

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC

DANE PATRICK ABDOOL

Petitioner,

v.

MICHAEL D. CREWS

SECRETARY, DEPARTMENT OF CORRECTIONS

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Article 1, Section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is filed to address substantial claims of error under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. The first claim demonstrates that Mr. Abdool's sentence of death was obtained through a sentencing process which is arbitrary and capricious and fails to comport with evolving standards of decency which mark the progress of a maturing society. As such, his death sentence, and any resulting execution, would be unconstitutional under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the Florida Constitution. The second claim alleges ineffectiveness assistance of his direct appeal counsel.

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

REQUEST FOR ORAL ARGUMENT

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

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Florida Rule of Appellate Procedure 9.100(a). Fla. Const. Art I, § 13 provides that, “The writ of habeas corpus shall be grantable of right, freely and without cost. It shall be returnable without delay, and shall never be suspended unless, in case of rebellion or invasion, suspension is essential to the public safety.” This Court has original jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(a)(3) and Fla. Const. Art V, §3(b)(1) and (9). This petition presents constitutional issues which directly concern the judgment of the Florida State courts and Mr. Abdool’s death sentence.

This Court has jurisdiction and the inherent power to do justice. *Brown v. Wainwright*, 392 So.2d 1327 (Fla. 1981). The ends of justice call on the Court to grant the relief sought in this case. The petition raises claims involving fundamental

state and federal constitutional error. This Court's exercise of its habeas corpus jurisdiction and of its authority to correct constitutional errors is warranted in this action. As the petition shows, habeas corpus relief is proper on the basis of Mr. Abdool's claims.

GROUND FOR HABEAS CORPUS RELIEF

First, Mr. Abdool asserts that his sentence of death was obtained in violation of his rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution because Florida's death penalty statute, which allows a jury to return a sentence of death with a less than unanimous verdict, marks Florida as an outlier. Only two other states in the entire nation allow for less than unanimous verdicts in a capital sentencing proceeding, and they still require either a minimum of a ten to two verdict (Alabama), or unanimity on at least one aggravating factor (Delaware). The verdict imposed in this case was ten to two. This renders Mr. Abdool's death sentence and resulting execution unconstitutional under the Eighth Amendment's requirement that a state's sentencing practice comport with the evolving standards of decency that mark the progress of a maturing society.

Second, Mr. Abdool asserts that appellate counsel was ineffective for failing to raise on appeal the fact that the Winter Garden Police violated Mr. Abdool's rights under the Vienna Convention. This failure is a violation of his rights guaranteed by

the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

PROCEDURAL HISTORY

Mr. Abdool, a Trinidadian National, was convicted on a single count of first degree premeditated murder following a jury trial in February of 2008. His penalty phase took place on February 20th, 21st, and 25th of 2008. The State sought to prove the existence of only two aggravating factors, HAC and CCP. Trial counsel requested interrogatory verdict forms in order to determine the jury vote on those two aggravating circumstances. The trial court denied this request. TR4:394-96, TR2:113. The jury recommended death by a vote of 10 to 2. The Spencer Hearing took place on April 10, 2008. No additional evidence was presented by the State or Defense. On May 12, 2008, the Court sentenced Dane Abdool to death on the sole count of the indictment.

On direct appeal, this Court affirmed Dane Abdool's convictions and sentence of death. *Abdool v. State*, 53 So.3d 208, (Fla. 2010).¹ The United States Supreme Court denied certiorari on October 3, 2011. *Abdool v. Florida*, 132 S.Ct. 149, 181 L.Ed 2d 66 (2011). Mr. Abdool timely filed a Motion to Vacate Judgments of

¹ Appellate counsel raised a claim that Florida's death penalty scheme was unconstitutional under *Ring v. Arizona* and the Sixth Amendment. This Court rejected that claim. *Abdool v. State*, 53 So.3d 208, 228 (Fla. 2010).

Conviction and Sentence on September 21, 2012. The lower court granted an evidentiary hearing.

The lower court conducted the evidentiary hearing on July 8-12, 2013; August 13-14, 2013; and August 27-28, 2013. The lower court took judicial notice of the entire court file including the Record on Appeal. The lower court denied Mr. Abdool's 3.851 Motion on January 13, 2014, and his Motion for Rehearing on February 21, 2014. Mr. Abdool has timely appealed that denial of relief to this Court under case SC14-582.

ARGUMENT I

FLORIDA'S DEATH PENALTY STATUTE WHICH ALLOWS A NON UNANIMOUS VERDICT IS UNCONSTITUTIONAL UNDER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND VIOLATES EVOLVING STANDARDS OF DECENCY WHICH MARK THE PROGRESS OF A MATURING SOCIETY. MR. ABDOOL'S SENTENCE OF DEATH, IMPOSED BY A TEN TO TWO JURY VERDICT WAS OBTAINED IN AN UNCONSTITUTIONAL MANNER AND RENDERS HIS EXECUTION UNCONSTITUTIONAL.

The Eighth Amendment to the United States Constitution prohibits the "unnecessary and wanton infliction of pain," *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion), and procedures that create an "unnecessary risk" that such pain will be inflicted. *Cooper v. Rimmer*, 379 F.3d 1029, 1033 (9th Cir.2004). The Eighth Amendment has been construed by the Supreme Court of the United States to require that punishment for crimes comport with "the evolving standards of decency that mark the progress of a maturing society." *Roper v. Simmons*, 543 U.S.

551, 561 (2005)(quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion). “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.” *Trop v. Dulles*, 356 U.S. 86, 100, 78 S.Ct. 590 (1958). In assessing the evolving standards of decency, the Court has considered the laws of the various states and the entire world. *Id.* at 102-03. The Court further stated, that, “The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation. “ *Id.* at 103.

The Eighth Amendment to the Federal Constitution requires additional procedural protections in capital cases. *Beck v. Alabama*, 447 U.S. 625, 637-38, 100 S.Ct. 2382 (1980). “Death is a different kind of punishment from any other which may be imposed in this country. From the point of view of the defendant, it is different in both its severity and its finalityFrom the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.” *Gardner v. Florida*, 430 U.S. 349, 357-58, 97 S.Ct. 1197 (1977).

The American system of justice, and the American jury system, is one of the best, if not the best, system in the world. However, Florida’s jury system in capital

cases has failed to keep pace with the evolving standards of decency that mark the progress of a maturing society as demonstrated by the other State and federal death penalty statutes nationwide. Florida's system does not comport with the Eighth Amendment's evolving standards of decency because juries are not required to issue a unanimous death sentence and the State still adheres to a widely criticized practice of allowing a judge to override a jury's life verdict. Florida's capital punishment statute regarding juror unanimity is an outlier that has failed to keep pace with the rest of the nation and the world.

Pursuant to *Graham v. Florida*, the Eighth Amendment's Cruel and Unusual Punishment Clause analysis alleging failure to comport with the evolving standards of decency requires that a court make two determinations on a "sentencing practice at issue." 560 U.S. 48, 130 S.Ct. 2011 (2010). Courts are first to take into account "objective indicia of society's standards, as expressed in legislative enactments and state practice." *Id.* See also *Atkins*, 536 U.S. at 312 ("[T]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.")(quoting *Penry v. Lynaugh*, 492 U.S. 302 (1989)). Second, courts consider whether the punishment at bar comports with "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning and purpose." *Id.* See also *Hall v. Florida*, 134 S.Ct. 1986, 2001 (2014)(Reviewing nationwide practices on

Intellectual Disability and rejecting Florida's strict cutoff of 70 on the IQ prong as an unconstitutional outlier. "Florida's law contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world.").

A. Societal standards show that Florida is an outlier with respect to its capital sentencing statute.

With respect to societal standards, 30 out of the 32 death penalty states require unanimous death sentences. The Federal Death Penalty Statute also requires a unanimous verdict. Only two states allow a death sentence to be imposed with a less than unanimous jury findings: Alabama and Florida. However, Alabama requires a minimum jury recommendation of 10 to 2, in favor of death, before a death sentence can be imposed. Delaware requires a unanimous vote on the finding of one aggravator before a sentence of death can be considered, but the ultimate verdict can be non-unanimous. In Delaware, the jury is required to write their votes on a verdict form specifying which aggravating factor was found unanimously.

Florida is the *only* state in the entire country that allows juries to recommend a death sentence by a simple majority. As of 2012, only half of the persons given the death sentence in Florida could have been sentenced to death in any other state. As of 2000, only 20% of the death sentenced individuals on Florida's Death Row were sentenced to death by a unanimous jury verdict. Bill Analysis and Fiscal Impact Statement for SB 148, Sentencing in Capital Felonies, March 7, 2013, available at

<http://www.flsenate.gov/Session/Bill/2013/0148/Analyses/2013s0148.pre.cj.PDF>

(last visited October 13, 2014).

This trend has continued in 2013 and 2014. In 2013, Florida was second only to California in the number of new death sentences, with 15. *The Death Penalty in 2013: Year End Report*, Death Penalty Information Center, available at <http://deathpenaltyinfo.org/documents/YearEnd2013.pdf> (last visited October 13, 2014). Of those 15 new sentences, only three of them were unanimous. To date in 2014, there have been 10 new death sentences. Of those 10, only four were unanimous.²

Florida is currently the only state with a steadily increasing number of death sentences. This fact alone demonstrates the outlier status created by Florida's death penalty statute and the arbitrary and capricious effect of a system that does not require juror unanimity. Florida has the fourth largest population in the country, United States Census Bureau Annual Population Estimates,

² Data provided by Professor Michael Radelet, University of Colorado, who, since 1979, has collected data on all post-Furman capital cases in Florida. Among the data that Radelet collects are the judge's sentencing orders in all Florida capital cases, which outline the formal findings of aggravators and mitigators and the juries' sentencing recommendations. The three unanimous death sentences in 2013 were Delmer Smith, SC13-1550, Kenneth Jackson, SC13-1232, and Steven Cozzie, SC13-2393. The four unanimous death sentences thus far in 2014 were Henry Jones, SC14-990, Quentin Truehill, SC14-1514, Dontae Morris, SC14-1317, and Kentrell Johnson, SC14-1966.

http://www.census.gov/popclock/?intcmp=home_pop yet, Florida has the second largest number of inmates on death row, with 395 as of October 13, 2014. <http://www.dc.state.fl.us/activeinmates/deathrowroster.asp>; See also Death Penalty Information Center (“DPIC”), <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year>. Florida has one and a half times the population of Pennsylvania (a state that requires a unanimous verdict) but twice the number of death sentenced individuals. *Id.*

Florida’s percentage of annual death sentences over the last two years was stunning. In 2012, seventy-eight individuals nationwide were sentenced to death, the second lowest number since the death penalty was reinstated in 1976. DPIC, <http://www.deathpenaltyinfo.org/2012-sentencing#Inmates>. Twenty of those sentences, or 35%, were from Florida, up from fourteen in 2011 and the same number in 2010. In 2013, there were 80 new death sentences. Florida (15) and California (24) accounted for nearly half of the death sentences nationwide.

In light of Florida’s death penalty scheme, and failure to require juror unanimity, Florida has the highest number of death row exonerations in the country—twenty-three, or 16.5% of the nation’s 139 wrongful capital convictions. DPIC, <http://www.deathpenaltyinfo.org/florida-1>. Taken together, these statistics demonstrate that an innocent person charged with first degree murder in Florida is substantially more likely to be sentenced to death in Florida than if the exact same

person committed the exact same crime in any other death penalty state in the country. *See also* Raoul Cantero and Mark Schlakman, Florida ignores “unanimous jury” legislation in death penalty cases at its peril, Miami Herald, Feb. 20, 2012 available at <http://www.deathpenaltyinfo.org/op-ed-florida-ignores-unanimous-jury-legislation-death-penalty-cases-its-peril> (last visited October 13, 2014) (“Florida is an outlier insofar as allowing capital-case juries to find aggravating circumstances and recommend a death sentence by a simple majority. All 33 other death penalty states require some form of unanimity. ... Regardless of ... one’s views on capital punishment, maintaining the status quo and thereby Florida’s outlier status in this country does not serve the cause of justice. States like Texas and Georgia, known for their pro-death penalty stance, require unanimous juries. So should we.”).

Further, recent studies of group decision-making in the context of jury verdicts in civil and capital cases conducted by social scientists and psychologists has established that the reliability and accuracy of group decision-making is diminished when jurors are not required to render a unanimous verdict. Majority jurors in cases where unanimity is not required tend to disregard the minority point of view.

This is especially so if the minority jurors are members of an ethnic minority, or if the jury is composed of primarily more men or women, the majority group tends to disregard the minority group’s point of view. Non unanimous juries “threaten[] to

discount the deliberations of minority jurors. Non unanimous juries are functionally equivalent to juries of less than twelve, as fewer than twelve jurors are required for a binding decision. Research indicates that smaller juries can lead to injustices, for they are less likely to contain minorities. Our nation has taken steps only recently to ensure better minority representation on juries.³ The implementation of non-unanimous jury sentencing risks marginalizing, once again, the views of minorities.” Sourcebook of Criminal Justice Statistics; Monica K. Miller & Michelle N. Kazmar, “Psychology Research and public Opinion Do Not Support Proposed Changes to the Jury System,” 30 Hamline L. Rev. 285 at 287 (Spring 2007); Wanda D. Foglia & William J. Bowers, “Shared Sentencing Responsibility; How Hybrid Statutes Exacerbate the Shortcomings of Capital Jury Decision-Making,” 42 Crim. Law. Bull. 1 (2006).

As demonstrated in a series of juror interviews conducted by the Tampa Bay Times in 2012-2013, jurors have a diminished sense of responsibility in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and tend to disregard the views of minority jurors when they are not required to reach a unanimous verdict. *See* Zayas, Alexandra, Law doesn’t require unanimous jury for death sentence, Tampa Bay Times, March 16, 2013 available at

³*Swain v. Alabama*, 380 U.S. 202 (1965); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Snyder v Louisiana*, 552 U.S.472 (2008).

<http://www.tampabay.com/news/courts/criminal/law-doesnt-require-unanimous-jury-for-death-sentence/2109467> (last visited October 13, 2014). The juror can vote against the death penalty knowing that a death sentence will be imposed yet also knowing that they did not have it on their conscience that they voted for death. As one juror explained, “I believe it should stay like it is, because it gives a person like me the opportunity that they can still give him the death penalty and some people have a clear conscience.” *Id.* Another juror described what happened during the deliberations in a different case. One of the jurors cried, said Juror Quentin Davis, but another juror said he “didn’t care,” and that it “wouldn’t change his mind.” *Id.* Another group of jurors simply put their votes in a cup, which resulted in a simple majority vote and ended all further discussion. *Id.*

In a different context regarding a *Ring/Apprendi* challenge, this Court recognized nine years ago that Fla. Stat. 921.141 has placed the Florida death penalty system on the fringes of Constitutionality. *State v. Steele*, 921 So. 2d 538, 548-550 (Fla. 2005). “[I]n light of development in other states and at the federal level, the Legislature should revisit the statute to require some unanimity in the jury’s recommendations.” *Id.* at 548.

At the time of this Court’s opinion in *State v. Steele*, Florida was the only state in the country to decide that aggravators exist and to recommend a sentence of death by a mere majority. *Id.* at n. 3, 4, 5, 6, 7, 8 and 9 (collecting state statutes). The

Federal Government also requires a unanimous sentencing verdict. 18 U.S.C. § 3593 (d)(2000). At the time of the *Steele* opinion, 38 states retained the death penalty. *Id.* at 548. Since then six states have abolished the death penalty - New Jersey (2007), New York (2007) New Mexico (2009), Illinois (2011), Connecticut 2012, and Maryland (2013). Oregon has a *de facto* moratorium. *The Death Penalty in 2013: Year End Report*, Death Penalty Information Center, available at <http://deathpenaltyinfo.org/documents/YearEnd2013.pdf> (last visited October 13, 2014).

In signing the bill repealing Maryland's death penalty, Governor O'Malley stated, "Our free and diverse republic was not founded on fear and revenge, or on retribution. Freedom, justice, the dignity of every individual, equal rights before the law – these are the principles that define our character. The death penalty is inconsistent with these principles." <http://www.politico.com/story/2013/03/martin-omalley-repealing-marylands-death-penalty-88972.html>. Governor O'Malley also stated that, while Maryland was the first state below the Mason-Dixon line to abolish capital punishment, "other states will follow suit." *Id.* Governor O'Malley's statements are precisely the type of evidence reflecting society's evolving standards of decency relevant to an Eighth Amendment analysis.

As further evidence of the nation's evolving standards of decency, in 2007, New York's death penalty statute was overturned and the legislature elected not to

reinstate the death penalty, leaving the state with no death penalty statute and no one on death row. In Virginia, the Death Row population has dwindled to 8 from a peak of 57 in 1995. A major reason for the decline is that fewer death sentences are being handed down; only two new inmates have been received in nearly 5 years. Larry O'Dell, Virginia's Death Row Population Down to 8, Richmond-Times Dispatch: AP, available at http://www.timesdispatch.com/news/state-regional/government-politics/virginia-s-death-row-population-down-to/article_333bd65e-70a6-5502-b947-e6bc5abf777b.html; see also <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year#state>. Thus, Florida is even more of an outlier now than in 2005. And, at the time of the *Steele* opinion, Florida's number of new death sentences was not outstripping the rest of the country, as it is now.

In 2012, 2013, and 2014, Senator Thad Altman (R – Brevard County) introduced bills to attempt to bring Florida in line with the rest of the country by requiring unanimous jury verdicts. Each attempt failed to get out of committee, and thus Florida maintains its outlier status. Require unanimity from capital case juries: Editorial, Orlando Sentinel, April 17, 2014, available at http://articles.orlandosentinel.com/2014-04-17/news/os-ed-unanimous-death-penalty-20140416_1_juries-require-unanimity-death-row-exonerations.

Many years ago, the Connecticut Supreme Court stated:

We perceive a special need for jury unanimity in capital sentencing. Under ordinary circumstances, the requirement of unanimity induces a

jury to deliberate thoroughly and helps to assure the reliability of the ultimate verdict. The “heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate; Sumner v. Shulman, 483 U.S. 66, 107 S.Ct. 2716, 2720, 97 L.Ed.2d 56 (1987); convinces us that jury unanimity is an especially important safeguard at a capital sentencing hearing. In its death penalty decisions since the mid-1970s, the United States Supreme Court has emphasized the importance of ensuring reliable and informed judgments. These cases stand for the general proposition that the “reliability” of death sentences depends on adhering to guided procedures that promote a reasoned judgment by the trier of fact. The requirement of a unanimous verdict can only assist the capital sentencing jury in reaching such a reasoned decision.

State v. Daniels, 207 Conn. 374, 542 A.2d 306, 315 (1988) (internal citations omitted). At the time it was issued, the Connecticut court’s holding seemed cutting edge and revolutionary. In 2014, it is simply further support for a consensus determination that Florida has failed to keep up with the evolving standards of decency.

B. Controlling precedents and the Court’s understanding and interpretation of the Eighth Amendment’s text, history, meaning and purpose demonstrates that Florida’s non-unanimous jury requirement does not comport with the Eighth Amendment’s evolving standards of decency.

In considering whether the punishment at bar comports with “the standards elaborated by controlling precedents and by the Court’s own understanding and interpretations of the Eighth Amendment’s text, history, meaning and purpose, the Supreme Court of the United States has emphasized that the Eighth Amendment cannot tolerate the infliction of a sentence of death under legal systems that permit

this unique penalty to be so wantonly and so freakishly imposed.” *Furman v. Georgia*, 408 U.S. at 310 (Brennan, J., concurring).

This is exactly what Florida's outlier system has allowed. In allowing for a death verdict based on a simple majority, with no breakdown of which, if any, aggravators were found by a majority of jurors, Florida's death sentencing rates are growing along with its wrongful convictions. And there will be more wrongful convictions established. The Florida death penalty system is the very definition of freakishly and wantonly applied.

In addressing Sixth Amendment challenges to jury systems, the Court, in *Ballew v. Georgia*, 435 U.S. 223, 98 S.Ct. 1029 (1978), held that a state criminal trial of only five persons violated the Sixth and Fourteenth Amendments. The Court noted that the purpose of a jury trial is to “prevent oppression by the Government.” *Id.* at 229. “Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge.” *Id.* (internal citations omitted).

The Court found that based on empirical data, smaller juries are less likely to foster deliberation which leads to inaccurate fact-finding. *Id.* at 232. “When individual and group decision-making were compared, it was seen that groups performed better because prejudices of individuals were frequently counterbalanced, and objectivity resulted. Groups also exhibited increased motivation and self-

criticism. ... Because juries frequently face problems laden with value choices, the benefits are important and should be retained. In particular, the counterbalancing of various biases is critical to the accurate application of the common sense of the community.” *Id.* These same criticisms and concerns are now known to apply to non-unanimous jury decision making also as set out *supra*.

The Court has also noted that, ‘we have long been of the view that ‘[t]he very object of the jury system is to secure unanimity by a comparison of views and by arguments among jurors themselves. *Allen v. United States*, 164 U.S. 492, 501, 108 S.Ct. 546 . . . (1988).” *Jones v. United States*, 527 U.S. 373, 382, 119 S.Ct. 2090 (1999). In a capital sentencing, it is important that a jury “express the conscience of the community on the ultimate question of life or death.” *Lowenfeld v. Phelps*, 484 U.S. 231, 238, 108 S.Ct. 546 (1988). The Court has also held that “unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply. In criminal cases, this requirement of unanimity extends to all issues– character or degree of the crime, guilt and punishment — which are left to the jury. ... the jury’s decision upon both guilt and whether punishment of death should be imposed must be unanimous.” *Andres v. United States*, 333 U.S. 740, 749, 68 S.Ct. 880 (1948).

“The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments, and with a distrust

of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury room with a blind determination that the verdict shall represent his opinion of the case at that moment, or that he should close his ears to the arguments of men who are equally honest and intelligent as himself.” *Allen v. U.S.*, 164 U.S. 492, 501-02, 17 S.Ct. 154 (1896).

The Court has also stated that there are “size and unanimity limits that cannot be transgressed if the essence of the jury trial right is to be maintained.” *Snyder v. Louisiana*, 447 U.S. 323, 330-31, 100 S.Ct. 2214 (1980). A fractured court in *Johnson v. Louisiana/Apodaca v. Oregon*, 406 U.S. 356 (1972) (plurality opinion) upheld a less than unanimous verdict of nine to three in a ***non-capital*** case as constitutional under the Sixth Amendment. However, society had not evolved at that time, as it has now, to a greater understanding of the importance of juror unanimity. Further, Florida was not the outlier that it is now.

C. Florida is also an outlier in the international arena by allowing juror majority death sentences and with its steady increase in number of death sentences handed down.

Even in the international arena, Florida remains an outlier by imposing the death penalty based merely on a majority vote of the jurors. Barbados, for example, mandates that a jury must deliver a unanimous verdict in favour of death. (See <http://www.state.gov/j/drl/rls/hrrpt/2011/wha/186489.htm>.) Barbados, it should be

noted, is a country marred by prisons condemned as “overcrowded, harsh and degrading.” (See <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Barbados>.) Death-sentenced prisoners are sometimes kept in cages. (*Ibid.*) Moreover, Barbados conducts executions by hanging. Florida takes pains to note the “humane” method by which it executes prisoners, yet permits the execution of a person by a simple majority.

By way of additional example, Ghana provides for execution by hanging or firing squad. (See <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Ghana>.) One report shows over 700 prisoners are being kept in an area designed for 70 men. (See AfriMAP, The Open Society Initiative for West Africa & The Institute for Democratic Governance, Ghana: Justice Sector and the Rule of Law, p. 115, http://www.afrimap.org/english/images/report/AfriMAP_Ghana_Justice.pdf, 2007.) Yet, the Ghanaian government recognizes the fact that sentencing an individual charged with capital murder to death with less than a unanimous jury verdict would be wrong. (See <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Ghana>.) See also <http://www.state.gov/g/drl/rls/hrrpt/2009/wha/136099.htm> (Bahamas) and <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Guyana> (Guyana).)

In addition, Amnesty International in its 2010 report on the imposition of the death penalty worldwide stated:

At the end of 2010 the global trend towards abolition of the death penalty could not have been clearer. While in the mid-1990s 40 countries on average were known to carry out executions each year, during the first years of this century executions were reported in 30 countries on average. Most recently, 25 countries reportedly executed prisoners in 2008 while 19 countries – the lowest number ever recorded by Amnesty International – did so in 2009 . . . the number of countries that are abolitionist in law or practice has substantially increased over the past decade, rising from 108 in 2001 to 139 in recent years.

Amnesty International, *Death Sentences and Executions 2010*
<http://www.amnesty.org/en/library/asset/ACT50/001/2011/en/ea1b6b25-a62a-4074-927d-ba51e88df2e9/act500012011en.pdf>

No western democracy has retained the death penalty in many years. The European Union has condemned America's continuing use of the death penalty. During 2007-2013, the United States carried out the fifth highest number of executions worldwide, behind only China, Iran, Saudi Arabia, and Iraq. Haddou, Leila, Death Penalty Statistics 2013: country by country, The Guardian, March 27, 2014, <http://www.theguardian.com/world/datablog/2014/mar/27/death-penalty-statistics-2013-by-country> (last visited October 13, 2014).

These international statistics and cases further establish Florida's outlier status.

D. Mr. Abdool's sentence of death was unconstitutionally obtained

The jury sentenced Mr. Abdool to death by a ten to two majority vote. Had Mr. Abdool lived anywhere but Florida or Alabama, he would have received a life sentence.⁴ Further, because of Florida's outdated and unconstitutional death penalty statute, minority jurors on Mr. Abdool's jury would likely have been ignored or disregarded. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986). And, jurors who did not vote for death would not have had the appropriate sense of responsibility as they would have known Mr. Abdool received a death verdict but would not have been "responsible" as they voted for life. *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633 (1985). See Zayas, Alexandra, Law doesn't require unanimous jury for death sentence, Tampa Bay Times, March 16, 2013 available at <http://www.tampabay.com/news/courts/criminal/law-doesnt-require-unanimous-jury-for-death-sentence/2109467> (last visited October 13, 2014). Scientific studies establish the defects in jury decision-making that result when a less than unanimous verdict is allowed. The jury deliberation and verdict in Mr. Abdool's case resulted

⁴ Unlike Florida, however, Alabama law requires that jurors unanimously find *the same* aggravating circumstance before they can impose a sentence of death. See Alabama Pattern Jury Instructions – Criminal, available at http://judicial.alabama.gov/library/docs/capital_charges.pdf (last visited October 15, 2014). Since the trial court did not allow a special verdict form, it is unknown whether Mr. Abdool's jurors unanimously agreed on the same aggravator.

in an unreliable sentencing process/determination that renders his sentence of death and his execution unconstitutional.

This Court must step in where the Legislature has failed to act and ensure the continuing constitutionality and availability of Florida's death penalty statute by striking Mr. Abdool's unconstitutionally obtained sentence of death.

E. This claim should be considered on the merits

This Court should hold this claim can be raised in a State Habeas Petition and consider it on the merits. This Court's failure to consider this claim on the merits would amount to an unconstitutional suspension of the right of habeas corpus and a denial of Mr. Abdool's rights to reasonable access to the courts under the Florida and federal constitutions.

Art. I, § 13 of the Florida Constitution provides that, "The writ of habeas corpus shall be grantable of right . . . and *shall never be suspended* unless, in case of rebellion or invasion, suspension is essential to the public safety." (emphasis added). The right to habeas corpus is a "basic guarantee of Florida law." *Haag v. State*, 591 So.2d 614, 616 (Fla. 1992). Art. I, § 21 of the Florida Constitution provides that "the courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." To establish an unconstitutional denial of access to courts, an individual does not have to show that a statute or rule,

“produces a procedural hurdle which is absolutely impossible to surmount, only one which is significantly difficult.” *Mitchell v. Moore*, 786 So. 2d 521, 527 (Fla. 2001).

The Fifth, Sixth, Eighth and Fourteenth Amendments to the federal constitution also guarantee state prisoners the rights of Due Process and access to the courts. *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491 (1977); *Johnson v. Avery*, 393 U.S. 483 (1969); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Ex Parte Hull*, 312 U.S. 546 (1941); *Burns v. Ohio*, 360 U.S. 252 (1959); *Smith v. Bennett*, 365 U.S. 708 (1961). While these cases generally deal with a prisoner’s access to legal materials and law libraries, the right of an indigent prisoner to proceed *in forma pauperis* on appeal, and other similar types of issues, the overarching principle demonstrated by these cases is that the State cannot impose hurdles which unconstitutionally deprive a prisoner of access to the courts to challenge the constitutionality of his or her sentence. A prisoner under sentence of death most assuredly must have a means to raise a constitutional claim, including one that asserts that his sentence of death was obtained in violation of the Eighth Amendment’s requirement that punishment and sentencing practices comport with the evolving standards of decency that mark the progress of a maturing society.

In *Chandler v. Crosby*, 916 So.2d 728 (Fla. 2005), this Court was called upon to address whether a death-sentenced inmate could properly petition this Court for a writ of habeas corpus seeking retroactive relief based on the Supreme Court’s

opinion in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004). In his concurring opinion, Justice Anstead stated that, “Although the right, ‘like any other constitutional right, is subject to certain reasonable limitations consistent with the full and fair exercise of the right,’ the limitations must not be ‘applied harshly or contrary to fundamental principles of fairness.’” *Chandler*, 916 So.2d at 735-36, quoting *Haag*, 591 So. 2d at 616 Anstead, J., with whom Pariente, J. joins, concurring).

This Court has “always been willing to entertain constitutional issues raised via application for a writ of habeas corpus, access to which is guaranteed by the Florida Constitution, especially in a death penalty context where our obligation for review is heightened.” *Chandler*, 916 So.2d at 736 (Anstead, J., with whom Pariente, J. joins, concurring).

Because only this Court, or the Supreme Court of the United States, can announce or precipitate a major change in constitutional law in death penalty proceedings in Florida, this Court has protected its role in considering habeas petitions, and “has frequently entertained habeas petitions seeking to resolve important constitutional issues, especially in capital cases where only this court has jurisdiction to grant the relief requested.” *Id.* at 739. To preclude Mr. Abdool from having the merits of his claim heard, “would be particularly irrational and harsh in

combination with the extraordinary procedural restrictions already in place.” *Id.* at 740.

Lastly, because the constitutional right to habeas corpus is available to all non-death sentenced prisoners under 3.850(1), denial of the right of habeas corpus to death-sentenced individuals, would violate federal principles of Equal Protection and heightened Due Process under the federal constitution. *See Chandler* at 740.

“The qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny.” *California v. Ramos*, 463 U.S. 992, 998-99, 103 S.Ct. 3446 (1983). This Court must establish that there exists a means under Florida law to raise an Eighth Amendment challenge alleging a sentencing practice in a capital proceeding violates evolving standards of decency.

CLAIM II

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL A MERITORIOUS ISSUE WHICH WARRANTS REVERSAL OF MR. ABDOOL’S CONVICTION AND SENTENCE.

A. Introduction

Appellate counsel had the “duty to bring to bear such skill and knowledge as will render the [appeal] a reliable adversarial testing process”. *Strickland v. Washington*, 466 U.S. 668 (1984). To establish that counsel was ineffective, *Strickland* requires a defendant to demonstrate (1) specific errors or omissions which show that appellate counsel’s performance deviated from the norm or fell outside

the range of professionally acceptable performance, and (2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result. *Wilson v. Wainwright*, 474 So.2d 1162, 1163 (Fla. 1985).

In order to grant habeas relief based on ineffectiveness of appellate counsel, this Court must determine “whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.” *Pope v. Wainwright*, 496 So.2d 798, 800 (Fla. 1986).

Appellate counsel’s failure to raise the meritorious issue addressed in this petition proves his advocacy involved “serious and substantial deficiencies” which establishes that “confidence in the outcome is undermined”. *Fitzpatrick v. Wainwright*, 490 So.2d 938, 940 (Fla.1986); *Barclay v. Wainwright*, 444 So.2d 956, 959 (Fla. 1984); *Wilson v. Wainwright*, 474 So.2d 1162 (Fla. 1985).

This Court has held that “constitutional errors, with rare exceptions, are subject to harmless error analysis”. *State v. DiGuilio*, 491 So.2d 1129, 1134 (Fla. 1986). Harmless error analysis:

requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the verdict.

Id. at 1135. Once error is found, it is presumed harmful unless the state can prove beyond a reasonable doubt that the error “did not contribute to the verdict or, alternatively stated, that there is no reasonable probability that the error contributed to the [verdict]”. *DiGuilio*, 491 So.2d at 1138.

B. Appellate counsel was ineffective for failing to raise on appeal the fact that the Winter Garden Police violated Abdool’s rights under the Vienna Convention.

Dane Abdool is a Trinidadian National. He is not a citizen of the United States and only possessed a green card at the time of his arrest. The Winter Garden Police knew that Abdool was born in Trinidad. R29:Exhibit 8. According to the interview on March 2, 2006, they had actually known this for several days prior to his detention and arrest. *Id.* Despite this knowledge, the Winter Garden Police Department violated the Vienna Convention by failing to notify the Trinidad consulate of Mr. Abdool’s arrest. This failure was apparent on the face of the direct appeal record as Mr. Abdool’s recorded confession was a State’s Exhibit at trial. TR17:49.

Mr. Abdool also raised this issue as a claim of ineffective assistance of trial counsel for failure to litigate this issue prior to trial. The post-conviction court addressed the ineffectiveness assistance of counsel issue on the merits, but also

found that it was procedurally barred and should have been raised on direct appeal. R12:1425. Mr. Abdool does not concede that his claim is procedurally barred and maintains that it was properly raised as an ineffective assistance of counsel claim in his Rule 3.851 Motion. However, Mr. Abdool alternatively argues that his appellate counsel was ineffective for failing to raise the apparent violation of the Vienna Convention on appeal.

Appellate Counsel was deficient in failing to preserve and litigate this issue before this Court. Prevailing norms require counsel to be familiar with the Vienna Convention and the obligations the State had under the Convention. The 2003 ABA Guidelines, which were in effect at the time of Abdool's arrest and trial, explain that when representing a foreign national, counsel should ensure that the consulate of the client's country has been notified. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.6(2003). The Commentary to that Guideline states, "There is considerable evidence that American local authorities routinely fail to comply with their obligations under the Vienna Convention." *Id.* This is precisely what happened in Mr. Abdool's case.

The 2003 Guidelines also instruct counsel *at every stage* to consider, assert and/or preserve all available legal claims. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.8(2003). The Commentary explains that in a death penalty case, "counsel must be significantly more vigilant

about litigating all potential issues at all levels in a capital case than in any other case.” *Id.*

As such, appellate counsel should have raised and preserved the violation of the Vienna Convention by the Winter Garden Police on direct appeal. Failure to do so was deficient performance which prejudiced Mr. Abdool by forcing him to stand trial for his life in a foreign country without the assistance and/or representation from the government of his home country.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Abdool respectfully urges this Honorable Court to grant habeas relief and set aside his sentence of death.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been electronically filed with the Clerk of the Supreme Court and electronically delivered to Scott Browne, Assistant Attorney General at scott.browne@myfloridalegal.com and CapApp@myfloridalegal.com on this 15th day of October, 2014.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Petition for Writ of Habeas Corpus, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210.

s/Maria DeLiberato

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