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

REPLY BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
Florida Bar No. 249238

MEGHAN ANN COLLINS
Florida Bar No. 0492868

ASSISTANT PUBLIC DEFENDERS

444 Seabreeze Blvd. - Suite 210
Daytona Beach, Florida 32118-3941
(386) 252-3367

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS(continued)

TABLE OF CITATIONS

PAGE NO.

CASES CITED:

OTHER AUTHORITIES:

IN THE SUPREME COURT OF FLORIDA

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

STATEMENT OF THE FACTS

The Appellant stands by his Statement of Case and Facts contained in the Initial Brief of Appellant, as an accurate and complete statement of the facts. The Statement of the Case and Facts contained in the Appellee's brief does not state with any specificity which facts the state believes were omitted in or disputed from the appellant's version,[1] and an examination of the state's version reveals nothing more than a general restatement of the facts, with certain important facts noticeably missing or inaccurately stated.

Appellant writes to correct two factual errors in the Appellee's answer brief that were made in Point I of the argument. The Appellee stated, "Abdool also

spoke with Visham Adjoda about getting rid of Amelia's body." (Answer brief, p. 23) This is an error, Adjoda testified at trial, while discussing Ms. Sookdeo's pregnancy, the Appellant said he wanted to "get rid of the baby." (Vol. 9, T 242-243)

The Appellee also states that, "Abdool told investigators that Amelia did not smoke" and cites to page 514 of the trial transcript. (AB, p.25) Appellee appears to suggest that Ms. Sookdeo never smokes, when in fact the exchange on page 514, a transcript of the playing of the tape of the Appellant's interrogation, was a conversation simply about Ms. Sookdeo not smoking on the night she died. (Vol. 11, T 514) The following is the relevant portion of the exchange:

> Okay. How long were you guys out there walking around?
> Like a minute or two.
> A minute, you said? What -- do you smoke?
> Do I smoke? No.
> Does she smoke?
> She, like, when -- when we were going out?
> *No, that night, when you guys were out there talking on 545 –*
> *No, she didn't smoke*.
> -- you don't remember her smoking when you were on 545?
> No, she was not smoking. (Vol. 11, T514).

---

[1] *See 1977 Committee Notes*, Fla. R. App. P. 9.210 (c), "Subdivision (c) affirmatively requires that no statement of the facts of the case be made by an appellee or respondent unless there is disagreement with the initial brief, and then only to the extent of disagreement."

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.

In the initial brief, the Appellant argued that the trial court erred in denying the motion for judgment of acquittal where the state failed to introduce competent substantial evidence of premeditation. (IB, pp.40-50) The Appellant asserted that the victim had been accidentally killed during an argument. (IB, pp.40-50) The only evidence offered by the state of premeditation that did not equally support the theory that the death was accidental was the testimony of four witnesses with questionable motives; which, Appellant contends, fails to refute his claim of lack of premeditation. (IB, pp.40-50)

The state's argument details the evidence introduced at trial, which the state believes provides competent substantial evidence of Appellant's premeditation. (AB, pp. 19-28) The state argued that the Appellant's case is not purely circumstantial, so Appellant is not entitled to demand that the state exclude his reasonable hypothesis of innocence, and the State need only provide competent, substantial evidence of the elements of the offense. (AB, pp. 19-20) Appellant replies that regardless of the standard employed, the state has failed to meet its

burden as the evidence introduced in this case does not provide competent and substantial evidence of premeditation. Appellant relies on the argument raised in the initial brief, but writes to address two matters.

On page 23 of the answer brief, the state is discussed the testimony provided by the four questionable witnesses mentioned above. (AB, p. 23) The state wrote, "Abdool also spoke with Visham about getting rid of Amelia's body. Abdool demurred. (TR Vol. 9 241-242)" (AB, p. 23) Visham Adjoda testified at trial, that while discussing Ms. Sookdeo's pregnancy, the Appellant said he wanted to "get rid of the baby." (Vol. 9, p. 242-243)

On page 25, the state argues that it presented ample evidence that the Appellant acted with premeditation, because the jury could find that the Appellant brought the lighter that set Ms. Sookdeo on fire with him. (AB, p.25) Answer brief states, "Abdool told the investigators that Amelia did not smoke. (TR Vol. IX 514)" The state is obviously implying is that the lighter found at the scene must have been brought there for the express purpose of killing Ms. Sookdeo as there was no other reason for it to be present. Appellee appears to suggest that the Ms. Sookdeo never smokes, when in fact the exchange on page 514, a transcript of the playing of the tape of the Appellant's interrogation, was a conversation specifically

about the night Ms. Sookdeo died. (Vol. 11, T 514) The following is the relevant portion of the exchange:

> Okay. How long were you guys out there walking around?
> Like a minute or two.
> A minute, you said? What -- do you smoke?
> Do I smoke? No.
> Does she smoke?
> She, like, when -- when we were going out?
> *No, that night, when you guys were out there talking on 545 –*
> *No, she didn't smoke*.
> -- you don't remember her smoking when you were on 545?
> No, she was not smoking. (Vol. 11; T514).

During the interrogation, the Appellant had told the officers that Ms. Sookdeo occasionally smoked (Vol. 11, T583-584)

Appellant submits that the state's evidence failed 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.

In the initial brief, the Appellant argued that the trial court erred when the investigating officer, Detective Gammill, was permitted to tell the jury that in his opinion the death of the victim was not an accident. (IB 51-55) Appellant asserted that, since the only issue before the jury was whether or not the victim's death was accidental, the detective was giving an opinion on the ultimate issue of the Appellant's guilt, in violation of Appellant's right to a fair trial. (IB 51-55)

In the answer brief, the state notes that defense counsel did not request a limiting instruction after the trial court overruled the objection to the detective's testimony. (AB 30) The state argued that the detective was not giving his opinion as to the Appellant's guilt, but was instead explaining an interrogation technique for the jury. (AB 30) The state opined that this explanation was necessary in order to clear up any misconception on the part of the jury that the officer thought the death was an accident, because otherwise the Appellant "would have exploited that during closing argument" by reminding the jury that, on videotape, the detective agreed with Abdool that the death had been an accident. (AB 30) However, the state does not explain why the trial prosecutor could not have requested a limiting

instruction to prevent defense counsel from 'exploiting' the situation in his closing statement. Finally, the State concluded that no reasonable juror would have believed that the detective was offering an opinion as to an element of the crime, but that "every reasonable juror" would view the testimony as an explanation of a technique. (AB 30-31)

The state's view of the jurors is somewhat contradictory. According to the state, these "reasonable" jurors, who could not possibly be influenced by the detective stating in open court his personal belief that the death was not an accident, are the same jurors that needed a clarification of the interrogation video lest the defense sway them by arguing that the detective believed the death was an accident, because he had said so in the video. The state cannot argue both ways. The dictates of logic demand that either jurors can potentially be influenced by the opinions of law enforcement officers, particularly investigating officers, or they are not. This Court has already answered this conundrum in *Martinez v. State*, 761 So.2d 1074 (Fla. 2000), in which this Court held 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. *Id.*

The State argues that any error was harmless, because of other evidence of guilt introduced at trial, namely the testimony of Juan Bailey, the arson investigator. (AB 31) Mr. Bailey testified that accelerant had been intentionally poured on the victim and the fire intentionally set. This Court has held that "[t]o affirm a conviction despite error at trial, the State must prove beyond a reasonable doubt that the error "did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction."" *Rigterink v. State*, 2 So.3d 221, 255 (Fla. 2009)(quoting *State v. DiGuilio*, 491 So.2d 1129, 1135 (Fla.1986).) In *Rigterink*, this Court explained that the harmless error test is not satisfied simply because there is other evidence of guilt:

> However, our harmless-error test is not guided by a sufficiency-of-the-evidence, correct-result, not-clearly-wrong, substantial-evidence, more-probable-than-not, clear-and-convincing, or overwhelming-evidence test. See DiGuilio, 491 So.2d at 1139. If any of these were the proper test, we might agree that the admission and publication of Rigterink's videotaped interrogation constituted harmless error. The simple answer to the simple question of whether there is competent, substantial evidence to support the charges that Rigterink committed these crimes is "Yes." However, the actual question that we must ask-and the constitutional protection that we must address-are not so simple. We have specifically rejected sufficiency-of-the-evidence

> approaches through our decision in DiGuilio, and we will not recede from established precedent by, on the one hand, paying lip service to its requirements and then, on the other, employing reasoning that would be clearly contrary to the pertinent legal standard. See id.

Rigterink v. State, 2 So.3d 221, 255 -256 (Fla.2009). While here the state did offer other evidence of guilt, the State cannot prove that the officer's statement that he did not believe it was an accident, i.e. does not believe the Appellant is being truthful, did not contribute to the verdict. The only issue before the jurors was whether Appellant's actions were premeditated or not. The opinion of the investigating officer carried enormous weight in the courtroom and this error merits a new trial. The state essentially admitted that the officer's opinions were extremely persuasive to the jury, when the state argued that there was a danger that defense counsel could 'exploit' the situation.

Recently this Court held that it was especially harmful to allow a law enforcement officer to give his opinion as to the veracity of another witness. *Tumblin v. State*, 2010 WL 652982 (Fla. 2010). Although the Appellant did not testify in the instant case, so the officer's statement did not directly impugn his veracity, the harm is similar. This Court held:

> "[A]llowing one witness to offer a personal view on the credibility of a fellow witness is an invasion of the province of the jury to determine a witness's credibility." *Seibert v. State*, 923 So.2d 460, 472 (Fla.2006) (quoting

> *Knowles v. State*, 632 So.2d 62, 65-66 (Fla.1993)). "It is clearly error for one witness to testify as to the credibility of another witness." *Acosta v. State*, 798 So.2d 809, 810 (Fla. 4th DCA 2001). Moreover, "[i]t is especially harmful for a police witness to give his opinion of a witnesses' [sic] credibility because of the great weight afforded an officer's testimony." *Seibert*, 923 So.2d at 472 (quoting *Page v. State*, 733 So.2d 1079, 1081 (Fla. 4th DCA 1999)); see also *Acosta*, 798 So.2d at 810. "Police officers, by virtue of their positions, rightfully bring with their testimony an air of authority and legitimacy. A jury is inclined to give great weight to their opinions...." *Bowles v. State*, 381 So.2d 326, 328 (Fla. 5th DCA 1980); see also *Lee v. State*, 873 So.2d 582, 583 (Fla. 3d DCA 2004) (holding police officer's comment that witness was credible and positive in her pretrial lineup identification was error requiring new trial); *Olsen v. State*, 778 So.2d 422, 423 (Fla. 5th DCA 2001) ("[I]t is considered especially harmful for a police officer to give his or her opinion of a witness' credibility because of the great weight afforded an officer's testimony."); cf. *Perez v. State*, 595 So.2d 1096, 1097 (Fla. 3d DCA 1992) (stating that improper admission of police officer's testimony to bolster the credibility of a witness cannot be deemed harmless).

Tumblin, 2010 WL 652982,* 6 (Fla.2010).

The state has failed to prove that the erroneous admission of the detective's opinion did not contribute to the Appellant's conviction of premeditated murder.

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.

The state contends that this issue is to be decided by an "abuse of discretion" standard. (Answer Brief, p. 39) While rulings on discovery matters are generally reviewed using the abuse of discretion standard, the court does not have the discretion to apply the wrong legal standard – doing so constitutes error as a matter of law. *See Hernandez v. State*, 16 So. 3d 336 (Fla. 4th DCA 2009); *Chavez v. State*, 2010 WL 4591048 *2 (Fla. 1st DCA 2010). Here, the trial court, using the wrong legal standard, contrary to clear language in the statute and rule, ordered the defendant to turn over his experts raw testing data, over his objections. By so doing, the court committed reversible error as a matter of law; it should be reviewed *de novo*.

The state, in its argument, fails to address the specific language of Rule 3.202, Florida Rules of Criminal Procedure, and Section 90.705, Florida Statutes, merely relying on the more general discovery rule, which has no application here. For it is an axiom of law that where multiple rules or statutes address the same

issue, one in general fashion and the other in specific fashion, the specific controls over the general, and the courts are bound by the specific rule or statute. *See Adams v. Culver*, 111 So.2d 665 (Fla. 1959); *Murray v. Mariner Health*, 994 So.2d 1051, 1061 (Fla. 2008); *Whipple v. State*, 789 So.2d 1132 (Fla. 4th DCA 2001). *See also State v. Schreiber*, 868 So.2d 564, 567 (Fla. 4th DCA 2004).

*** Under subsection (e) of Rule 3.202, the defense is required to turn over the raw data, test results and evaluations to the state if, *and only if*, the defendant refuses to cooperate with the state's mental health experts. 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." As contended below and in the Initial Brief, it is only 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 section 90.705 and Rule 3.220,[2] the district court, in *Gore v. State*, 614 So.2d 1111, 1115 (Fla. 4th DCA 1992), ruled that disclosure of such raw data is, under the clear language of the statute, delayed until the witness is in court and testifying at the trial or proceeding. To hold otherwise,

---

[2] In his discussion of *Gore* in the Initial Brief (p. 61), Appellant made a typographical error, incorrectly indicating that the court there discussed Rule 3.2*02*, when it correctly should have read that the court discussed Rule 3.2***20*** as it related to §90.705.

and to apply the general discovery rule instead, would make the plain language of the statute, and Rule 3.202(e) also, meaningless.

The court clearly applied the wrong legal standard and thus erred as a matter of law 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.

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.

The state contends in its brief that there was no harm from the prosecution's elicitation of these matters for the jury, quibbling that the prosecutor did not argue these matters to the jury. (Answer Brief, p. 47) However, counsel for the state ignores clear references in the prosecutor's arguments to the jury to these irrelevant and highly prejudicial matters.

The prosecutor harps repeatedly on the alleged lack of defendant's remorse in that Abdool only was concerned about his own burns, his own car, his own family relationships, and remained calm and non-remorseful after the crime:

> "and being concerned about his own leg burning" (Vol. 14, T 1246);
>
> "And you even heard words from the defendant when he talked to the detectives and he talked to Dr. Tressler is a concern about his own burns" (Vol. 14, T 1252);
>
> "Get in the car, drive away, wash the car" (Vol. 14, T 1253);
>
> "lack of empathy for the actual crime itself" (Vol. 14, T 1262);
>
> "Ladies and gentlemen, clearly you've seen evidence of that through the defendant's statement to the police, through statements he said to Dr. Tressler, through statements he said to Dr. Gold. Mr. Abdool's main concern was himself, concern about him being on fire, concern about how this affects his parents, concern that if his parents are no longer here who will put money in his account while he's incarcerated" (Vol. 14, T 1262-3);
>
> MS. CASHMAN [defense counsel] "The State is trying to play the part [of D's interview with police]. Nonstatutory aggravation."
> THE COURT: "Okay. State, what is the purpose of showing this?"
> MS. WILKINSON [prosecutor]: "Showing that the defendant was also calm afterwards." (Vol. 14, T 1269-1270)

And the prosecutor also emphasized to the jury the improper sentencing consideration of the lack of insanity:

> "In fact, Dr. Tressler told you that the social judgment of the defendant was his greatest strength and *knowing what's right and*

> *what's wrong*. And you've heard the testimony and seen the defendant's parents, along with extended family, and clearly he was raised in a home *to know right from wrong*." (Vol. 14, T 1260)

As such, this evidence, deliberately elicited by the prosecutor and argued to the jury, could only serve to confuse the jury and get them to base their sentencing decision on irrelevant and inflammatory matters. The comments of the prosecutor "so deeply implant[ed] 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 elicitation of this testimony and his argument prejudiced Abdool. They put irrelevant matters before the jury for their consideration in determining the appropriate sentence. They served to confuse the jury from their proper considerations. The prosecutor's actions thus rendered the capital trial proceeding fundamentally unfair and denied the defendant due process of law; causing his death sentence to be cruel or unusual punishment. A new penalty

phase 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 state complains that this issue is not preserved for appeal, contending that trial counsel did not contend that the victim impact evidence would "inflame the passions of the jury or distract it from an impartial and reasoned sentencing analysis," nor did counsel "object to the statement on the grounds it improperly expressed Mr. Sookdeo's or his son's opinions about the crime itself." (Appellee's Brief, p. 55) However, this argument is precisely what trial counsel did make, and make repeatedly. *See* Vol. 13, T 838-839 ("discussing his characterization of crime and what he believes she went through;" "instead goes on to describe his opinion and his characterization;" "what it's talking about is his steps to go through the grieving process, and while we all feel him, that's not something that is to be shared with the jury and taken into consideration in recommending a sentence"); Vol. 13, T 840, 841 (improper "characterizations of the crime"); and Vol. 13, T 844 ("that's not the effect it's had about him, that's him speculating as to might occur in the future. We don't believe that it's appropriate for speculation into the future. What he is supposed to talk about is the loss to the community of Amelia,

and he's sort of gone off on a tangent imagining that he's now going to lose his other child.")

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 trial court permitted these inflammatory and improper references, thereby tainting the jury's recommendation and the resultant sentence of death.

The evidence introduced here over objection was inadmissible. The witness improperly relayed his and his son's characterizations and opinions about the crime, a direct violation of *Payne v. Tennessee,* 501 U.S. 808 (1991). They were permitted to relay to the jury effects of the crime beyond the permissible, as decried in *Windom v. State,* 656 So. 2d 432, 438 (Fla. 1995), and in *Sexton v. State*, 775 So.2d 923, 932-933 (Fla. 2000). His outrage and his fiery metaphors improperly aroused the passions of the jury, passions which have no place in the capital sentencing determination. The state only recounts one portion of the objected to evidence, omitting Mr. Sookdeo's objected to declarations of outrage and anger, his characterization of the crime:

> Daddy, please help me. She cries. I feel her fear, her terror, and her regret of trusting someone unworthy of trust. Even though I love God and I know that we all make mistakes at a young age, I feel outraged by what has occurred.

(Vol. 13, T 867-868)

The presentation of this type of information, in addition to that at Vol. 13, T 869, as recounted in the State's brief (Appellee's Brief, p. 54), 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.

The state fails to address at all the trial court's clear factual errors in its sentencing order, as recounted in the Initial Brief, p. 71-74, including:

The court incorrectly saying 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), completely overlooking Bailey's specific testimony wherein he

indicated that the defendant's account of accidental ignition is entirely consistent with the evidence and does not contradict it at all. (Vol. 9, T 302)

The court's recall of 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) where Pinnock's time frame of eight months prior to the incident does not fit the evidence and is neither competent nor substantial, since Pinnock admitted that the defendant's request for some type of action was quite vague and the request to "kill" her was never mentioned "in so many words" (Vol. 9, T 225), with Adjoda testifying 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 testimony from a *state* witness, absent from the court's sentencing order and the state's brief, indicated that Adjoda had informed him that the defendant wanted Adjoda and Pinnock to merely punch Sookdeo in the stomach to cause a miscarriage. (Vol. 9, T 668-669)

Just as the trial court's sentencing order, the state incorrectly maintains in its brief that the evidence shows the defendant's ability to carefully plan and reflect upon his intended action and that there was no nexus between the mental health

experts' diagnoses of mental problems and the crime. (Appellee's brief, pp. 64-67) As noted in the Initial Brief, pp. 71-78, this is entirely contrary to the testimony during the penalty phase: **all** of the doctors specifically negated the factor of cold, calculated, and premeditated by stating that, because of Abdool's 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) 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 a "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, the doctor said. (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 disabilities which would preclude him from the type of "careful plan or prearranged design" necessary for the CCP aggravating circumstance; it establishes weighty mitigation directly related to the crime. Again, the trial court was mistaken in its recollection of facts with regard to the mitigation. The Appellee fails to address these clear errors.

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)

Having been based on such an erroneous and incomplete factual analysis, the trial court's death sentence was clearly erroneous and an abuse of discretion.

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.

First, the state attempts to discredit the doctors' testimony regarding the defendant's emotional and social immaturity by arguing that Abdool was able to

actually drive a car and play poker with his brother! (Appellee's brief, pp. 69) Of course, a 15-year old can drive a car but is considered too immature as a matter of law to receive the death penalty. And many an elementary-school child is able to play poker, yet no one would seriously suggest that they have reached any level of maturity. And while the defendant briefly had his own apartment and credit card (Appellee's brief, pp. 69-70), this evidence clearly shows no level of maturity considering the fact that his parents provided the money and support for those items.

The state attempts to compare favorably two cases wherein this Court upheld the death sentences. (Appellee's brief, pp. 75-81) However, both of these cases are inapposite. In *Way v. State*, 760 So.2d 903 (Fla. 2000), this Court noted aggravating circumstances of a prior violent felony conviction (a second victim of the arson), the murder was committed during the commission of another felony (arson); both factors highly determinative of the death sentence and both factors not present in Abdool's case. Moreover, Way was significantly older (38) and much more mature, a highly distinguishing factor from the instant case.

Likewise, in *Robinson v. State*, 761 So.2d 269 (Fla. 1999), also relied upon by the state, the defendant was much older then Abdool, being 29 at the time of the crime. Further, present in *Robinson* but lacking here are the aggravators that

Robinson committed the crime for pecuniary gain and to avoid arrest. Also, Robinson had an extensive history of prior criminal activity; here Abdool's record is absolutely clean and untarnished up until this episode.

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, as recounted in the Initial Brief, pp. 84-91. *See Offord v. State*, 959 So.2d 187 (Fla. 2007); *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); *Fitzpatrick v. State*, 527 So.2d 809 (Fla.1988).

Her, the defendant was nineteen years old at the time of the crime, suffered from a learning disability and low average intelligence, had an untreated attention deficit disorder, and his emotional and social maturity was substantially younger than his chronological age within the twelve to fourteen range. 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; had the defendant been more mature, "he likely would have dealt with the adversity that he believed he was under in a different manner," as noted by the trial court. (Vol. 7, R 879) Couple his physical age with a low emotional, mental, and social maturity level and behavior similar to a 10½- to 14-year old, and add in his lack of

any prior criminal history, and the mitigation is substantial. Compared to other cases, the death sentence in this case is disproportionate and renders the death penalty unconstitutional as an arbitrary and wanton imposition of the death penalty under *Furman v. Georgia*, 408 U.S. 238 (1972). This is simply not among the most aggravated and unmitigated of the most serious crimes for which the death penalty is reserved. Imposition of the death penalty would thus be a disproportionate punishment.

CONCLUSION

BASED UPON the cases, authorities and policies cited herein and in the Initial Brief, 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 26th day of February, 2010.

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