IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-457

MICHAEL A. TANZI,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR MONROE COUNTY

BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

In the afternoon of April 25, 2000, Janet Acosta was reading a book while seating inside her recently purchased maroon Plymouth Voyager at the Japanese Gardens located on Watson Island in Miami, where she regularly enjoyed her lunch hour, as it was close to her workplace, the Miami Herald building. (T. 127, 141-145, 393)[1] At that time, Defendant, who had been residing in Key West for a few months, was stranded in Miami Beach without a means of returning to Key West, and was willing to do anything to get there. (T. 993-94)

When Defendant saw Ms. Acosta sitting in her vehicle with her window rolled down, he approached her and asked her for a cigarette. (T. 994-95) She stated she did not have one. (T. 994) Defendant then asked Ms. Acosta for the time, and when she was distracted, punched her in the face multiple times with both fists until he gained entry to the car. (T. 994-96) He then threatened her with a razor blade and drove off with Ms. Acosta in the van. (T. 996) He told her to sit back because it was going to be a long ride. Id. Defendant held Ms. Acosta by the

[1] Although the entire record is bound and labeled as one "record of appeal" and numbered volumes 1 through 27, beginning at volume 15, where the transcripts begin, page numbers begin again at 1. Therefore, to avoid confusion, volumes 1-14 will be referred to as the record of appeal and referenced using the symbol "R." and volumes 15-27 will be referred to as the transcript of proceedings and referenced using the symbol "T."

wrist until he reached Homestead. Id.

Defendant stopped at a gas station in Homestead, where he threatened Ms. Acosta with the razor and asked her if she had any rope in the van. (T. 996-97) Defendant then bound Ms. Acosta and gagged her with a towel. (T. 997-98) When Ms. Acosta complained that the ropes were too tight, Defendant stated "I don't give a fuck. This is all about me now" and covered her up with a towel so no one could see her. (T. 998) Defendant further threatened Ms. Acosta telling her that if she kicked or made noise he would cut her from ear to ear. (T. 999) Defendant then bought some cigarettes and a soda and attempted to use Ms. Acosta's bank card, which he had obtained after rifling through her belongings. (T. 999-1000)

While still in Homestead, Defendant forced Ms. Acosta to perform oral sex on him. (T. 1003-04) He stopped her from continuing because he was not enjoying himself because the victim's teeth, which he had knocked loose, were grinding against his penis. (T. 1004) He had threatened to kill her if she bit him. Id. Defendant also stated Ms. Acosta's race had gotten in the way of his pleasure, as he preferred African-American women. (T. 414)

Defendant then continued to drive with Ms. Acosta bound and gagged in the rear of the van until he reached Tavernier in the

Florida Keys, where he stopped at approximately 5:15 p.m. to withdraw money from Janet Acosta's bank account. (T. 1000-03) After realizing he could not use the card without the personal identification number (PIN), he had threatened Ms. Acosta again with the razor until she told him the number. (T. 1001-02) Defendant then stopped at a hardware store where he bought duct tape and razors. (T. 1005)

Defendant then continued his journey until about 6:30 p.m. when he reached Sugarloaf Key. (T. 1007) He had decided Ms. Acosta was getting in the way of what he wanted to do and he needed to get rid of her. (T. 1008) He also knew he would get caught quicker if he let her go alive. (T. 1011) Defendant determined the area where he stopped in Sugarloaf was too visible, so he proceeded to Blimp Road in Cudjoe Key, to an area that seemed suitable to kill Janet Acosta and discard her body. (T. 1008-09)

Defendant first told Ms. Acosta that he was going to kill her. (T. 1010) He then crosslaced a piece of thick rope and attempted to strangle her. (T. 1009-10) Defendant described seeing Ms. Acosta's skin tightening as he strangled her. (T. 1010) She screamed, so he stopped the strangulation to put duct tape over her mouth, nose and eyes. (T. 1010-11) Defendant then continued to strangle Ms. Acosta. (T. 1011) She had scratched

him during the struggle. (T. 411) As he continued to strangle Ms. Acosta, she trembled and flinched. (T. 1012) He strangled her for approximately twenty five (25) minutes until she died. Id. He had to wipe the sweat off his brow afterwards. (T. 412) Defendant was sure he had killed her because he checked for a pulse. (T. 1012)

Defendant tried to conceal Ms. Acosta's body by putting it in a garbage bag, but her shoes kept ripping the bag. (T. 1013) Defendant then dragged Ms. Acosta's body to a wooded secluded area where he though someone could walk up to the body, urinate on her, and not even notice. (T. 1014-15, 1018-19) He did not carry her because she smelled, as she had urinated and defecated on herself during the strangulation. (T. 1012, 1014, 1018) While dragging her body, Ms. Acosta's head bumped on some rocks on the ground and he heard a crack. (T. 1014, 1016, 1018) Defendant cut himself while cutting the ropes that he had used to bind Ms. Acosta, and he dripped blood on her pant leg. (T. 1013-14)

After he was done disposing of Ms. Acosta's body, Defendant went on a shopping spree in Key West. (T. 1020) He bought new clothes, shoes and a new hat. Id. He ate at Waffle House. (T. 1021) He bought some marijuana at Bahama Village, which he then rolled into a blunt cigar and smoked. (T. 1021-22) He looked

for his friend Ben to share his marijuana and find some women. (T. 1023) Defendant told his friend Ben that the van was a rental for which his mother had paid. (T. 1023) He slept in Ms. Acosta's van that night parked at the beach. (T. 1024) The next morning Defendant headed straight for the ATM in downtown Key West to take out more of Janet Acosta's money. Id. He spent about half of the money on crack and smoked it. (T. 1025) He did not want to waste the rest of the money on more drugs. (T. 1026) After sleeping for some time, Defendant went to Ben and Jerry's ice cream store where his friend worked. Id. There he met up with his friend, another male and two girls. Id. They smoked some marijuana at the beach. Id. Defendant then met up with a girl, drank some tequila, smoked some marijuana, had sex with the girl and slept in the van until the next morning. (1027-28)

The next morning Defendant was once again free to take more of Ms. Acosta's money. (T. 1028) He tried to buy some crack but decided not to do so because there were too many police officers in the area. (T. 1029) Defendant then met up with friends near Sugarloaf Elementary School and took some pictures with a camera he had just bought himself with his new found money source. (T. 1029, 1031) While there, Defendant cleaned out Janet Acosta's van. (T. 1029-30) He threw out some of the items he had used,

including ropes and the duct tape, in a barrel. (T. 1031) Defendant then went to the movies. (T. 1032). After the movies Defendant got some ice cream, hung out for a while and then went back to the van. (T. 1033)

Defendant had plans to wait until midnight so he could get more money out, sleep in a hotel and get more marijuana. (T. 1033) He had also planned on changing the license plates, tinting the windows and keeping the van. (T. 1033-34) Defendant liked the van because it had good pick up and gave good gas mileage. (T. 1034) But Defendant's plans were cut short when the police observed him returning to Janet Acosta's van, which they had located and had been surveilling. (R. 1962-63; T. 267-68, 1033) Back in Miami, Janet Acosta's friends and coworkers, who knew about her regular routine, had reported her missing when she failed to return to work after lunch on the 25th. (T. 144-48, 161-63) An investigation had ensued that had uncovered the use of Ms. Acosta's ATM card in the Keys. (T. 164-65, 179-81)

When the police approached Defendant, he had receipts in his pocket showing his ATM withdrawals and other purchases. (R. 1964; T. 271-72, 959, 1002) Det. Frank Casanovas, a Miami Dade County detective, asked Defendant if he was with anybody, and after indicating he was with his boss, who was at Mallory Square, Defendant voluntarily agreed to go with them to that

location. (R. 1965) While in transit to Mallory Square, a verbal exchange ensued between Detective Casanovas and Defendant during which Defendant stated he "knew what this was about," he claimed to have gotten the van from a male in exchange for crack, and then asked Det. Casanovas, who had claimed to be an FBI agent investigating bank robberies, if using someone else's ATM card constituted bank robbery. (R. 1966-67) After being told that it did, Defendant said he figured he would be getting arrested for bank robbery, for using "some lady's ATM card." (R. 1967-68) He then spontaneously stated he wanted to talk about some bad things he had done. (R. 1968; T. 273) Det. Casanovas then asked Defendant some questions to ascertain his ability to understand his Miranda rights, and proceeded to advise Defendant of those rights. (R. 1968-71)

After waiving his rights and while in a police car en route from Mallory Square to the Key West Police Department, Defendant confessed he had assaulted, abducted, robbed, sexually battered and killed Janet Acosta. (R. 1972-74; T. 276-77, 392-95) Immediately after, a tape recorder was obtained, and after again being advised of his Miranda rights, Defendant repeated his confession with greater detail, while en route to show the police where he had put Janet Acosta's body. (R. 1975-77; T. 396-98, 401-22, 979) Shortly after discovering the victim's

body, and for the benefit of the Monroe County Sheriff's office, who would now be leading the investigation given the location where the victim's body was found, and who had now arrived at the scene, Defendant repeated his confession on tape. (R. 1983-84; T. 422-23, 434-52, 980) The police returned to the Key West Police Department where Defendant once again, with even greater detail, described his crimes on videotape. (R. 1986-88; T. 980-1060)

On May 16, 2000, Defendant was indicted for the first degree murder of Janet Acosta. (R. 13-14) He was also charged, by amended information with carjacking with a weapon, kidnapping to facilitate a felony with a weapon, armed robbery with a deadly weapon and two counts of sexual battery with a deadly weapon. (R. 1235-37)

Defendant moved to suppress his confessions. (R. 1044-1144) After hearing evidence establishing the voluntariness of said confession, which included the audio recording that memorialized both the reading of Miranda warnings and Defendant's coherent thought process and expression shortly after Defendant's apprehension, as well as a video recording showing Defendant's demeanor within a few hours of his apprehension, the court found that there was no evidence of intoxication or that the statement was in any way involuntarily given. (R. 2042-43) The court

excluded all statements made prior to Defendant being advised of his Miranda rights, with the exception of two statements that were spontaneous and not the result of questioning. Id. The court denied the motion to suppress with respect to the audio taped and videotape statements as there was a sufficient showing that they were not tainted by the pre-Miranda questioning. Id. The court also granted the State's motion in limine to admit the confession to the sexual battery. (R. 2043)

On January 31, 2003, shortly before trial was set to begin, and before the above described suppression hearing, Defendant entered a guilty plea to first degree murder, carjacking with a deadly weapon, kidnapping to facilitate a felony with a deadly weapon and armed robbery with a deadly weapon. (R. 1242-44) The two remaining counts of sexual battery were severed, as Defendant indicated he wished to be tried for those charges in Dade County, where the offenses were alleged to have been committed.

During the plea colloquy Defendant indicated he had discussed the provisions of the written plea document and had understood everything it contained. (R. 1887) Defendant told the court no one had told him the court would be lenient in exchange for the plea. (R. 1888) Defendant stated he understood he could still receive a sentence of death. Id. The court

explained there would still be a penalty phase. (R. 1888-89) Specifically, Defendant stated he understood there would be a penalty phase in front of a jury at which testimony would be heard establishing aggravating and mitigating circumstances, and at the conclusion of which the jury would return a recommendation of life without parole or death. (R. 1889) In fact, several more references were made to a penalty phase in front of a jury and the possibility of a death sentence. (R. 1894, 1897). Moreover, while discussing what the appropriate procedure would be with respect to severance and transfer of the sexual battery charges and with respect to which should proceed first, several references were made by both the court and counsel for both sides to selecting a jury for the penalty phase. (R. 1905-06, 1907-08)

After the plea colloquy, the court proceeded to hear testimony regarding Defendant's motion to suppress certain evidence seized from the victim's van. (R. 1910) A lunch recess was taken and cost motions were heard, immediately after which Defendant moved to waive a jury for the penalty phase. (R. 1921) Counsel for both parties agreed on the law and advised the court that it provides that the State need not consent to the waiver, but that the court could reject it and still impanel a jury. (R. 1921-24) At the conclusion of a comprehensive discussion on the

issue, the court indicated it preferred to have a jury make a recommendation. (R. 1924) The court then expressed concerns on how to address to the jury the fact that Defendant had pled guilty. (R. 1925-28) The court then denied the motion to waive the penalty phase jury, stating it could be renewed if it became difficult to impanel a jury due to the notoriety of the case. (R. 1928) Defense counsel then moved on to other pre-trial motions and the court heard testimony from three (3) witnesses and argument on the pre-trial motions. (R. 1928-2044)

Following the hearing on Defendant's motion to suppress statements, defense counsel told the court Defendant wished to address the court with respect to withdrawing his plea. (R. 2044) Defendant began by stating he had not been truthful to the court with respect to his relationship with one of his two attorneys. (R. 2044) Defendant then went on to recount some allegation, which had been previously brought out in front of Judge Jones, who had handled the case before Judge Payne, that Defendant had been involved in sexual activity with his attorney, Ms. Rossell. (R. 2045) Defendant also complained that he should not need two attorneys, as he believed it should only take one qualified person to represent him adequately. (R. 2045-46) Defendant then stated:

> I just want, I wanted, I want competent counsel. I don't want a counsel that's going to lie to me as to

> what she, he or she thinks is going to happen and I find out through another attorney that is not happening in the right way, that things are – it's confusing to me. I'm not saying I don't understand it, because sometimes I do and sometimes I don't. I don't understand – I don't know.
>
> We went through all the process to get a jury, and now on Monday we're going to pick a jury. We're going to have a penalty phase, so why not have a guilt phase? You know, we went to you, the Court wasted all the time, all the money, all the procedure preparing and everything to get a jury. There's no difference between a slow death, which is life, and death, which is the death penalty. There's no difference. There's a couple of years in between. That's it.
>
> So what kind of – I wouldn't be getting no finalization as to, as to me taking this plea. If I took this plea, I'd just be wasting the Court's time, I'd be wasting my time, because I want some finalization on this case. I feel as though there's parts of this case that will be brought out during the guilt phase that I can appeal, and by taking this plea I have rejected all the appeals for the pretrial motions.

(R. 2046) The court then inquired further into Defendant's satisfaction with his attorneys and expressed surprise, as Defendant had never before expressed to the Court anything negative with respect to any aspect of the representation rendered by his attorneys. (R. 2048) The court then continued to hear pre-trial motions with respect to peremptory challenges, voir dire, jury sequestration and pre-trial publicity. Id. Defense counsel then suggested a Nelson[2] inquiry might be appropriate in light of Defendant's statements. (R. 2063) A Nelson inquiry followed. (R. 2063-76)

[2] Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973).

The court asked Defendant to specify the problems he had with his representation. Defendant then, under oath, stated he had previously threatened to kill Ms. Rossell. (R. 2064) Defendant then explained that other attorneys had told him that the advise of Ms. Rossell and Mr. Kuypers had been erroneous. (R. 2065) The court asked Defendant to specify what advise. Id. Defendant stated that his attorneys had advised him that he "would be able to waive the jury part of the guilt phase, but [Defendant] wouldn't be able to waive the jury part of the trial of the penalty phase." (R. 2066) The court pointed out to Defendant that this was in fact the case, specifically pointing out to Defendant that that was in fact what had transpired earlier. (R. 2066-67)

When the court then asked Defendant if there was anything else Defendant felt his attorneys had lied to him about, Defendant stated "[t]hat's it" and then proceeded to tell the court that if he threatened his attorney's with bodily harm in the near future, this would create a conflict of interest, that he had never previously had any problems getting his attorneys off a case, and that he had to stoop down to threatening his attorneys to try to get them off the case. (R. 2066-68) Defendant also expressed dissatisfaction with a previous attorney having been taken off his case and made vague

allegation that, despite the $60,000 spent on his case he felt certain things had not been uncovered. (R. 2068-69)

When the court, once again, asked Defendant if he had any other problems with his attorneys, Defendant stated:

> I won't talk to them if it's – I'm not – I don't want to deal with them. If I'm not going to get competent counsel that I need to go through trial and if I can't get a jury, if I can't withdraw my plea then I have to do what I have to do.

(R. 2069-70) The court then explained to Defendant none of his complains provided adequate basis to remove his lawyers, to which Defendant responded by reiterating the allegations of sexual activity with Ms. Rossell. (R. 2070) Ms. Rossell denied any sexual relationship with Defendant and explained to the court she had ceased meeting with Defendant alone after she had observed Defendant masturbating during their meetings. (R. 2072) Defendant claimed there was an eyewitness to him grabbing Ms. Rossell and the court asked to hear from this person before jury selection. (R. 2073-75) The court then told Defendant it would not discharge his attorney's for actions in which he had chosen to engage. (R. 2075) The court then ascertained that Defendant's complaints were circumscribed to Ms. Rossell and that Defendant had no problems with Mr. Kuypers. (R. 2076) The court then continued to hear arguments on other pre-trial motions and adjourned the case until the following Monday. (R.

2076-2103)

The following Monday, the court heard from Ms. Sandra Pearce, the investigator who accompanied Ms. Rosssell to visit Defendant, and who Defendant alleged had witnessed the sexual improprieties between himself and Ms. Rossell. She denied having ever witnessed any offensive touching by Defendant toward either herself or Ms. Rossell during said visits. (R. 2161-62) The matter then proceeded to jury selection for the penalty phase.

At the penalty phase, that began on February 10, 2003, Defendant's confessions were introduced. (T. 389—418, 434-52, 983-1061) Evidence was introduced to establish that Janet Acosta did in fact have lunch every afternoon at the Japanese Gardens, and that she had had not returned to work from lunch in the afternoon of April 25, 2000. (T. 127, 141-50). Bank records were introduced establishing the activity on Ms. Acosta's account at various locations in the Florida Keys (T. 172-88), as well as the video image capturing Defendant using Janet Acosta's ATM card. (T. 230-36)

Testimony pertaining to the investigation from both the Miami Dade and Key West Police Departments and eventual surveillance on the van was also presented. Lt. Alfaro, of the Key West Police Department, testified to the details surrounding

Defendant's apprehension. (T. 212) Detective Casanovas, of the Miami Dade Police Department testified as to the details of the circumstances surrounding Defendant's multiple confessions. Upon being apprehended Defendant had made certain spontaneous statements indicating he had done something bad and that he wanted to talk to Detective Casanovas about it. (T. 273) Upon hearing this, Det. Casanovas immediately advised Defendant of his rights. (T. 276) Det. Casanovas then decided to secure a tape recorder to record Defendant's statements (T. 397) During the questioning at the scene Defendant had admitted he had gotten the van from Ms. Acosta and confirmed she was dead. He had also agreed to show the police where had had put the victim's body. (T. 394) The confession was taped while in the car en route to the location. (T. 397) The audiotape of Defendant's confession detailing the crime as outlined above was played for the jury (T. 401-423).

Physical evidence was presented that corroborated much of what Defendant had stated. Records detailing the transactions on Janet Acosta's bank account at the locations Defendant had specified (T. 175-88); an image captured for a bank surveillance tape showing Defendant at the ATM using Ms. Acosta's card; (T. 223-30); items recovered from the garbage can where Defendant indicated he had discarded them including rope and duct tape (T.

575-78); items recovered from the van that Defendant had purchased with Janet Acosta's money (T. 518-58); Janet Acosta's jeans with Defendant's blood on them where Defendant had stated he had dripped blood after cutting himself, as well as his blood on the inside lining of the pocket (T. 566, 806); and a towel containing blood and Defendant's semen (T. 499, 792-94).

The medical examiner testified that the two ligature abrasions on Janet Acosta's body were consistent with two separate applications of pressure. (T. 870) He also testified the other injuries to the body were consistent with strangulation and the cause of death was ligature strangulation. (T. 893) He also testified that the victim had suffered other injuries that had been sustained while she was alive. The victim had multiple injuries to the face and head including some loose teeth, consistent with Defendant's statement that he struck Ms. Acosta several times during the carjacking. (T. 860-70) Bruises to the ankles, abrasions on the wrists and tape residue on the victim's cheek were also all consistent with Defendant's version of the events in which he admitted to binding and gagging her. (T. 877, 891) He also testified that a laceration to the lower part of the victim's labia as well as bruising to the tissue under the skin surrounding the victim's vagina were sustained while the victim was alive and were

consistent with a sexual battery. (T. 879-82)

Defendant's friend testified that Defendant had met up with him around the time of the murder, that he had seen Defendant in the victim's van, and that when he asked Defendant where he had gotten it, Defendant had stated that his mother had won the lotto. (T. 928-34) He also stated he observed Defendant wearing several brand new items of clothing, which receipt recovered from the van indicated had just been purchased. (T. 934)

Other items were also introduced that tracked Defendant's actions after the murder, and which coincided with Defendant's own version of the events, such as the receipts that Defendant had in his hand at the time of his apprehension and from the van, showing Defendant's ATM withdrawals and recent purchases, as well as a movie ticket stub (T. 959-60).

Several witnesses testified regarding Defendant's demeanor and actions establishing that Defendant did not appear intoxicated or in any other way impaired at the time of his apprehension and had confessed voluntarily. (T. 215, 971) Defendant's own statements also established he had done drugs that morning hours before his apprehension and confession. (T. 401-02)

Testimony was also presented to establish that Defendant was on felony probation stemming from a burglary conviction in

his native state of Massachusetts, for which he had never reported. (T.62-84, 103)

Defendant presented testimony from six witnesses in support of mitigation. Defendant presented the expert testimony of two mental health experts to support the proposed mitigator that Defendant's ability to appreciate the criminality of his conduct and to conform it to the requirements of the law was impaired by a mental disorder. Two mental health experts as well as a social worker and a homeless shelter counselor, who had personally known Defendant prior to the murder, all testified at length regarding Defendant's long history of mental problems and his stay in, and evaluations and diagnoses at, various institutions.

Linda Sanford, a social worker at the Chamberlain School in Massachusetts testified in regard to her work with Defendant in 1994. (T. 1076-1116) She chronicled much of Defendant's troubled upbringing, including the death of his father when he was 8 years old and contemporaneous repeated molestation by a 13 year old acquaintance, as well as a history of sexually inappropriate acts that followed, which led to his placement in the school. (T. 1089-99) A counselor at a shelter in New York, who had known Defendant for a few months when he had sought services there, also testified with regard to his impressions of

Defendant's mental health, including grandiose fantasies, lies and reported drug use and sex abuse. (T. 1241-1259)

Defendant's mother also testified to corroborate much of Defendant's history. She testified about the abusive relationship with Defendant's father; the changes in Defendant's behavior following his father's death and the sexual abuse (T. 1362); an incident where Defendant threatened her; and her attempts to seek help for Defendant. (T. 1376)

Dr. William Vicary, a psychiatrist, testified that he evaluated Defendant. He used numerous background materials in reaching his conclusions including records from the various placements in institutions and hospital records. (T. 1153, 1159) He diagnosed Defendant with bipolar disorder, substance abuse, paraphilia and antisocial personality disorder. (T. 1159) Although there were multiple diagnoses, the bipolar disorder was clearly the focus of his testimony. (T. 1160-61) A videotape entitled "Growing up bipolar" was played during his testimony. (T. 1170-75) He admonished that the antisocial personality diagnosis is "secondary to [Defendant's] bipolar disorder" and that being an axis one disorder, it was most important in understanding why someone behaves in a particular way. (T. 1165-66) He further stated that the illnesses he described substantially affected Defendant's ability to appreciate the

criminality of his conduct and his ability to conform his conduct to the requirements of the law. (T. 1168)

Defendant also presented the testimony of Dr. Alan Raphael, a psychologist, to support the existence of the same mitigator. Dr. Raphael reached eleven diagnoses including polysubstance abuse, post traumatic stress disorder, exhibitionism, sexual sadism, voyeurism, attention deficit hyperactivity disorder, learning disability, bereavement, and antisocial personality. (T. 1300-04) He stated that he suspected Defendant also suffered psychotic disorders including bipolar disorder, but could not determine if Defendant met all the criteria. (T. 1302) He testified that antisocial personality disorder is a form of mental illness. (T. 1304) He, too based his conclusions on a multitude of records, in addition to his own testing. (T. 1273-76)

Defendant also presented the testimony of Dr. Feegel to rebut that the injuries on Ms. Acosta could be considered consistent with a sexual battery. (T. 1233) His testimony also sought to rebut the HAC aggravator as he testified that it could not be determined that the victim was alive when strangled, and that the two ligature marks were not necessarily indicative of a cessation and continuation of the strangulation. (T. 1236-38)

The State presented rebuttal, primarily in the form of

testimony from two mental health experts. A few lay witnesses also testified regarding Defendant's behavior and demeanor immediately following the murder, and at the time of his apprehension, which was not consistent with the suggestion that Defendant was in any way impaired by either drugs, alcohol or a mental disorder. (T. 1385-92, 1390-93, 1395-98, 1400-09)

The State presented the testimony of Dr. Jane Ansley and Dr. Edward Sczechowicz. Like Defendant's experts, Dr. Ansley, too, relied on the documented history of Defendant's institutionalizations and prior evaluations in reaching her diagnosis. (T. 1459) In particular, the expert noted the absence of a prior diagnosis of bipolar disorder, and that Defendant, rather, had been previously diagnosed with conduct disorder, which she explained is a precursor of antisocial personality disorder. Both of these mental health experts opined that all of Defendant's characteristics were consistent with antisocial personality disorder.

On February 19, 2003, the jury returned a recommendation of death by a vote of 12-0. (R. 1430, T. 1821-22) At a Spencer[3] hearing on March 14, 2003 several letters from friends and family were submitted for consideration, as well as sworn statements from a friend of the victim and the victim's

[3] Spencer v. State, 615 So. 2d 688 (Fla. 1993).

boyfriend establishing that Ms. Acosta was opposed to the death penalty in principle. (R. 2214-35) Defendant also addressed the court, recounting much of the history that had been established during the penalty phase, and adding that he had attempted to join the military twice. (R. 2228-32) A sentencing hearing was held on April 11, 2003. (R. 2197-2213) The court followed the jury's recommendation and sentenced Defendant to death finding that the following aggravators had been proven beyond a reasonable doubt and giving each great weight: (i) that the murder had been committed by a person previously convicted of a felony and under sentence of imprisonment or on community control or on felony probation; (ii) that the capital felony was committed while Defendant was engaged in the commission of a sexual battery; (iii) that the capital felony was committed during the commission of a kidnapping; (iv) that the capital felony was committed for the purpose of avoiding arrest; (v) the capital felony was committed for pecuniary gain; (vi) the capital felony was especially heinous, atrocious, or cruel; and (vii) the capital felony was committed in a cold, calculated, and premeditated manner. (R. 1804-17)

With respect to the statutory mitigators of extreme mental or emotional disturbance and impaired capacity to appreciate the criminality or to conform conduct to the requirements of the

law, the court found that these mitigating factors were not established. After considering the different expert witnesses who testified regarding Defendant's mental health and history, the court found that the diagnosis of bipolar disorder was not proven by a preponderance of the evidence. (R. 1819) Although the evidence had established that Defendant had mental health problems, his personality disorders did not rise to the level of statutory mitigation as such "did not operate to prevent [Defendant] from appreciating the nature and consequences of his acts." (R. 1824) The court also found this mitigator was not established by Defendant's use of drugs or alcohol. (R. 1822-23)

The court rejected that Defendant's age was a mitigating factor as he was 23 at the time of the murder, and his mental and emotional age was consistent with his chronological age. (R. 1824) The court also found that, although Defendant had a history of drug abuse and dependence, Defendant's actions immediately preceding and during the commission of the crimes established that the problem was in remission at the time of the murder, and did not contribute to the commission of the capital crime. (R. 1824-25) The court did give some weight to Defendant's institutionalization as a youth, as well as the fact that he responded well to psychotropic drugs. (R. 1825) The court also gave some weight to the fact that Defendant lost his

father at an early age. (R. 1825-26) The court found that the fact that Defendant had been sexually abused as a child had been established and gave this mitigator some weight. (R. 1826) The court also gave some weight to Defendant's attempt to join the military. Id. The court rejected that argument that Defendant had not planned or intended to kill Janet Acosta. (R. 1826) The court did not find that the absence of flight following the crime was established as a mitigator. (R. 1826-27) The court gave some weight to Defendant's cooperation with law enforcement. (R. 1827-28) The court gave no weight to the proposed mitigator that Defendant did not use a gun or knife in the commission of the crime. (R. 1828) Some weight was given to Defendant's good deeds of assisting inmates in writing letters and Defendant's love of books. Id. The court gave no weight to the proposed mitigator that the victim did not believe in the death penalty. Id. The court also found the availability of a life sentence not to be a mitigating factor. (R. 1829) Finally, the court gave some weight to the loving relationship with his family. (R. 1829-30.

The court found that the aggravators greatly outweighed the mitigation established and concurred with the jury's unanimous recommendation in sentencing Defendant to death. (R. 1830-31) The court also sentenced Defendant to consecutive life sentences

for the carjacking with a deadly weapon, kidnapping to facilitate a felony with a deadly weapon and armed robbery with a deadly weapon of Janet Acosta. (R. 1831)

On May 9, 2003, Defendant filed a written motion to withdraw his plea. (R. 2134-58) A hearing was held on November 15, 2004. (R. 2312-2498) The State moved to preclude the testimony of Dr. Leonard Koziol (R. 2316-22), which motion was granted, and his testimony was later proffered. (R. 2439-70)

At the evidentiary hearing, Defendant testified first. (R. 2339-93) He stated that he had originally come up with the idea of pleading guilty because he had had a dream in which he had done so and had been sentenced to 27½ years. (R. 2339-40) His attorney, Mr. Kuypers, had explained to him that would never happen, but a discussion of the possibility of pleading guilty had ensued. (R. 2340) Mr. Kuypers explained to Defendant that even if he plead guilty, there would still be a penalty phase. Id. Defendant testified that Mr. Kuypers had told him a jury would unanimously recommend a death sentence. Id. He then stated that Mr. Kuypers told him that "if [Defendant] were to get a jury waiver for the penalty phase" he could avoid the certainty of a death sentence from a jury. (R. 2340-41) (emphasis added).

He then recounted the reasons Mr. Kuypers gave for thinking

the judge would be a better choice for sentencing, namely, that he was not known as a proponent of the death penalty and was not seeking re-election. (R. 2341) Defendant decided to plead guilty and seek the jury waiver the night before the plea took place. (R. 2341-42) He met with his attorneys in the jury room before the plea, and went over the written plea and affidavit that addressed the jury waiver, both of which he reviewed with his attorneys and signed. (R. 2342-45)

Defendant testified he was told by his attorney not to mention the jury waiver while pleading guilty and that this advice was the reason he did not say anything when the court, during the plea colloquy, told him a jury would be hearing the penalty phase. (R. 2345-46, 2364) He said that he did not react when the judge subsequently rejected the jury waiver because he was confused and got sidetracked by issues and past problems he had with his attorneys. (R. 2347, 2373)

Defendant acknowledged that he told the court during his Nelson hearing that Mr. Kuypers had given him a memo stating that he would be able to waive a jury for the guilt phase but not the penalty phase. (R. 2375)

On cross Defendant acknowledged he had previously pled guilty to other charges in other courts and, thus, was familiar with the process. (R. 2349-50) He stated he did not recall if

Mr. Kuypers had informed him that the State could impose the requirement of a jury for the penalty phase. (R. 2351) He acknowledged that during the court hearing on the plea, his own attorney and the prosecutor agreed on the law with respect to the judge's ability to reject the waiver of a jury for the penalty phase. (R. 2352, 2361) Defendant stated his affidavit, though, was clear that he "wished to be sentenced solely in front of a judge." Id. (emphasis added). When pressed on the question of what his counsel had actually advised him, Defendant stated that "[i]n [his] thinking [he] thought [he] was going to get a jury waiver" and that "what [he] understood" was that it was "a done deal."(R. 2353, 2365-66) He did not remember any specific words from Mr. Kuypers that created that understanding but stated that Mr. Kuyers' "body language" and "expressions of confidence," and Mr. Kuyper's belief that the judge would grant it, caused that understanding. (R. 2368-69)

Over the State's hearsay objection, the court admitted an affidavit of one of Defendant's trial counsel, Nancy Rossell, who had passed away. (R. 2392-93) In the affidavit, Ms. Rossell recounted her history representing Defendant, which had included sexually inappropriate behavior by Defendant. (R. 2130) She stated she and Mr. Kuypers had ascertained the State could not insist on a penalty phase jury and, thus, in light of the

certain recommendation of death by a jury, the best course of action was to plea and waive the penalty phase jury, as they felt Judge Payne would probably accept it. (R. 2131) It was their express strategy to conceal the intent to waive until after the plea so as to prevent a prepared opposing argument by the State. Id. She also acknowledged it was Mr. Kuypers who primarily discussed the details of the plea with Defendant. (R. 2131-32) She stated that she and Mr. Kuypers "expressed confidence" that the judge would "probably" accept the waiver. (R. 2132)

The State then called William Kuypers, who was also Defendant's trial counsel. (R. 2394) With respect to the probability of the penalty phase jury waiver being accepted, he testified that he "never told [Defendant] that it would be successful" but rather he presented the options to Defendant. (R. 2400) After researching the law, he expressed to Defendant that the decision whether to accept the waiver was the judge's, and Defendant appeared to understand. (R. 2401) He denied expressing confidence that the judge would in fact accept it. (R. 2402) He never heard Ms. Rossell make such a representation either. Id.

The court entered a written order denying Defendant's motion to withdraw his plea of guilty on January 6, 2005. (R.

2302-08) In that order, the court expressly stated that it considered the motion using the pre-sentence standard, in light of the fact that Defendant had made an oral motion before being sentenced, it was relating the written motion back to the time of the oral motion. (R. 2303) The court rejected Defendant's testimony that his attorneys had misled him to believe that the penalty phase jury waiver would be necessarily accepted by operation of his pleading guilty. Rather, the court found that the Defendant entered into a strategy to plead guilty and waive a jury for the penalty phase in the hope that the court would sentence him to life. (R. 2305) The court found that this strategy was entered into with full advice of counsel and with the understanding that it was within the court's discretion to grant the waiver. (R. 2307) The court concluded that the fact the strategy proved unsuccessful was not sufficient grounds to grant Defendant's motion. Id. This appeal follows.

SUMMARY OF THE ARGUMENT

The trial court properly denied Defendant's motion to withdraw his plea of guilty after holding a hearing on the motion at which ample evidence was adduced to support the court's findings. The trial court did not err in allowing questioning at the penalty phase, regarding lack of remorse being one of the criteria of antisocial personality disorder. Any error with respect to this testimony was cured by the limiting instruction, and was, in any event, harmless beyond a reasonable doubt. The trial court did not err in allowing impeachment of Dr. Vicary regarding a specific act of misconduct in an unrelated matter as it went to establish bias. The trial court did not err in admitting Defendant's confession to sexual battery. The trial court's weighing of the facts that the murder was committed during the course of a sexual battery as well as a kidnapping did not constitute improper doubling. The trial court did not err in failing to consider, find and weigh allegedly mitigating evidence and did not abuse its discretion in its treatment of mitigating circumstances of Defendant's history of drug abuse and dependence and the availability of life without parole as an alternative sentence. Defendant's Ring claims are without merit. Defendant's guilty plea was

knowing, intelligent and voluntary. Defendant's death sentence is proportionate.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA.

A. THE STANDARD.

Defendant first argues the he is entitled to have his motion to withdraw his plea judged under the pre-sentence standard as provided in Florida Rule Of Criminal Procedure 3.170(f). At the conclusion of the evidentiary hearing on the motion, the State agreed with Defendant on this point. (R. 2490) The trial court's order denying said motion clearly states that the court agreed with Defendant that the written motion filed after Defendant's sentence should relate back to the oral motion made by Defendant prior to his sentence. (R. 2303) Thus, the trial court clearly was applying the more lenient standard contained in Rule Of Criminal Procedure 3.170(f) that provides that Defendant is entitled to withdraw his plea upon a showing of good cause. Fla. R. Crim. Proc. 3.170(f); Robinson v. State, 761 So. 2d 269, 274 (Fla. 1999) (citing Yesnes v. State, 440 So. 2d 628, 634 (Fla. 1st DCA 1983)).

The State is also in agreement with Defendant regarding the standard this Court must use in reviewing the trial court's denial of Defendant's motion to withdraw his plea. "[O]n appeal from the denial of [a] motion to withdraw [a] plea, the burden

rests on the defendant to show the trial court abused its discretion in denying the defendant's motion." Id. In light of the evidence presented at the hearing on the motion, as detailed below, the trial court did not abuse its discretion in finding that Defendant had failed to establish good cause.

B. THE TRIAL COURT PROPERLY APPLIED THE CORRECT STANDARD

Defendant argues that, despite the trial court's express agreement with Defendant's position regarding the standard to be applied to his motion to withdraw his guilty plea, in practice, the court in fact applied a stricter standard. Defendant's argument rests on the trial court's language in its order discussing that Defendant was clearly competent to enter the plea, that suggesting a strategy which does not prove to be successful cannot constitute ineffective assistance of counsel, and on the fact that the order does not contain specific language regarding mental weakness, mistake, surprise, or misapprehension.

As to the first of these arguments, the complaint that the court used competency to stand trial as a standard in deciding his motion to withdraw his plea, Defendant fails to provide any legal authority to establish that this is an erroneous standard. As was argued below, the standard for competency to stand trial is the same as the standard to enter a plea. Godinez v. Moran,

509 U.S. 389 (1993). Mental weakness is one of Defendant's stated basis why good cause to withdraw his plea exists. Defendant does not allege that he was under the use of any intoxicants at the time the plea was entered such that his mental weakness only at that particular time was at issue. Thus, any allegation of mental weakness must be judged under this standard.

Moreover, in his motion below, Defendant made specific reference to his low GAF score that allegedly reflected some impairment in communication, as the reason why his oral motion to withdraw his plea was "inartful," most notably omitting any allegation that he had only entered the plea because he had been advised by his attorneys the court would accept the jury waiver, instead making allegations of sexual improprieties about Ms. Rossell. (R. 2143) Defendant further argued below that Defendant's expression on the record had to be understood in the context of his mental health history as his focus on the sexual delusions about Ms. Rossell were his expression of a sense of betrayal with respect to his attorneys. Id. Moreover, at the evidentiary hearing, Defendant sought to elicit the expert testimony Dr. Leonard Koziol, a neuropsychologist, to establish Defendant's mental weakness. (R. 2318-25) Defendant specifically argued that his deficits in attention would explain

why he would "make the kind of mistake that he did in understanding what he was doing." (R. 2325)

Although the court excluded this testimony at the evidentiary hearing, the court's language in its order is clearly addressing and rejecting Defendant's arguments. The complained of discussion with respect to competency is introduced by the statement that "[t]he Defendant proffered testimony by new experts that he was not competent to enter a plea." (R. 2303) The court clearly states, after discussing that Defendant was previously found competent, "[t]herefore, the only issue before the Court was the Defendant's entitlement to withdraw his plea."

Moreover, Defendant argued below that good cause existed because he was "led to believe" that if he pled guilty the court would accept his waiver of a penalty phase jury. (R. 2144) Defendant alternatively argued that the plea was involuntary because his decision to enter it was based on mistaken advice of counsel. (R. 2144-45) Defendant claimed that his counsel advised him that the court would accept the waiver. However, during the plea colloquy the court expressly informed Defendant that the plea did not mean he would not be sentenced to death, and that a jury would be empanelled for the purpose of recommending a sentence. Moreover, counsel's testimony at the

evidentiary hearing was that he never told Defendant that the judge would in fact accept the proposed jury waiver. Defendant's testimony at said hearing was that this was his understanding. Thus, a discussion relating to the prior evaluations finding Defendant competent, and, thus, capable of understanding court proceedings and effectively communicate with his attorneys, was entirely relevant in determining the credibility of Defendant's testimony as to his "understanding" and the reasonableness of the alleged mistake or misapprehension.

After discussing the competency issue, the trial court in its order specifically recites that Defendant's assertion is that he is entitled to withdraw his plea because of counsel's erroneous advice, an accurate and fair representation of Defendant's claim. The court then goes on to discuss Defendant's statement as to counsel's advice. Defendant says counsel told him the court would "likely" grant his request to waive a penalty phase jury." The trial court then recounts counsel's evidentiary hearing testimony. The court then expressly finds that this does not constitute good cause, clearly using the correct standard of "good cause" under the rule.

Defendant also argues that the court's misapplication of the standard is evidenced by the court's failure to specifically track the rule's standard and omission of certain language. The State would submit that the court's finding that the "decision to enter the guilty plea and move to waive a penalty phase jury was a matter of trial strategy agreed upon by the Defendant and his Counsel" (R. 2305) is an express finding that there was no mistake, misapprehension, or mental weakness.

The court then goes on to find that the fact that the strategy was unsuccessful does not constitute "good cause". (R. 2306) Immediately following that statement, the court then comments on the absurdity of finding that the mere fact that a chosen strategy is unsuccessful could constitute good cause to withdraw a plea by analogizing the situation to an argument that a consent to a trial strategy is not vitiated by the ultimate failure of the strategy in the context of a claim of ineffective assistance of counsel, and cites to a case for that proposition. (R. 2306-07)

Defendant complains that in making this statement the court is in fact applying the wrong standard. This is an obtuse reading of the trial court's order, which clearly and expressly states the correct standard. The fact that the court was making an analogy to the ineffectiveness scenario, is self evident in

the sentence that follows the cite to Gamble where the court said "[w]hat was true of the defendant in the foregoing case is also true of the Defendant here". No reasonable reading of the order could lead to the conclusion that the court required a finding of ineffectiveness to find good cause. The trial court's order, on its face, makes it clear it applied the appropriate standard.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION TO WITHDRAW HIS PLEA.

Defendant argues that the trial court erred in denying his motion to withdraw his plea because good cause in fact existed for the withdrawal. The withdrawal of a guilty plea is a question addressed to the sound discretion of the trial court, and appellate courts may reverse the trial court upon a showing of an abuse of discretion. Costello v. State, 260 So. 2d 198 (Fla. 1982). While a motion to withdraw a plea of guilty should be liberally construed in favor of a defendant, the defendant still bears the burden of establishing good cause for the withdrawal. Robinson, 761 So. 2d at 274. Mere allegations are not enough, Defendant must offer proof. Id. As stated above, the trial court here, after hearing evidence on the motion, made specific findings of fact applying the appropriate standard.

Defendant claims he was entitled to withdraw his plea because he was led to believe the trial court would accept his waiver of a jury for the penalty phase. At the time of trial, Defendant alleged generally that his counsel was not competent. (R. 2046) In his written motion, Defendant changed the claim and asserted he was affirmatively misadviced by his counsel that the court would accept the jury waiver. (R. 2152-53) At the evidentiary hearing, Defendant, once again, changed his claim and testified that he was given that "impression" by his counsel. However, he could not recall what counsel had said that gave him that impression. (R. 2353, 2365-66) He only stated that "body language" and "expressions of confidence" led him to have that understanding. (R. 2368-69) Defense counsel Kuypers testified specifically he never expressed such confidence, but rather presented the options to Defendant and never said the waiver would be successful. (R. 2400-02) He also testified he specifically advised Defendant of the law with respect to the court having discretion to accept or reject the waiver. (R. 2401)

Defendant argues that Ms. Rossell's affidavit is in direct contradiction and supports his claim. However, Ms. Rossell's affidavit merely states they expressed confidence that the judge would "probably" accept the waiver. (R. 2132) The use of the

word “probably” naturally denotes a lack of certainty. Thus, her affidavit does not contradict Mr. Kuypers testimony on the central issue. Moreover, she admits that it was Mr. Kuypers who was primarily responsible for the plea. In any event, her affidavit was not admissible. Randolph v. State, 853 So. 2d 1051 (Fla. 2003) (finding postconviction court did not abuse its discretion in excluding affidavit of deceased person, and noting the affidavit did not fall within any of the four hearsay exceptions by which the statement of an unavailable declarant may be admitted under §90.804(2) Fla. Stat. (1997)).

Furthermore, the colloquy itself belies Defendant’s allegations. Defendant indicated he had discussed the provisions of the written plea document and had understood everything it contained. (R. 1887) Defendant told the court no one had told him the court would be lenient in exchange for the plea. (R. 1888) Defendant stated he understood he could still receive a sentence of death. Id. The court explained there would still be a penalty phase in front of a jury. (R. 188-89) Specifically, Defendant stated he understood there would be a penalty phase in front of a jury at which testimony would be heard establishing aggravating and mitigating circumstances, and at the conclusion of which the jury would return a recommendation of life without parole or death. (R. 1889) In

fact, several more references were made to a penalty phase in front of a jury and the possibility of a death sentence. (R. 1894, 1897). Moreover, while discussing what the appropriate procedure would be with respect to severance and transfer of the sexual battery charges and with respect to which should proceed first, several references were made by both the court and counsel for both sides to picking a jury for the penalty phase. (R. 1905-06, 1907-08)

Defendant asserted at the evidentiary hearing that he did not speak up during the plea colloquy because his attorneys had advised him not to say anything about the waiver. However, he could not explain why there was a need for a secrecy campaign if the waiver was truly a "done deal". Moreover, even accepting his assertion, Defendant did not say anything again during the motion to waive, at which point there would have been no further need for secrecy. Defendant was present when the attorneys discussed at length that it was within the discretion of the court whether to accept the waiver. (R. 1921-24) In fact, it was his attorney who spoke first to the issue of the court's discretion, which in and of itself belies Defendant's allegation of a secrecy campaign. Neither does Defendant say anything immediately after the waiver was rejected. Instead, pre trial

motions were heard and the testimony of three witnesses was taken.

Moreover, when addressing the court with respect to withdrawing the plea, Defendant focused his argument on his past problems with Ms. Rossell and never once said his attorney told him, or he was led to believe that, the waiver was a "done deal". (R. 2044-46) At the evidentiary hearing, Defendant testified he got sidetracked. However, the court allows Defendant to speak on his motion without any specific questioning. (R. 2044) Defendant began by stating he was not truthful earlier during the colloquy with respect to his relationship with his attorneys. (R. 2044-46)

Defendant argues that when, during his oral motion to withdraw his plea, he states that "we are going to have a penalty phase so why not a guilt phase," and that he was getting no finality, are evidence of Defendant's confusion and misunderstanding. The State submits these are clear expressions of shock, dismay, and disappointment at the fact that the chosen strategy did not work.

Defendant also argues that he did not address the jury waiver issue because the court's questions focused on the attorneys. However, Defendant argues that he was led to believe it was his right to waive the jury by his attorneys, and that it

was his attorneys' expressions of confidence that led to his misunderstanding. Thus, the question "do you have any other problems with your attorneys" would have naturally led to Defendant stating they had misled or misadviced him.

The court then, during the subsequent Nelson inquiry, on at least two separate occasions, after hearing from Defendant, asked Defendant if there was anything else. (R. 2066-69) The first of these led Defendant to respond "that's it" and then proceed to tell the court that if he threatened his attorney's with bodily harm in the near future, this would create a conflict of interest, that he had never previously had any problems getting his attorneys off a case, and that he had to stoop down to threatening his attorneys to try to get them off the case. (R. 2066-68) The second led to Defendant telling the court that if he could not withdraw his plea then he would have to do what he had to do. (R. 2069-70)

Defendant also relies on the language of the affidavit he signed prior to pleading guilty to support his argument. Defendant states that nothing in the affidavit's language would lead one to believe the waiver could be rejected. Most notably, the affidavit states that Defendant wishes to waive the jury and wishes to be sentenced by the judge. The natural connotation of the word "wishes" negates that the matter is a "done deal."

Moreover, nothing in the affidavit supports such conclusion. Nor does Defendant give any reason why the affidavit would necessarily have to speak to the issue. On the contrary, if one is attempting to persuade a court to take a certain course of action, one would not want to point out that the opposite course is available. The affidavit logically focuses on the Defendant's wishes for persuasive reasons.

Defendant asserts that his counsel's records support his claim. However, Defendant's assertion that a guilty plea and jury waiver were under consideration for at least two months only serves to further support the trial court's finding that this was a reasoned, well informed, strategic decision.

Moreover, even if this Court were to discount what was said, or the documentary evidence which existed, at the time of the plea and waiver, even Defendant's on-track and no longer confused testimony at the evidentiary hearing, still does not entitle him to relief. As discussed above, Mr. Kuypers testimony is unequivocal that he never told Defendant anything that would lead him to believe that his waiver was dispositive of the issue. The lower court implicitly found Defendant's testimony at the evidentiary hearing to be untrue. The record supports that he made a strategic decision that was reasonable given the overwhelming evidence against him, and the advice of

counsel that going to a jury would mean a certain death recommendation, and that the waiver was the only chance for a life sentence. Defendant fails to show that the court's findings are not supported by the evidence.

Defendant also seeks to explain why he reached the conclusion that he alleges he did with respect to the court's discretion to reject the waiver of the penalty phase jury, despite counsel's advise and the court's admonitions, by putting his understanding in context of his mental status. Defendant alleges that his "diagnosed mental weakness," which would have been further delved into through Dr. Koziol's testimony, is consistent with the alleged misunderstanding. As detailed by the trial court in its order, the issue of Defendant's competence to stand trial had been resolved. Thus, he had been found capable of understanding his proceedings against him and assisting counsel. See Godinez v. Moran, 509 U.S. 389 (1993), (holding that the standard for competency to enter a plea is the identical standard for competency to stand trial).

Defendant cites to a number of cases that hold that a Defendant should have been allowed to withdraw a plea where there was a misunderstanding about some effect of the plea. What Defendant again ignores is that the trial court heard evidence and found there was no such misunderstanding.

Moreover, even in cases where there has been evidence that there was some misadvice by counsel, the appellate courts have upheld trial courts denials of motions to withdraw pleas. Collins v. State, 858 So. 2d 1197 (Fla. 4th DCA 2003) (no abuse of discretion in denying motion to withdraw plea where Defendant was misadvised by counsel regarding whether he would be allowed to withdraw his plea where the court colloquied Defendant specifically informing him he would not be able to do so); Lines v. State, 594 So. 2d 322 (Fla. 1st DCA 1992) (no abuse of discretion in lower court's denial of motion to withdraw plea where Defendant claimed his counsel failed to advise him of a possible competency defense); Wagner v. State, 895 So. 2d 453 (Fla. 5th DCA 2005) (no abuse of discretion in denying motion to withdraw plea where Defendant claims he was misled and took plea intending to seek a downward departure); Davis v. State, 783 So. 2d 288 (Fla. 5th DCA 2001) (no abuse of discretion in denying motion to withdraw plea where Defendant states he failed to appreciate moral consequences of plea).

In Collins, Defendant claimed his attorney had told him that it was in his best interest to enter into a plea, but that if he did not like it, he could withdraw it later. In affirming the trial court's denial of the motion to withdraw the plea, the 4th District Court of Appeals relied on the colloquy, where the

court told Defendant he would not be able to withdraw the plea. The court also pointed to the fact that Defendant was a high school graduated who had previously entered pleas to other charges. Moreover, the Defendant, at the hearing on the motion, stated that he understood that what the court was telling him during the colloquy was different than what his attorney had allegedly advised him. The court found no abuse in discretion in finding no good cause existed. Here, Defendant seeks to explain his answers to the colloquy by pointing to the fact that he was hiding the intent to waiver the jury. However, he could not explain why hiding the waiver was necessary if in fact it was a "done deal."

Although mistake and misapprehension are cited as grounds upon which good cause to withdraw a plea may be found, there must be more than a naked allegation that the Defendant was mistaken. Brown v. State, 428 So. 2d 369 (Fla. 5th DCA 1983) (no abuse of discretion where trial court finds that Defendant's allegation that he thought he was pleading to something less than a life felony was not sufficient to establish good cause to withdraw plea). Here, Defendant's testimony that he believed the judge would accept the jury waiver is such a naked allegation. The colloquy itself, as well as Mr. Kuypers testimony as to what transpired prior to the plea, refute that

there was any basis for Defendant reaching his mistaken understanding. Moreover, Defendant's own statements to the court after the waiver was rejected are consistent with the court's finding that he made a strategic decision with counsel's advice. Thus, the trial court did not abuse its discretion in finding that there was no good cause established at the evidentiary hearing.

D. THE TRIAL COURT DID NOT RELY ON FACTUAL ERRORS OR IGNORE AVAILABLE EVIDENCE

Defendant next claims that the trial court relied on factual errors to reach its conclusion and ignored available evidence. Defendant first complains of the trial court's statement that Mr. Kuypers testimony was that he told Defendant that an opinion with respect to whether the judge would accept his jury waiver would be pure speculation misstates that testimony. Although the exact words were not used by Mr. Kuypers, the court's language is not a misstatement as Mr. Kuypers testified he informed Defendant that the judge could, under the law, reject the waiver, he never told Defendant their strategy would be successful and he denied expressing confidence that it would be.

Defendant also asserts the trial court order mischaracterizes his testimony that he did not believe his

attorneys said or implied the jury would be waived. However, at the evidentiary hearing Defendant was repeatedly asked what words his attorneys had used, to which Defendant repeatedly evaded the question and stated it was his understanding, that he could not recall the exact words used, and that it was the body language and expressions of confidence. Again no mischaracterization of the evidence exists.

Finally Defendant complains that the order ignores Nancy Rossell's account in her affidavit that she "expressed confidence" with respect to the judge accepting the waiver. A previously stated, her affidavit does not constitute admissible evidence. Moreover, her affidavit states that they expressed confidence that the judge would "probably" accept the waiver. This is not necessarily inconsistent with Mr. Kuyper's testimony. Moreover, even if inconsistent, the court's express findings clearly indicate the court believed Mr. Kuyper's testimony in this regard. The court's failure to mention Ms. Rossell's affidavit does not negate that the court's findings are amply supported by the evidence.

E. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING EXPERT TETIMONY CONCERNING DEFENDANT'S ALLEGED MENTAL WEAKNESS

Defendant next argues that the court erred in excluding the testimony of neuropsychologist, Dr. Leonard Koziol. The

admissibility of evidence is within the sound discretion of the trial court, and the trial court's determination will not be disturbed on appellate review absent a clear abuse of that discretion. Brooks v. State, 918 So. 2d 181 (Fla. 2005) (citing Ray v. State, 755 So. 2d 604, 610 (Fla. 2000) and Zack v. State, 753 So. 2d 9, 25 (Fla. 2000)). The aid of an expert is appropriate when a trial court determines that the subject is beyond the common understanding of the trier of fact and that the testimony will aid the trier of fact. Jones v. State, 748 So. 2d 1012 (Fla. 1999).

After hearing argument on the issue, where the State specifically pointed out that Godinez v. Moran, 509 U.S. 389 (1993), holds that the standard for competency to enter a plea is the identical standard for competency to stand trial, the court determined the expert testimony would be irrelevant in light of the previous evaluations of Defendant finding him competent to stand trial. (R. 2321-22) Thus, the trial court did not abuse its discretion in excluding this evidence.

F. DEFENDANT'S PLEA DOES NOT OFFEND DUE PROCESS

Defendant argues that his plea was not knowing or voluntary, and thus violates due process, because the court's inquiry was, in effect, meaningless as the court was not aware of Defendant's intention to obtain a penalty phase jury waiver.

Defendant ignores that the court, during the plea colloquy, specifically asked him if he understood that there could be a jury. Defendant in essence is asking this Court for relief based on his intentional and calculated choice to surprise the court and the prosecution so as to improve his chances of being sentenced by the judge without a jury recommendation. Defendant provides no legal authority for the proposition that his manipulation of the criminal justice system violates due process. Defendant also argues his attorneys giving him a reasonable basis for believing his plea would entitle him to waive the penalty phase jury. For all the reasons discussed above, Defendant's plea was knowing and voluntary.

G. REMEDY

Defendant asks this court to remand to the lower court with instructions to allow the withdrawal of his guilty plea and with instructions to reinstate a plea of not guilty. The State respectfully submits that, if this court were to find any error in the lower court's analysis or application of the law, the proper remedy would be to remand to the lower court for a reconsideration of the motion using the appropriate standard.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE STATE TO ASK QUESTIONS WITH RESPECT TO LACK OF REMORSE

Defendant next argues that the trial court erred because it allegedly allowed the State to "make lack of remorse a feature of its penalty phase presentation and argument." The factual basis for this claim rests on two questions posed by the prosecutor during the State's direct examination of its mental health expert, Dr. Jane Ansley, presented during the State's rebuttal case, two references to records used by Defendant's experts in their evaluations, and a comment on that testimony during closing argument. The trial court did not abuse its discretion in allowing this rebuttal questioning based on records upon which Defendant's experts had heavily relied for their opinions.

This court has clearly stated that lack of remorse "should have no place in the consideration of aggravating factors." Pope v. State, 441 So. 2d 1073, 1078 (Fla. 1983). However, this Court has upheld death sentences where lack of remorse was presented as rebuttal evidence to either a remorse or rehabilitation argument. Cruse v. State, 588 So. 2d 983 (Fla. 1991); Singleton v State, 783 So. 2d 970 (Fla. 2001). This Court has also recently upheld a trial court's finding that it was not ineffective assistance of counsel to fail to object to a lack of remorse comment by the State in closing argument were it

was an invited response. Walls v. State, 31 Fla. L. Weekly S 101 (Fla. Feb. 9, 2006). Neither is it error to admit a confession, that is otherwise admissible, but which contains statements demonstrating lack of remorse. Wuornos v. State, 644 So. 2d 1000 (Fla. 1994).

The law is also clearly established that, where an expert witness renders an opinion, he or she can be required, on cross-examination, to specify the facts and data which serve as a basis for that opinion. §90.705, Fla. Stat. (1987). In the context of a capital penalty phase proceeding, this Court has held that it is "proper for a party to fully inquire into the history utilized by the expert to determine whether the expert's opinion has a proper basis." Parker v. State, 476 So. 2d 134, 139 (Fla. 1985); see Valle v. State, 581 So. 2d 40, 46 (Fla. 1991).

During the penalty phase, Defendant presented the testimony of two mental health experts to support the argument that Defendant's ability to appreciate the criminality of his conduct and his ability to conform it to the requirements of the law were impaired by a mental disorder. Dr. William Vicary, a psychiatrist, testified that he evaluated Defendant. He used background materials in reaching his conclusions including records from the various placements in institutions and hospital

records, specifically those of Pembroke Hospital. (T. 1153, 1159) He diagnosed Defendant with bipolar disorder, substance abuse, paraphilia and antisocial personality disorder. (T. 1159) He sought to bolster his diagnosis by pointing out the fact that it was supported by facts ascertained from the records reflecting Defendant's history and, thus, not Monday morning quarterbacking. (T. 1161-62)

Although Dr. Vicary diagnosed Defendant with multiple disorders, the bipolar disorder was clearly the focus of his testimony. (T. 1160-61) A videotape entitled "Growing up bipolar" was played during his testimony. (T. 1170-75) He admonished that the antisocial personality diagnosis is "secondary to [Defendant's] bipolar disorder" and that being an axis one disorder, it was most important in understanding why someone behaves in a particular way. (T. 1165-66) He further stated that the illnesses he described substantially affected Defendant's ability to appreciate the criminality of his conduct and his ability to conform his conduct to the requirements of the law. (T. 1168)

Defendant also presented the testimony of Dr. Alan Raphael, a psychologist, to support the existence of the same mitigating factor. Dr. Raphael reached eleven diagnoses including polysubstance abuse, post traumatic stress disorder,

exhibitionism, sexual sadism, voyeurism, attention deficit hyperactivity disorder, learning disability, bereavement, and antisocial personality. (T. 1300-04) He stated that he suspected Defendant also suffered psychotic disorders including bipolar disorder but could not determine if Defendant met all the criteria. (T. 1302) He testified that antisocial personality disorder is a form of mental illness. (T. 1304) He, too, based his conclusions on a multitude of records, in addition to his own testing. (T. 1273-76) He recounted Defendant's development chronologically by referring in detail to records and prior diagnoses. (T. 1279-90)

To rebut these diagnoses, the State presented the testimony of Dr. Jane Ansley and Dr. Edward Sczechowicz. Both of these mental health experts opined that all of Defendant's characteristics were consistent with antisocial personality disorder. Like Defendant's experts, Dr. Ansley, too, relied on the documented history of Defendant's institutionalizations and prior evaluations in reaching her diagnosis. (T. 1459) The State then referred to a notation from the records of Pembroke Hospital, which indicated Defendant showed lack of remorse, and asked Dr. Ansley to explain its relevance to a conduct disorder diagnosis (T. 1459) A review of the questions leading up to the question of lack of remorse makes it apparent that the

prosecutor was establishing the soundness of the diagnoses from the record and their consistency with the witness's expert opinion. The prosecutor asked Dr. Ansley to explain both narcissistic and conduct disorder and whether the DSM criteria existed at the time Defendant was evaluated at Pembroke. The prosecutor specifically made the point that there were two consistent diagnoses of conduct disorder. (T. 1459) The logical inference from this questioning was that in all these diagnoses, in all these institutions, no one had ever diagnosed Defendant with bipolar disorder until he was evaluated by his expert for these proceedings. However, a number of the prior experts had noted traits of both antisocial, as well as narcissistic, personality disorders. Interestingly, Dr. Ansley's answer to the complained of question was that conduct disorder only looks at the behavior and not at how the person feels about it (T. 1462) Thus, although the question addressed lack of remorse, the answer did not.

Dr. Ansley then explained in detail the criteria for an antisocial personality disorder diagnosis listing seven criteria, among which is lack of remorse. (T. 1463) Dr. Ansley then sought to explain the difference between Axis I and Axis II disorders explaining that Axis I are treatable and usually involve acute episodes whereas personality disorders are

pervasive ways in which one relates to the world. (T. 1465) Finally, Dr. Ansley commented on the report prepared by a doctor at Brockton Hospital where Defendant had been admitted following a suspected suicide attempt, noting antisocial personality traits, again supporting her conclusions, and read directly from the report. (T. 1492-93)

During closing argument, the prosecutor was arguing to the jury that Defendant's actions were a direct result of his choices. He argued that past evaluations of Defendant were consistent with this and, in doing so, made reference to Dr. Horowitz' notation. (T. 1725) Immediately after the reference, the prosecutor argued that "there ha[d] been one overriding consistent evaluation." (T. 1729) Clearly the only purpose to the reference was to show how the prior evaluations were consistent with the State's expert's present diagnosis, and that the Defendant's expert's testimony was not credible. The prosecutor then placed the comments in that appropriate context by stating: "that is the mitigation presented to you. Give it its appropriate weight." (T. 1733)

Defendant relies on Colina v. State, 570 So. 2d 929 (Fla. 1990) for the proposition that it is error to consider lack of remorse for any purpose in capital sentencing. In Colina, this Court reiterated the position that lack of remorse should have

no place in the consideration of aggravating factors. It does not follow, however, that any mention of lack of remorse is error. As stated above, lack of remorse evidence is not erroneously admitted when presented as rebuttal evidence to a remorse or rehabilitation argument, where it is invited response, or where it is part of an otherwise admissible confession by the defendant. Cruse, 588 So. 2d 983; Singleton, 783 So. 2d 970; Walls, 31 Fla. L. Weekly S 101; Wuornos, 644 So. 2d 1000. Clearly, Colina does not amount to a blanket prohibition on the term "lack of remorse" as Defendant would like to believe.

Furthermore, Colina is readily distinguishable. In Colina, the State introduced a T-shirt that the Defendant was wearing at the time of his arrest which indicated such lack of remorse as well as eliciting testimony from the investigator with respect to the defendant not having shown any remorse. In the instant case, lack of remorse evidence was not presented to the jury. Defendant admits in his brief that the State did not expressly argue it as an aggravator. (Appellant's Brief at 74). Rather, Defendant accuses the prosecution of getting the evidence in through the back door or in a clever way. Defendant argues that the prosecution made lack of remorse a feature of its rebuttal case. He seeks to support this argument by a string

cite to the transcript. However, careful review of the record reveals that the references were quite limited, as detailed above, specially in light of the fact, that the references were made during the State's brief rebuttal case, in a very lengthy penalty phase proceeding. Moreover, it was not argued in any regard to any aggravating factor.

Moreover, in Colina the impermissible evidence of lack of remorse referred to the instant crime. Here, all complained of references were to Defendant's past bad acts, which had been at the center of Defendant's presentation of mitigation. As explained above, two of the references were direct quotations to records upon which Defendant's experts relied for their diagnosis. The others were direct quotations from the DSM.

Defendant also relies on Atwater v. State, 626 So. 2d 1325 (Fla. 1993) and Smithers v. State, 826 So. 2d 916 (Fla. 2002), to argue that lack of remorse is impermissible even in the context of a diagnosis of antisocial personality. However, both these cases are distinguishable.

In Atwater, the State sought to impeach the Defendant's own expert, who had diagnosed the defendant with anti-social personality disorder, by asking, during cross-examination, whether persons with the disorder showed lack of remorse. Thus, in Atwater, the State was, in effect, turning the defendant's

proposed mitigation into an aggravating factor. Here, the thrust of Defendant's mitigation was that he had bipolar disorder, and the State, through its own witness and in rebuttal, sought to show that Defendant's characteristics, which had been apparent to many mental health experts before, were consistent with a different diagnosis. The distinction was a crucial one, as Defendant's expert testified bipolar disorder would affect a person's ability to appreciate the criminality of his conduct whereas the State's expert explained antisocial personality disorder does not. See Patton v. State, 878 So. 2d 368, 375 (Fla. 2004)(stating difference between a disorder and a disease is not insignificant); Elledge v. State, 706 So. 2d 1340, 1346 (Fla. 1997)(affirming death sentence where trial court denied statutory mental health mitigator based on the expert testimony that defendant had antisocial personality disorder and that such disorder is not a mental illness, but a life long history of a person who makes bad choices in life and that these choices are conscious and volitional). Thus, the evidence here was not being presented as an aggravating factor, but rather to rebut mitigation.

Smithers, too, is distinguishable. In Smithers, this Court found that the trial court had not abused its discretion in denying a motion for a mistrial based on a question of the

State's mental health expert that a person with antisocial personality disorder does not have remorse. Smithers, 826 So. 2d 916. This Court's analysis in finding no abuse of discretion and mention of the brevity of the comments and lack of argument of remorse, does not mandate a different result here.

In sum, lack of remorse was not argued to the jury or considered by the sentencing court in aggravation. Brief references were made to documents on which Defendant's own experts relied for their conclusions. The questions were posed during the State's rebuttal case and in the context of negating the mitigation presented, not in aggravation. Moreover, the court expressly instructed the jury it was not to consider lack of remorse as an aggravating factor. (R. 1399; T. 1675, 1801)

Furthermore, even if the questioning and closing comments had been erroneously considered, it is clearly harmless in the instant case. It is beyond a reasonable doubt that death would have been imposed even absent this evidence, given the overwhelming evidence establishing seven aggravators and the lacking mitigation. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1985); §59.041, Fla. Stat. (2002); Yates v. Evatt, 500 U.S. 391, 403 (1991).

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING IMPEACHMENT OF DEFENDANT'S EXPERT WITNESS REGARDING A SPECIFIC ACT OF MISCONDUCT IN AN UNRELATED MATTER TO ESTABLISH BIAS

In Defendant's next claim, he asserts that the trial court abused its discretion in permitting the State to impeach his expert, Dr. William Vicary, regarding an incident in which he falsified notes at the behest of a defense attorney. Defendant moved in limine to exclude this line of questioning, which motion was denied. (T. 1121, 1134)

Dr. Vicary had been retained as an expert in the California murder case against Eric and Lyle Menendez. In that case, Dr. Vicary had falsified certain notes that the defense attorney had told him would not be favorable to their case after she threatened to get him off the case. Subsequently, Dr. Vicary was disciplined for his action pertaining to the falsification of the notes and received a probationary discipline and a fine. Dr. Vicary admits to the underlying facts regarding these events. (T. 1121-22, 1148-51)

Below, the State argued, and the court agreed, that the questioning was permissible as it established bias. (T. 1134) Although impeachment by particular acts of misconduct is generally improper, Florida Statute §90.608 permits the impeachment of a witness by showing that the witness is biased. Moreover, how far an inquiry into bias may go is within the

discretion of the trial court. Pandula v. Fonseca, 199 So. 358 (Fla. 1941). Thus this Court must review the trial court's actions under an abuse of discretion standard. Id. at 360.

In the case of an expert witness, who is generally hired by one party or the other, bias is of particular importance. For this reason, inquiry into an expert's other work is relevant to show bias. Henry v. State, 574 So. 2d 66, 71 (Fla. 1991) (prosecution properly allowed to elicit that 98% of expert's clients were criminal defendants as questions were relevant to show bias, prejudice or interest). Similarly inquiry into how much income the expert is generating, not only from testifying in the particular case, but from testifying for a particular side in other cases, is likewise permissible.

In the instant case, Dr. Vicary's willingness to forge his interview notes at the behest of the defense attorney in order to assist the defense went directly to show his bias for the defense. It also went directly to his profitability as he admitted, had he not done so, he would have been fired. (T. 1149) Thus, this evidence went directly to bias.

Defendant relies on Fernandez v. State, 730 So. 2d 277 (Fla. 1999), Farinas v. State, 569 So. 2d 425 (Fla. 1990), Tormey v. State, 748 So. 2d 303 (Fla. 4th DCA 1999), and King v. State, 716 So. 2d 831 (Fla. 1998). Every one of these cases

establishes that the only proper line of impeachment into a witnesses character is questioning that goes to reputation for truthfulness. The inquiry here does not go to the witness' character, but, rather, his bias, which is expressly permitted by statute.

Moreover, in every one of the cases cited, the alleged act of misconduct had no relationship to bias. In Fernandez, the complained of questioning was with regard to whether, being clergy in whom the defendant had confided, the witness had violated his religious oath by telling the police about the defendant's statements. In Farinas, the improper questioning related to whether a defense witness had engaged in improper referral of patients to himself while employed by the government. Such conduct had no bearing whatsoever on bias.

Tormey is, likewise inapplicable. In Tormey, an expert witness was asked whether he had been disciplined for gross malpractice for an interpretation of an MRI. This questioning, again, was a clearly improper attack on character. Moreover, the court found the error harmless. Finally, King involved a defense attorney who sought to impeach plaintiff's two expert witnesses, both of whom had formerly been his clients, with details which he had learned through his earlier representation of the witnesses. Some of the questioning involved allegations

that the expert, a psychologist, had sexually battered a patient. Not only had the witness been acquitted of the charges, such had no relationship to bias in his testimony, and was purely character assassination. As none of the cases cited by Defendant address bias, they are entirely inapplicable to our discussion.

In sum, the trial court did not abuse its discretion in allowing the questions. The witness's willingness to perpetrate a fraud on a court of law so as not to risk his employment directly bore on his bias to testify favorably for Defendant. Thus, the questions were proper inquiry into bias as specifically authorized by Florida Statute §90.608.

Moreover, any error was harmless beyond a reasonable doubt. Having received an unfavorable ruling on the motion in limine, Defendant sought to soften the impact of the impeachment by asking preemptively on direct, thus, presenting a most sympathetic version of the events. Defendant also presented the testimony of another expert witness in support of the same mitigating factor. Finally, in light of the extensive aggravating factors proven, any error with respect to this limited area, must be deemed harmless. DiGuilio, 491 So. 2d 1129; §59.041, Fla. Stat. (2002); Yates, 500 U.S. 391.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING DEFENDANT'S CONFESSION TO SEXUAL BATTERY

Defendant next argues that the trial court abused its discretion in granting the State's motion to admit Defendant's confession to sexual battery. Defendant specifically argues that the court applied the wrong standard, failed to make the statutorily required findings and granted the motion in the absence of any evidence to corroborate the reliability of the confession.

As detailed above, included in Defendant's detailed confession to his crimes was the confession that he had forced Janet Acosta to perform oral sex while Defendant was holding her against her will, and after he had bound her, gagged her and threatened her with a razor. In that confession, he also stated he had threatened to kill her if she bit him. The State made a motion in limine pursuant to §92.565, Fla. Stat., as the State did not feel it could establish the *corpus delecti* with respect to this crime.

> Section 92.565 eliminates corpus delicti as a predicate for the admission of a defendant's confession when the state is unable to show the existence of each element of the offense because the victim is either physically helpless, mentally incapacitated, mentally defective, or physically incapacitated. These factors are not exclusive. Once this predicate is established, "the state must prove by a preponderance of the evidence that there is sufficient corroborating evidence that tends to establish the trustworthiness of the statement . . .

> ." §92.565(3), Fla. Stat. (2000). The hearing must be conducted by the trial judge outside of the presence of the jury. §92.565(2), Fla. Stat. (2000). Specific findings of fact must be made by the trial judge on the record to support his or her ruling. §92.565(4), Fla. Stat. (2000). Thus, in these limited circumstances, corpus delicti is eliminated as the predicate for admission of the confession and the trustworthiness standard is substituted in its place.
>
> [T]he trustworthiness doctrine under section 92.565 is a procedural mechanism utilized to admit a confession into evidence.

State v. Dionne, 814 So. 2d 1087, 1091-92 (Fla. 5th DCA 2002).

It should first be noted that the motion was made in contemplation of a guilt phase and prior to Defendant pleading guilty to the charges. The State contends, the standard contained in §92.565 does not apply to a penalty phase proceeding. The purpose of the *corpus delecti* predicate is to insure that "no person be convicted out of derangement, mistake, or official fabrication." State v. Allen, 335 So. 2d 823, 825 (Fla. 1976)(emphasis added). The trustworthiness doctrine under section 92.565 serves the same purpose. State v. Dionne, 814 So. 2d 1087, 1091-92 (Fla. 5th DCA 2002). This interpretation is also consistent with the well established principle that the State need not charge an offense in the guilt phase in order to argue the aggravator exists. Turner v. State, 530 So. 2d 45 (Fla. 1987).

Moreover, evidence of the statement's trustworthiness was amply established. The hearing on this motion was conducted simultaneously to the hearing on Defendant's motion to suppress the statements. After hearing evidence on the motion, the trial court found that the confessions were given voluntarily, after Defendant was advised repeatedly of his Miranda warnings, and that there was no evidence of Defendant's impairment or intoxication.

Defendant specifically complains that no evidence corroborating the statement was presented to the court at the time of the court's ruling. However, Defendant ignores that evidence was presented at the hearing regarding the fact that Defendant led police to the discovery of the victim's body (R. 1983-84), as well as testimony regarding the testing of blood on the victim's pants that matched Defendant's. (R. 1985) These facts corroborated Defendant's statement. The elicited corroboration, together with the ample evidence establishing that Defendant was alert, coherent, displayed remarkable memory of details of the events, including the exact balance remaining on the victim's bank account, as well as her PIN number, all amply established the reliability and trustworthiness of the statement.

Despite Defendant's assertion that the statement in question involves a confession to forcing the victim to perform oral sex, the confession in question in fact involves Defendant admitting to the abduction, binding and gagging, carjacking, robbery, use of her ATM card, strangulation of Janet Acosta and disposal of her body, all of which was corroborated in great detail through physical evidence presented at the penalty phase. See Chavez v. State, 832 So. 2d 730, 762-763 (Fla. 2002)(details of the defendant's confession matched well the physical evidence, evidence of victim's failure to return home from school showed abduction by force, the defendant's prints found on the victim's property, and evidence showed removal of clothing, and recovery of item of physical evidence where defendant indicated it would be found, all provided sufficient corroboration for the admission of defendant's confession and established *corpus delecti* of sexual battery); Schwab v. State, 636 So. 2d 3, 6 (Fla. 1994) (where evidence of death by manual asphyxiation, nude body and clothing concealed in remote location, defendants fingerprint on physical evidence found near the body all of which established that victim was held against his will, as well as details of the defendant's confession matching physical evidence found, "state submitted sufficient proof of the *corpus delicti* to admit Schwab's admissions that he

kidnapped and raped the victim"). See also Opper v. United States, 348 U.S. 84, 92 (U.S. 1954) (for confession to be corroborated, the corroborative evidence need not be sufficient, independent of the statements, to establish the *corpus delecti*, rather, the government must introduce substantial independent evidence which would "tend to establish the trustworthiness of the statement")

Furthermore, evidence corroborating the specific portion of the confession recounting the sexual battery was also elicited at the penalty phase. Evidence was presented that the victim's teeth had been knocked loose. Defendant had stated Ms. Acosta's teeth had been the reason he had stopped the sexual battery. He stated he threatened her with a razor not to bite him and razors were recovered from the victim's van.

Defendant specifically complains that the court stated the wrong standard and failed to make specific findings of fact. What Defendant ignores is that the two motions were heard together. The court clearly made findings of fact when it stated that there was no coercion or intoxication, and that the statement had been made voluntarily.

Defendant is also only partly correct when he argues that the sexual battery formed the basis of the felony aggravator. In fact the kidnapping, to which Defendant also voluntarily

confessed and plead guilty, also formed the basis of the felony aggravator. Thus, even if Defendant could establish the trial court erred with respect to admitting the confession to the sexual battery, any error is harmless in light of the overwhelming evidence establishing the aggravator that the murder was committed during the course of another felony, to wit, kidnapping. Moreover, evidence was also presented to support a finding of a vaginal sexual battery, as detailed above, to which Defendant did not confess. See Brown v. State, 473 So. 2d 1260 (Fla. 1985) (where multiple felonies are stated as supporting the "during the course" aggravator, and one felony is invalidated, the validity of the aggravator is not undermined where there are other felonies to support it).

In the instant case, Defendant pled guilty to first degree murder. The confession was admitted for the purpose of establishing aggravating circumstances at the penalty phase. Thus, the proper inquiry is whether the State established the aggravator that the murder was committed during the course of a sexual battery beyond a reasonable doubt. Defendant's confession was not the only proof that a sexual battery occurred. Defendant's semen was found in a towel inside the van. Defendant's blood was found on the inside lining of her jeans. As the trial court pointed out in its sentencing order,

the only logical inference is that the victim's pants were removed at some point. The autopsy report also revealed the victim had sustained a laceration to the labia and vaginal bruising, recently and before death. Therefore, the trial court's finding of this aggravating factor was amply supported by substantial and competent evidence. See Chavez, 832 So. 2d 730; Schwab, 636 So. 2d 3; Dailey v. State, 594 So. 2d 254, 258-59 (Fla. 1991)(record contained competent substantial evidence to support the trial court's finding of an attempted sexual battery where the evidence established the victim's clothing had been removed, the body was found nude, there was blood on the clothing and the victim had rebuffed Defendant's advances).

Finally, even if this Court were to find error in the admission of the portion of the confession with respect to the sexual battery, and that this invalidated the entire aggravator, in light of the overwhelming evidence establishing the aggravators of under sentence of imprisonment, pecuniary gain, HAC, avoid arrest, and CCP, any error is harmless beyond a reasonable doubt. DiGuilio

V. THE TRIAL COURT DID NOT ERR IN ASSESSING THE FELONY MURDER AGGRAVATOR TWICE

Defendant next claims that the trial court erred in finding that the murder had been committed during the course of a kidnapping as well as during the course of a sexual battery. He argues this constitutes improper doubling.

The State agrees with Defendant's assertion that the court expressly stated it was considering the fact that the murder was committed during a kidnapping and during a sexual battery as two separate aggravators. In its order, the court recognizes the potential for this future attack and specifically states that "[t]his does not constitute improper doubling." Citing to this Court's analysis in Banks v. State, 700 So. 2d 363 (Fla. 1997), the court reasoned that doubling occurs where "two aggravators are based on the same essential feature or aspect of the crime." The court stated this was not the case here as "[n]either the kidnapping not the sexual batteries was a necessary feature of the other." (R. 1809)

Despite the court's express language, the resulting effect of finding two distinct felonies were committed independent of each other, is that the court is giving great weight to this aggravator. The weight to be given aggravating factors is within the discretion of the trial court, and, thus, it is subject to the abuse of discretion standard. Sexton v. State,

775 So. 2d 923, 934 (Fla. 2000) Moreover, when weighing aggravating factors against mitigating ones, the process is not simply arithmetic, but rather it is more qualitative than quantitative. Lawrence v. State, 846 So. 2d 440, 453 (Fla. 2003) Such qualitative analysis is precisely what the sentencing court was engaging in when it emphasized that this aggravating factor was of particular importance, not only because two felonies were committed, but because they were distinct and independent of each other. Moreover, the great weight given this aggravator is amply supported by competent, substantial evidence that Defendant committed both a kidnapping and a sexual battery, independently of each other. See Id.

Moreover, Defendant provides no legal authority in support of his claim that this constitutes improper doubling. Defendant relies solely on the absence of any specific authority authorizing such. Defendant argues that because courts have routinely treated multiple felonies as a single aggravator, it naturally follows that the opposite must be improper doubling. However, Defendant's logic is flawed. In most instances where multiple felonies are committed, counting each as a separate aggravator would constitute improper doubling, not because of some automatic rule, but by virtue of the fact that in most circumstances, two or more felonies are established by the same

conduct. Such would be the case if a defendant kidnapped a victim for the purpose of sexually assaulting her, or if a dwelling was entered into for the same purpose. The court here clearly found the kidnapping was committed for a purpose of obtaining the victim's car, and thus based on an entirely different set of fact than the subsequent sexual battery. "[N]o improper doubling exists so long as independent facts support each aggravator." Morton v. State, 689 So. 2d 259, 265 (Fla. 1997)(overruled on other grounds).

Defendant's reliance on Brown v. State, 473 So. 2d 1260 (Fla. 1985), is misplaced. In Brown, this Court held that where multiple felonies, a burglary and a rape, had been committed and provided by the trial court as basis for the during the course aggravator, the invalidation of one did not undermine the validity of the finding of the aggravator as the other felony supported it. Moreover, this Court found that, although the trial court had incorrectly stated that the jury's verdict established the commission of the rape, because there was clear evidence that the rape had been committed, "the commission of the rape properly provide[d] additional support for the finding of th[e] aggravator." Id. Moreover, in Brown, the same facts supported each felony committed as the rape had been committed "in the course of the burglary." Id.

Even more significantly, in Brown, this Court found no improper doubling occurred when the trial court considered the pecuniary gain aggravator in addition to the "during the course of a felony" aggravator, despite the fact that the theft had occurred during the course of the burglary, as the facts showed the burglary had "much broader significance than simply being the vehicle for a theft" as the victim had been beaten, raped and strangled. Id.

Also significant in Brown is the fact that this Court upheld the trial court's sentence of death, which was an override of the jury's recommendation, despite striking another aggravator, CCP, because the remaining aggravators (under sentence of imprisonment, prior violent felony, during the course of a felony, pecuniary gain, and HAC), outweighed the non existent mitigation. Here, like in Brown, in light of the overwhelming evidence establishing the substantial number of aggravators, to wit, CCP, HAC, avoid arrest, under sentence of imprisonment, and pecuniary gain, as well as the unanimity of the jury's recommendation, any error was harmless beyond a reasonable doubt.

VI. THE TRIAL COURT PROPERLY CONSIDERED AND WEIGHED THE PROPOSED MITIGATING EVIDENCE

Defendant argues that the trial court erred in failing to properly consider and weigh valid mitigating evidence and abused its discretion in its "boilerplate treatment" of allegedly weighty mitigating circumstances. The court's separate consideration of each proposed mitigator is detailed in the statement of facts above and encompasses 13 of the sentencing order's 30 pages. (R. 1817-28) Nothing in the court's lengthy discussion of each and application to the facts of the case can be characterized as "boilerplate."

This Court recently summarized the proper standard to be used when reviewing a trial court's assessment of mitigation as follows:

> [A] trial court must find a mitigating circumstance "when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented." Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990). However, "[a] trial court may reject a defendant's claim that a mitigating circumstance has been proved, . . . provided that the record contains 'competent substantial evidence to support the trial court's rejection of these mitigating circumstances.' " Id. (quoting Kight v. State, 512 So. 2d 922, 933 (Fla.1987)). A trial court's decision regarding the weight to be assigned to a mitigating circumstance that it determines has been established is "within the trial court's discretion, and its decision is subject to the abuse-of-discretion standard." Kearse v. State, 770 So. 2d 1119, 1133 (Fla. 2000); see also Trease, 768 So. 2d at 1055; Cole v. State, 701 So. 2d 845, 852 (Fla. 1997). Under the abuse of discretion standard, a trial court's ruling will be upheld unless the

> "judicial action is arbitrary, fanciful, or unreasonable, . . . [and] discretion is abused only where no reasonable [person] would take the view adopted by the trial court." Trease, 768 So. 2d at 1053 n.2 (quoting Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990)).

Reynolds v. State, No. SC03-1919 (Fla. May 18, 2006)

Defendant specifically complains that the court erred in finding that his history of drug abuse and dependence was not a mitigating factor. He also alleges that the court limited the validity of this nonstatutory mitigating evidence by imposing a causal requirement. However, a careful reading of the court's order reveals that the court not only considered considered this proposed mitigator, it in fact found that "the Defendant has a history of drug abuse and dependence." (R. 1824-25) However, the court found that Defendant's drug abuse problem was in remission based on the facts and circumstances surrounding the crimes. Id. Specifically, the court reasoned that Defendant's purchases of other items such as soda and cigarettes when he took the first sum of money from Ms. Acosta's purse belied a finding that he so desperately needed to get a fix. Id. Other evidence in the record, such as Defendant's statement that he did not want to waste any more money on drugs supported this analysis. The court had also discussed at length in considering the mental mitigators, that much of the evidence presented belied a finding that Defendant's drug use and abuse was as

extensive as suggested. (R. 1819-22) Although the order is silent as to what weight the court assigned to this mitigator, the statement that it did not feel it contributed to the commission of the crime leads to a natural inference that the court assigned little weight to it. But clearly, it was considered.

Under similar circumstances, this Court has construed mixed language as to this mitigator. In Morris v. State, 811 So. 2d 661, 667 (Fla. 2002), the defendant had argued that the sentencing court erred in finding a history of drug abuse not mitigating. However, this Court stated that despite the sentencing court's language that it was finding the history of drug abuse "not mitigating," the court's language with respect to the fact that the factor was in fact "established," but that it was entitled to "little weight" indicated that the factor had been considered and weighed. Moreover, this Court, in Morris, also made mention of the lacking evidence establishing that the defendant was using drugs at the time of the murder. This Court specifically found that this was a valid nonstatutory mitigating factor "under the facts of th[e] case." Id. Furthermore, this Court found that any inaccuracy in the court's language was harmless beyond a reasonable doubt.

Here, the court does not even expressly say it is finding the history of drug abuse "not mitigating." The order is merely silent and other language indicates it was considered and weighed. Thus, even if error, it is clearly harmless beyond a reasonable doubt.

Defendant also asserts that the court abused its discretion in failing to weigh each proposed mitigating factor meaningfully. Defendant bases this claim on the fact that the court assigned the same weight to virtually every mitigator it considered. The relative weight given each mitigating factor is within the province of the sentencing court. Campbell v. State 571 So. 2d 415, 420 (Fla. 1990). The court's thorough evaluation of each mitigator and application to the particular facts of the case, which is evident on the face of the 30 page sentencing order, cannot be said to be fanciful or arbitrary. Thus, no abuse its discretion occurred.

Finally, Defendant challenges the court's treatment of the proposed mitigation with respect to the availability of life without parole as an alternative sentence. Defendant relies on Ford v. State, 802 So. 2d 1121 (Fla. 2001). The court's statement that it did not feel the legislature intended to create an "automatic" mitigator and that it, arguably, would be true for all capital case, is in fact consistent with Ford. In

Ford, this Court stated that "[w]hile this factor is mitigating in nature, it may or may not be mitigating under the facts of [each] case [ ] (that is for the trial court to determine)." Moreover, this Court did not reach the issue because it concluded that any error harmless given the vast aggravation.

The court's analysis of mitigation is supported by the evidence it recites in its comprehensive sentencing order. Moreover, Defendant had failed to show any abuse of discretion in the court's assignment of weight.

VII. SECTION 921.141 IS NOT UNCONSTITUTIONAL UNDER *RING*

Defendant argues that §921.141 is unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002), because it requires the trial judge to make the findings necessary to impose a death sentence. This Court has repeatedly rejected such challenges to Florida's capital sentencing scheme.

Moreover, Defendant's plea to kidnapping and robbery establish the "during the course of a felony" and the "pecuniary gain aggravators." The sentence was also supported by the "under sentence of imprisonment" aggravator. This Court has repeatedly rejected *Ring* claims in cases where the death sentence was supported by the "prior violent felony" and the "during the course of a felony" aggravators. *Gamble v. State*, 877 So. 2d 706, 719 (Fla. 2004); *Jones v. State*, 855 So. 2d 611, 619 (Fla. 2003). This Court has also rejected such a claim where the "under sentence of imprisonment" aggravator had been established. Allen v. State, 854 So. 2d 1255, 1262 (Fla. 2003). As such, Defendant is entitled to no relief based on *Ring*.

It should also be noted that the recommendation in this case was in fact unanimous. See Rivera v. State, 859 So. 2d 495, 508 (Fla. 2003) (noting that the jury unanimously recommended the death penalty in rejecting defendant's Ring claim).

VIII. THE ADVISORY SENTENCING RECOMMENDATION OF A FLORIDA CAPITAL JURY DOES NOT VIOLATE THE SIXTH AND FOURTEENTH AMENDMENTS

Once again predicated on the United States Supreme Court in Ring, Defendant argues that the sentencing recommendation of a Florida capital sentencing jury does not satisfy the Sixth and Fourteenth Amendments. For the reasons stated above as to issue VI, this issue is without merit. See Globe v. State, 877 So. 2d 663, 674 (Fla. 2004); Jones v. State, 845 So. 2d 55 (Fla. 2003); Holland v. State, 916 So. 2d 750, 759-60 (Fla. 2005) (upholding trial court's denial of defendant's Ring claims together although based on Sixth and Fourteenth amendment grounds).

IX. AGGRAVATING CIRCUMSTANCES ARE NOT ELEMENTS OF THE CRIME THAT MUST BE CHARGED IN THE INDICTMENT.

Defendant argues that, under Ring, aggravating circumstances are elements of the crime and, thus, must be charged in the indictment. This issue has been repeatedly addressed and rejected by this Court. See Holland v. State, 916 So. 2d 750, 759-60 (Fla. 2005); Fennie v. State, 855 So. 2d 597, 607 n.10 (Fla. 2003); Kormondy v. State, 845 So. 2d 41 (Fla. 2003) ; Blackwelder v. State, 851 So. 2d 650, 654 (Fla. 2003); Winkles v. State, 894 So. 2d 842, 846 (Fla. 2005); Brown v. Moore, 800 So. 2d 223, 225 (Fla. 2001)

X. DEFENDANT'S DEATH SENTENCE IS PROPORTIONATE

Although not specifically raised by Defendant, this Court must engage in a review of the proportionality of Defendant's sentence. See art. I, §17, Fla. Const.; Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991) Proportionality review entails a consideration of the totality of the circumstances in any given case, comparing it with other capital cases; it is not merely a comparison of the number of aggravating and mitigating circumstances. Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990); Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). A comparison of the instant case to other capital cases, especially those in which the victims were killed by strangulation compels the conclusion that the death sentence herein is proportionate to those in which it has been upheld.

In its sentencing order the trial court found that seven aggravators had been proven beyond a reasonable doubt: (i) that the murder had been committed by a person previously convicted of a felony and under sentence of imprisonment or on community control or on felony probation; (ii) that the capital felony was committed while Defendant was engaged in the commission of a sexual battery; (iii) that the capital felony was committed during the commission of a kidnapping; (iv) that the capital felony was committed for the purpose of avoiding arrest; (v) the

capital felony was committed for pecuniary gain; (vi) the capital felony was especially heinous, atrocious, or cruel; and (vii) the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner. (R. 1804-17)

With respect to mitigation, the trial court rejected all statutory mitigators and gave only some weight to a number of nonstatutory mitigators (Defendant's disorders, his institutionalization as a youth, his positive response to psychotropic drugs, the death of his father at an early age and the sexual abuse he suffered as a child). (R. 1824-26)

This court has previously upheld death sentences under similar circumstances. See Johnston v. State, 841 So. 2d 349 (Fla. 2002) (death sentence proportional for sexual battery, beating, and strangulation of victim where aggravators included prior violent felony conviction and HAC); Orme v. State, 677 So. 2d 258, 263 (Fla. 1996) (holding the death sentence proportional for the sexual battery, beating, and strangulation of victim where aggravators included HAC, pecuniary gain, and sexual battery); Conde v. State, 860 So. 2d 930, 958-59 (Fla. 2003) (prior violent felony, HAC and CCP, and little mitigation found); Blackwood v. State, 777 So. 2d 399 (Fla. 2000) (death sentence proportionate where victim struggled for her life during manual strangulation and trial court found one

aggravating circumstance (HAC), one statutory mitigating circumstance, no significant history of prior criminal activity, and eight nonstatutory mitigating circumstances); Hauser v. State, 701 So. 2d 329 (Fla. 1997) (death sentence proportionate where victim was strangled after engaging in sex with defendant for money and trial court found three aggravating circumstances of HAC, CCP, and pecuniary gain balanced against one statutory mitigator of no significant history of prior criminal activity and four nonstatutory mitigators); Gordon v. State, 704 So. 2d 107, 118 (Fla. 1997) (four aggravators: during the commission of a burglary and robbery, pecuniary gain, HAC and CCP, with little non statutory mitigation found); Marshall v. State, 604 So. 2d 799 (Fla. 1992) (affirming death sentence where four strong aggravators, including HAC, prior violent felony convictions, and murder during commission of burglary outweighed minor mitigation).

XI. SUFFICIENCY OF THE EVIDENCE

Where a Defendant has been sentenced to death, this Court is obligated to review the record to determine whether the evidence is sufficient to support the conviction. See Fla. R. App. P. 9.140(i); Davis v. State, 859 So. 2d 465, 480 (Fla. 2003). "However, 'when a defendant has pled guilty to the charges resulting in a penalty of death, this Court's review shifts to the knowing, intelligent, and voluntary nature of that plea.'" Winkles v. State, 894 So. 2d 842, 847 (Fla. 2005)(quoting Lynch v. State, 841 So. 2d 362, 375 (Fla. 2003). For all the reasons stated above as to issue I, the record clearly establishes that Defendant's plea was voluntary and intelligent.

CONCLUSION

For the foregoing reasons, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to **Andrew Stanton**, Assistant Public Defender, 1320 NW 14th Street, Miami, FL 33125, this 22nd day of May, 2006.

_____
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is type in Courier New 12-point font.

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