses does not preclude finding this mitigator); *Morgan v. State*, 639 So.2d 6, 13-14 (Fla. 1994)

(jury's rejection of insanity defense and voluntary intoxication and finding of premeditation does not preclude finding this factor). The court's attention to the defendant's sanity is inapposite to this finding and shows the court utilized the wrong standard in its consideration of these powerful mitigators.

Further, the trial court incorrectly recalls that all of the experts agreed that none of the defendant's diagnoses contributed to the murder. (Vol. 7, R 876, 878) This is absolutely contrary to the evidence presented. Even Dr. Tressler, the state's psychologist, opined that he could **not** say for certain that Abdool's personality disorders did not influence his conduct and specifically denied that he was saying that the defendant was not suffering from his emotional disorders during the crime. (Vol. 15, T 1203-1204, 1216) Dr. Cowardin, the educational and learning disabilities expert, indicated that she was not asked to and thus could draw no connection between Abdool's learning disability and the crime. However, since they can often spill over into social issues and cause erratic thinking with an inability to process information and reason, she testified that she could not say that his disabilities had nothing to do with the crime (but again, she did not question the defendant regarding social issues). (Vol. 13, T 898, 907-909) And, most contrary to the court's pronouncement that "all of the experts agreed" with the lack of a connection, Dr. Gold explicitly finds a substantial connection between her

diagnoses and the crime, opining within a reasonable psychological certainty that the crime was committed while under the influence of an extreme mental or emotional disturbance, and his capacity to appreciate the criminality of his conduct was substantially impaired, coupling her conclusions in this regard with specifics regarding his mental disability, emotional immaturity, and lack of impulse control and how they affected him. (Vol. 14, T 1108-1109, 1111, 1115-1119, 1125-1126)

The finding of little weight for these powerful mental mitigators was clearly an abuse of discretion, having been based on such an erroneous and incomplete factual analysis.

B. The Death Sentence Is Disproportionate When Compared with Similar Cases Where the Aggravating Circumstances Are Few and the Mitigation Is Substantial.

This was a senseless murder committed by a mentally and emotionally disturbed "man-child" who was unable to cope rationally with an adult situation and who has never been in trouble before. When compared to similar cases involving the death penalty, the ultimate punishment is not warranted.

As this Court repeatedly has stated, the death penalty must be limited to the most aggravated and least mitigated of first-degree murders. *See e.g., Offord v. State*, 959 So.2d 187 (Fla. 2007); *Almeida v. State*, 748 So. 2d 922 (Fla. 1999) (crime must fall "within the category of both the most aggravated and least

mitigated of murders"); *Terry v. State*, 668 So. 2d 954, 965 (Fla. 1996) ("Consequently, its application is reserved only for those cases where the most aggravating and least mitigating circumstances exist"); *Kramer v. State*, 619 So. 2d 274, 278 (Fla. 1993) ("Our law reserves the death penalty only for the most aggravated and least mitigated murders"); *State v. Dixon*, 283 So. 2d 1, 7 (Fla. 1973) (death penalty is reserved for "the most aggravated and unmitigated of most serious crimes").

Proportionality review is not merely a comparison between the number of aggravating and mitigating circumstances. Proportionality review "requires a discrete analysis of the facts, entailing a *qualitative* review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis." *Urbin v. State*, 714 So. 2d 411, 416 (Fla. 1998) (quotations and citation omitted; emphasis in original); *Offord v. State*, *supra* at 191. Proportionality analysis requires the Court to "consider the totality of circumstances in a case," in comparison to other capital cases. *See Porter v. State*, 564 So. 2d 1060 (Fla. 1990). The Court must compare "similar defendants, facts, and sentences." *Brennan v. State*, 754 So. 2d 1, 10 (Fla. 1999). The standard of review is *de novo*. *See Larkins v. State*, 739 So. 2d 90 (Fla. 1999); *Urbin*, *supra*.

The circumstances of this case are more akin to those presented in cases in which this Court has reversed death sentences on proportionality grounds despite the presence of the HAC aggravator. *See Offord v. State, supra*; *Robertson v. State*, 699 So.2d 1343 (Fla. 1997); *Kramer v. State*, 619 So.2d 274 (Fla. 1993); *Nibert v. State*, 574 So.2d 1059 (Fla.1990). In *Offord*, the aggravating factor of HAC was quite present: after consensual sex and during an argument with his wife, the defendant retrieved duct tape and a knife from another room, returned to the bedroom and started beating his wife, first with his fists, then he stabbed her repeatedly with the knife, before spotting a hammer and beating her to death with the claw end. However, even with such a strong aggravator as HAC ("there is no question that Offord committed a brutal murder," *Offord*, 959 So.2d 193), and despite the trial court only giving "some weight" and "moderate weight" to the mental mitigation evidence presented (*see Initial Brief of Appellant, Offord v. State*, SC05-1611, p. 2), this Court vacated the death sentence finding Offord's mental issues underlying the impaired capacity and extreme mental distubance factors to be quite compelling. *Offord*, *supra*. This Court also took special note of the fact that, as here, the murder was unaccompanied by any motivation such as pecuniary gain or avoiding arrest, and without the aggravating circumstance of a prior violent felony. *Id*. at 193.

Robertson involved a strangulation murder committed by a nineteen-year-old in the course of a burglary, with two aggravators present, including HAC. 699 So.2d at 1344-1345. This Court vacated the defendant's death sentence "in light of the substantial mitigation present," which included, the defendant's age, impaired capacity, history of mental illness, and borderline intelligence. *Id*. at 1347. In vacating the death sentence in *Kramer*, this Court concluded that "[t]he factors establishing alcoholism, mental stress, severe loss of emotional control, and potential for productive functioning in the structured environment of prison are dispositive." 619 So.2d at 278. In *Nibert*, this Court ruled that the trial court erred in failing to weigh substantial mitigation and that there was no need to remand for the trial court to reweigh the aggravating and mitigating circumstances because the death penalty was a disproportionate punishment. 574 So.2d at 1063. The Court noted that "substantial mitigation may make the death penalty inappropriate even when the aggravating circumstance of heinous, atrocious, or cruel has been proved." *Id*. Similarly, in *Snipes v. State*, 733 So.2d 1000 (Fla. 1999), two aggravators, including CCP, were present. However, this Court vacated the death sentence finding substantial mitigation, including his youthful age, his lack of a prior violent history, his many positive personality traits, his personality disorder,

and the fact that the state depended on his statements to obtain conviction against him.

Her, the defendant was nineteen years old at the time of the crime. The trial court found this statutory mitigator, correctly noting that it is relevant to the defendant's mental and emotional maturity, also correctly outlining the highly relevant facts of Abdool's learning disability and low average intelligence, an untreated attention deficit disorder, and his emotional and social maturity substantially younger than his chronological age within the twelve to fourteen range. The court noted that he did not have the problem solving skills of a 19-year-old, and found it difficult to think through the adult situation in which he found himself and come to a reasonable conclusion. Particularly telling is the trial court's pronouncement that had the defendant been more mature, "he likely would have dealt with the adversity that he believed he was under in a different manner. (Vol. 7, R 879) Despite the presence of a strong foundation for a quite weighty mitigating factor, the trial court inexplicably and without any analysis finds it only merits "moderate weight." Especially when coupled with his mental, emotional, and educational age, along with his lack of any prior criminal history, his age is a powerful mitigator. Especially where the age of the defendant is accompanied by other factors, such as a lack of significant history of criminal activity, or by a

showing of some emotional or behavioral immaturity, the age of the defendant is a valid mitigating circumstance. *See Bradley v. State*, 787 So.2d 732 (Fla. 2001) (age of 36, coupled with lack of significant criminal activity); *Burns v. State*, 699 So.2d 646 (Fla. 1997) (age of 42; length of time defendant was a "law-abiding citizen" before committing the crimes is important for this mitigator); *Ramirez v. State*, 739 So.2d 568 (Fla. 1999) (finding that trial court abused its discretion in finding the defendant's age of seventeen to be entitled to only little weight where testimony that he was more immature emotionally and behaviorally than his chronological age); *Mahn v. State*, 714 So.2d 391, 400 (Fla. 1998) (finding that the trial court abused its discretion in refusing to consider defendant's age of twenty as a statutory mitigating factor in light of other factors, including a history of emotional instability); *Urbin v. State*, *supra* at 418; *Scull v. State*, 533 So.2d 1137, 1143 (Fla. 1988) (although Skull was twenty-four years old at the time of the killing, his age was found to be mitigating in light of other factors such as maturity level).

Even though nineteen, Dane was still a fragile, "loving child" with a low emotional, mental, and social maturity level and behavior similar to a 10½- to 14-year old. (Vol. 13, T 891-893, 922-923, 934-937, 988-989; Vol. 14, T 1126) In *Fitzpatrick v. State*, 527 So.2d 809 (Fla.1988), the trial court found five

aggravating circumstances (previously convicted of another capital felony or felony involving violence, knowingly created great risk of death to many persons, felony committed while in commission of kidnaping, felony committed for purpose of avoiding or preventing a lawful arrest, and felony committed for pecuniary gain), and three statutory mitigating circumstances (under influence of extreme mental or emotional disturbance, capacity to appreciate criminality of conduct substantially impaired, and age of defendant at the time of the crime). 527 So.2d at 811. However, this Court vacated Fitzpatrick's death sentence because of other substantial mitigation in the record especially that Fitzpatrick's emotional age was between nine and twelve years old. This Court concluded, "Fitzpatrick's actions were those of a seriously emotionally disturbed man-child, not those of a cold-blooded, heartless killer.". at 812. The defendant, being nineteen, was barely "age qualified" to be even eligible for the death penalty, *see Roper v. Simmons*, 125 S.Ct. 1183 (2005), but especially when coupled his low intelligence and mental and emotional maturity, this factor is strong. While the weight given to the age mitigator can be diminished by a showing of unusual maturity, *see Shelito v. State*, 701 So.2d 837, 843 (Fla. 1997), the opposite was present here. In *Bell v. State*, 841 So.2d 329 (Fla. 2002), the Court held that the trial court abused its discretion in assigning little weight to this mitigating circumstance.

> [T]he trial court must afford the mitigating factor of age "full" weight unless the trial court makes a finding of unusual maturity. It is only after a trial court makes a finding of unusual maturity that the trial court can exercise discretion in assigning diminished weight to the mitigator. In this case the trial court did not find that Bell was unusually mature… [T]here was no evidence of abuse or neglect. . . The only finding the trial court made on this mitigator was that Bell's childhood was *normal*.

Bell v. State, supra at 335-336. Dane's age (physical and emotional) is a strong mitigator, justifying a sentence of life.

Additionally, the defendant had absolutely no criminal history, a powerful statutory mitigating circumstance. This is an important mitigating circumstance upon which this Court has placed great emphasis. *See e.g., Stone v. State*, 378 So.2d 765 (Fla. 1979); *Harvard v. State*, 375 So.2d 833 (Fla. 1977). In this Court's proportionality review, the presence of this factor is quite significant and has been the basis for reducing a sentence to life. *See Cooper v. State*, 739 So.2d 82 (Fla. 1999) (presence of this factor a key to Court's reduction of sentence to life even though jury recommended death, and trial court found this factor but accorded it slight weight.)

The death sentence in this case is thus disproportionate. Just as this Court ruled in *Offer, supra* at 193-194:

> As this Court observed over 34 years ago in *Dixon*:

> It is necessary at the outset to bear in mind that all defendants who will face the issue of life imprisonment or death will already have been found guilty of a most serious crime, one which the Legislature has chosen to classify as capital. After his adjudication, this defendant is nevertheless provided with five steps between conviction and imposition of the death penalty-each step providing concrete safeguards beyond those of the trial system to protect him from death where a less harsh punishment might be sufficient.
>
> 283 So.2d at 7. The final step is the mandatory review by this Court, which we found was one indication of "legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes." *Id*. at 8. For all the reasons we have explained, we conclude that this is not among "the most aggravated and unmitigated of most serious crimes" for which the death penalty is reserved. *Id*. at 7. Imposition of the death penalty would thus be a disproportionate punishment. We therefore vacate the death sentence and remand for the imposition of a life sentence without the possibility of parole.

So here, too, for all the foregoing reasons, this is simply not among "the most aggravated and unmitigated of most serious crimes" for which the death penalty is reserved. *Id*. Imposition of the death penalty would thus be a disproportionate punishment.

POINT VIII.

FLORIDA'S DEATH SENTENCING SCHEME IS UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO *RING V. ARIZONA*.

During the course of the proceedings, trial counsel challenged the constitutionality of Florida's Capital Sentencing Scheme arguing, *inter alia*, that it violated Appellant's Sixth Amendment rights as interpreted by *Ring v. Arizona*, 536 U.S. 584 (2002), and was unconstitutional under *Caldwell v. Mississippi*, 472 U.S. 320 (1985). (Vol. 4, R 321-324, 325-328, 329-332; Vol. 5, R 399-401) None of the challenges were successful. (Vol.4, R 370-378; Vol. 2, T 112-113) Appellant was ultimately sentenced to death. The jury was repeatedly instructed and clearly understood that the ultimate decision on the appropriate sentence was the **sole** responsibility of the trial judge.

Appellant acknowledges that this Court has adhered to the position that it is without authority to declare Section 921.141, Florida Statutes unconstitutional under the Sixth Amendment even though *Ring* presents some constitutional questions about the statute's continued validity, because the United States Supreme Court previously upheld Florida's statute on a Sixth Amendment challenge. *See, e.g. Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), *cert. denied*, 537 U.S. 1070 (2002) and *King v. Moore*, 831 So.2d 143 (Fla. 2002) *cert. denied*, 537 U.S. 1069

(2002). Additionally, appellant is aware that this Court has held that it is without authority to correct constitutional flaws in the statute via judicial interpretation and that legislative action is required. *See, e.g., State v. Steele*, 921 So.2d 538 (Fla. 2005).

Appellant points out that the jury recommendation for his death sentence was not unanimous. However, the trial court repeatedly instructed and the state persistently pointed out that the ultimate decision on sentence was the sole responsibility of the judge. If *Ring v. Arizona* is the law of the land, and it clearly is, the jury's Sixth Amendment role was repeatedly diminished by the argument and instructions in contravention of *Caldwell v. Mississippi*.

Since the jury did not make specific findings as to aggravating and mitigating factors[5], we cannot determine at this point whether the jury was unanimous in their decisions on the applicability of appropriate circumstances. Additionally, we cannot know whether or not the jury unanimously determined that there were "sufficient" aggravating factors before addressing the issue of whether they were outweighed by the mitigating circumstances.

[5] This is so despite the fact that Appellant unsuccessfully sought interrogatory verdicts for the penalty phase. (Vol. 4, R 394-396; Vol. 2, T113)

At this time, appellant asks this Court to reconsider its position in *Bottosom* and *King* because *Ring* represents a major change in constitutional jurisprudence which would allow this Court to rule on the unconstitutionality of Florida's statute. This Court should vacate appellant's death sentences and remand for imposition of life imprisonment without the possibility of parole. *Amends. VI, VIII, and XIV, U.S. Const.; Art. I, §§ 9, 16, and 17.*

CONCLUSION

BASED UPON the cases, authorities and policies herein, the Appellant requests that this Court reverse his judgment and sentence and, as to Points I, reduce the conviction to second degree murder, as to Points II and III, remand for a new trial, as to Points IV, VII, and VIII, remand for the imposition of a life sentence, and as to Points V and VI, remand for a new penalty phase.

Respectfully submitted,

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

_____
JAMES R. WULCHAK

_____
MEGHAN ANN COLLINS

ASSISTANT PUBLIC DEFENDERS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to Hon. Bill McCollum, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, and mailed to Mr. Dane Patrick Abdool, Inmate # 130335, Florida State Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida 32026, this 24th day of July, 2009.

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is proportionally spaced Times New Roman, 14pt.

_____

JAMES R. WULCHAK