

**IN THE SUPREME COURT OF FLORIDA**

**DANE PATRICK ABDOOL,**

**Petitioner,**

**v.**

**CASE NO.: SC14-2039**

**L.T. No.: 48-2006-CF-2848-O**

**MICHAEL D. CREWS, ETC.,**

**Respondents.**

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**RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS**  
**AND**  
**MEMORANDUM OF LAW**

COMES NOW, Respondent, TIMOTHY H. CANNON, Interim Secretary<sup>1</sup>, Florida Department of Corrections, by and through the undersigned counsel, and hereby responds to the Petition for Writ of Habeas Corpus filed in the above-styled case. Respondent respectfully submits that the petition should be denied, and states as grounds therefore:

**FACTS AND PROCEDURAL HISTORY**

The State's answer brief on appeal from the denial of post-conviction relief in case no. SC14-582 contains a detailed summary of facts and procedural history

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<sup>1</sup> Michael D. Crews has been replaced by Timothy H. Cannon as Interim Secretary of the Florida Department of Corrections.

and is being submitted along with the instant response. On direct appeal, appellate counsel generally raised the following issues:

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

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

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

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

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

Argument VI: Cumulative Error

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

This Court affirmed Petitioner's conviction and death sentence on October 7, 2010, in Abdool v. State, 53 So. 3d 208 (Fla. 2010).

Petitioner filed a petition for writ of certiorari in the United States Supreme Court on April 25, 2011, in Abdool v. Florida, Case No. 10-10531. The United States Supreme Court denied certiorari review on October 3, 2011. See Abdool v. Florida, 132 S. Ct. 149, 181 L.Ed.2d 66 (2011).

Petitioner filed a rule 3.851 motion to vacate on September 21, 2012. Following an evidentiary hearing, Petitioner's motion to vacate was denied January 13, 2014. Petitioner's appeal from the denial of his motion to vacate is pending in case no. SC14-582. Petitioner's habeas petition in this Court was timely filed along with his initial brief in the appeal of the denial of his motion for post-conviction relief.

## **ARGUMENT**

### **CLAIM I**

#### **WHETHER FLORIDA'S DEATH PENALTY STATUTE, WHICH ALLOWS A NON UNANIMOUS VERDICT, IS UNCONSTITUTIONAL UNDER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION?**

Abdool asserts that his death sentence is invalid in light of the Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002). This claim is procedurally barred and otherwise without merit.

First, this claim is not properly presented in this state habeas petition. Abdool challenged Florida's death penalty statute based upon Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000) and Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428 (2002) on direct appeal. This Court rejected Abdool's claim in Abdool v. State, 53 So. 3d 208, 228 (Fla. 2010), stating:

#### **I. Ring Claim**

Abdool next argues that Florida's capital sentencing scheme is unconstitutional under *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). But this Court has repeatedly rejected Abdool's argument that the standard jury instructions denigrate the role of the jury in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). *See, e.g., Chavez v. State*, 12 So. 3d 199, 214 (Fla. 2009), *cert. denied*, — U.S. —, 130 S.Ct. 501, 175 L.Ed.2d 356 (2009); *Taylor v. State*, 937 So. 2d 590, 599 (Fla. 2006); *Card v. State*, 803 So. 2d 613, 628 (Fla. 2001). This Court has also repeatedly rejected the argument that the jury must reach a unanimous decision on the aggravating circumstances. *See, e.g., Parker v. State*, 904 So. 2d 370, 383 (Fla. 2005); *Hodges v. State*, 885

So. 2d 338, 359 (Fla. 2004); *Porter v. Crosby*, 840 So. 2d 981, 986 (Fla. 2003). This Court has also rejected Abdool's argument that this Court should revisit its opinions in *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), and *King v. Moore*, 831 So. 2d 143 (Fla. 2002), and find Florida's sentencing scheme unconstitutional. *See, e.g., Guardado v. State*, 965 So. 2d 108, 118 (Fla. 2007). Accordingly, we reject Abdool's *Ring* claims here.

As this Court has repeatedly held, habeas corpus "is not a second appeal" and may not be used to relitigate an issue which was previously raised and rejected on direct appeal. *Deparvine v. State*, 146 So. 3d 1071, 1108 (Fla. 2014) (citing *Breedlove v. Singletary*, 595 So. 2d 8, 10 (Fla. 1992) and *Taylor v. State*, 3 So. 3d 986, 1000 (Fla. 2009)). Consequently, this claim is barred from being relitigated here. *See Conde v. State*, 35 So. 3d 660, 665 (Fla. 2010) (finding post-conviction *Ring* claim "procedurally barred as it was raised and rejected in Conde's direct appeal."); *Douglas v. State*, 141 So. 3d 107, 127 (Fla. 2012) (finding *Ring* claim "procedurally barred because it was raised and decided adversely to Douglas on direct appeal.").

In addition to being procedurally barred, Abdool's claim is also devoid of any merit. This Court has rejected every challenge to Florida's capital sentencing statute based upon *Ring*. *Rigterink v. State*, 66 So. 3d 866, 895-96 (Fla. 2011) (noting that "[i]n over fifty cases since *Ring*'s release, this Court has rejected similar *Ring* claims."). There have been no significant, much less compelling legal

developments since this Court's decision on direct appeal that would warrant revisiting this Court's decision and reversing the now well settled precedent of this Court.<sup>2</sup> This Court should deny this procedurally barred and meritless claim.<sup>3</sup>

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<sup>2</sup> To date, the federal courts have also been less than impressed with such challenges to Florida's statute. See e.g. Evans v. Secretary, Florida Dept. of Corrections, 699 F.3d 1249, 1265 (11th Cir. 2012) ("The district court's judgment is due to be reversed insofar as it granted federal habeas relief to Evans on Ring grounds.").

<sup>3</sup> The State does not accept the general and irrelevant "factual" allegations in the state habeas such as the number of so-called "exonerations" which were compiled by anti-death penalty activists. (Habeas Petition at 10).

## CLAIM II

### **WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A VIENNA CONVENTION CHALLENGE ON DIRECT APPEAL?**

Abdool next faults his appellate counsel for failing to challenge his conviction based upon a violation of the Vienna Convention. This claim is without merit.

Of course, an appellate counsel will not be deemed ineffective for failing to raise meritless issues or issues that were not properly raised in the trial court and are not fundamental error. Deparvine, 146 So. 3d at 1108. Consequently, Abdool's counsel cannot be faulted for failing to raise this unpreserved, meritless Vienna Convention claim on appeal.<sup>4</sup> See Maharaj v. State, 778 So. 2d 944, 959 (Fla. 2000) (in addition to being procedurally defaulted, defendant failed to show he has standing to enforce a Vienna Convention claim, "as treaties are between countries, not citizens.") (citing Matta-Ballesteros v. Henman, 896 F.2d 255 (7th Cir.1990)); Valle v. State, 70 So. 3d 530 (Fla. 2011) (same). The trial court below rejected the related claim of ineffective trial counsel, recognizing that authority foreclosed relief on this claim. (V12/1425-26). As binding authority foreclosed this claim on

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<sup>4</sup> Sanchez-Llamas v. Oregon, 548 U.S. 331, 350-351 (2006) (indicating that neither the Vienna Convention nor Supreme Court precedent suggests that suppression of evidence is an available remedy for an alleged convention violation); Medellin v. Texas, 552 U.S. 491, 517 (2008) (Vienna Convention does not create binding obligations on domestic courts).

appeal, appellate counsel cannot be faulted for failing to raise it on appeal. Accordingly, defense counsel's failure to raise this claim did not constitute deficient performance under Strickland. And, it follows that the outcome of Abdool's direct appeal has not been undermined by the failure to raise the Vienna Convention claim.



## **CONCLUSION**

In conclusion, Respondents respectfully request that this Honorable Court DENY the instant petition for writ of habeas corpus.

Respectfully submitted,

PAMELA JO BONDI  
ATTORNEY GENERAL

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### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on December 29, 2014, I electronically filed the foregoing with the Clerk of the Florida Supreme Court by using the e-portal filing system which will send a notice of electronic filing to the following: Maria E. DeLiberato and Julissa Fontán, Assistants CCRC, Law Office of the Capital Collateral Regional Counsel - Middle, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619-1136 (**deliberato@ccmr.state.fl.us** and **fontan@ccmr.state.fl.us**).

### **CERTIFICATE OF FONT COMPLIANCE**

I HEREBY CERTIFY that the size and style of type used in this response is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.100(l).

/s/ Scott A. Browne  
COUNSEL FOR RESPONDENTS