IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-457

MICHAEL A. TANZI,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

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# INITIAL BRIEF OF APPELLANT

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

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## INTRODUCTION

This is a direct appeal from judgments of conviction and sentences of death, entered a guilty plea before the Honorable Richard Payne of the Sixteenth Judicial Circuit in and for Monroe County, Florida. In this brief, the clerk's record on appeal is cited as "R.," and the transcript of the proceedings as "T."

## STATEMENT OF THE CASE AND FACTS

### Michael Tanzi's Childhood

Michael was born into a family remarkable for mental illness and substance abuse. One of his aunts suffered from depression and attempted suicide. (T. 1158). One uncle had been hospitalized in a psychiatric institution, while another received outpatient psychiatric treatment. (T. 1158). One of Michael Tanzi's uncles committed suicide by shooting himself in the head **during a telephone conversation with Michael**. (T. 1158). Three of Michael's nephews were diagnosed with attention deficit disorder. (T. 1158). Two of his uncles had a history of drug or alcohol abuse. (T. 1159). One of Michael's cousins died of a heroin overdose. (T. 1159). His stepfather was an alcoholic. (T. 1159).

The formative event of Michael Tanzi's childhood in Massachussetts was his father's death of pancreatic cancer. (T. 1090;1100). Before he became ill, Michael's father had a loving relationship with his son. (T. 1360). After he got sick, about a year-and-a-half before his death, Michael's father became verbally

and physically abusive. (T. 1360, 1364). Once Mr. Tanzi realized he would not live long, he became aggressive in an attempt to make his son grow up quickly. (T. 1364). Michael's mother explained:

> Michael's father was trying to make Michael grow up too fast. He'd yell at him and snap at him and slap him and just us [sic] trying to make him grow up because we knew he wasn't going to be around.

(T. 1364).

Near the time of his father's death, 8-year-old Michael was befriended by a boy five years his senior. (T. 1091, 1362). Linda Sanford, a forensic social worker who evaluated Michael in 1994, said that the older boy, also named Michael, was Michael's "neighbor, father figure, best friend, only friend." (T. 1080; 1092). Young Michael's "father figure" anally raped him, sexually fondled him and exposed him to pornography over a period of five years. (T. 1091-93).

Shortly before the end, Michael's real father suffered a stroke. Michael's mother took him to the hospital, where he died. (T. 1090). Michael did not believe his father was in the casket. (T. 1281). It was at this time that Michael first started to hear voices. (T. 1281).

Michael blamed his mother for his father's death, thinking that by taking him to the hospital she had caused him to die. (T. 1090, 1281, 1365). Michael also became very jealous of his mother at this time, not wanting her to be out of his sight or to speak to any other child his age. (T. 1364). When Michael's mother

tried to take him to family functions, Michael would act out or fight until she was forced to leave. (T. 1364-65). When Mrs. Tanzi began to bring boyfriends home, Michael was exposed to his mother having sex with a series of men. (T. 1164). Michael believed his mother was being abused. (T. 1164). He began to have masturbatory fantasies about her relationships with other men and about having sex with her himself. (T. 1164; 1345).

It was the year of his father's death, the year the older Michael began sexually abusing him, that eight-year-old Michael began to get in trouble. (T. 1362). Michael had always been "wired," a fitful sleeper, difficult to soothe or calm down. (T. 1090). But now, he argued with the school principal, got into fights, played with matches. (T. 1362). This was a change from his earlier behavior. (T. 1362).

Michael's condition and behavior grew steadily worse in the years following his father's death. Elementary school records indicate he was diagnosed with attention deficit hyperactivity disorder as early as the second grade. (T. 1084; 1087; 1281). He had low self-esteem, neurologic deficits, and possible perceptual motor delays. (T. 1282). Michael found it difficult to make friends. (T. 1084). He had to be taken to the hospital after he hyperventilated during an argument with his mother. (T. 1282). In the fourth grade, he was suspended for being aggressive toward teachers. (T. 1084). In one incident, he was arguing with other children

and put his hand through a window, shearing his tendons. (T. 1372). At age 11, Michael was again diagnosed with attention deficit hyperactivity disorder and was put on Ritalin. (T. 1282; 1368). When Michael was 11 or 12, his mother put a lock on her bedroom door because Michael would come into her room at night and stand over the bed staring down at her. (T. 1371-72). At one point he threatened to stab his mother with gardening shears. (T. 1365). Michael began stealing, setting fires, being a peeping Tom, and skipping classes. (T. 1095; 1366). Records show that Michael was hearing voices at age 14. (T. 1284).

The older Michael's ongoing anal rape and abuse of Michael Tanzi was not revealed until later when Michael was institutionalized. (T. 1092; 1366). But clues began to appear as Michael in turn acted out sexually. When he was only 11, he offered a younger girl money to have sex with him. (T. 1095). Later, he forced a girl to kiss him against her will. (T. 1095). Immediately before his first psychiatric commitment, he exposed himself to a younger girl. (T. 1096).

**Michael's Adolescence**

Michael's adolescence was spent being shuttled among residential mental health programs, first in 1991, when Michael, then thirteen, was committed to a locked psychiatric facility at Pembroke Hospital. (T. 1082; 1084). He was discharged with a diagnosis of attention deficit hyperactivity disorder, and conduct disorder, solitary aggressive type. (T. 1084; 1457-58).

Michael was placed in specialized foster care. (T. 1084). After one month,

the foster mother became "very uncomfortable" with Michael, and asked that he be removed. (T. 1084-85). Michael was then transferred to the Phaneuf Center in Brockton, Massachusetts, for a four-month treatment program, after which further residential treatment was required. (T. 1085).

A January 1992 psychological evaluation reported grave concern about Michael's functioning. (T. 1083; 1088). Dr. Maya Pruett found an unusual merger of sexuality and violence in a fourteen-year-old. (T. 1083; 1089). She also noted Michael's highly distorted view of reality, exemplified by his belief that he was "actually the victim" in a given situation when in reality he had been "the perpetrator." (T. 1089). Dr. Pruett concurred in earlier findings of attention deficit hyperactivity disorder. (T. 1088).

In February 1992, Michael was transferred to the Pilgrim Center, a chronically-understaffed residential program that did not provide Michael with the specialized treatment he needed for his aggression and sexual behavior problems. (T. 1085). According to forensic social worker Linda Sanford, Michael was "just basically being housed there." (T. 1085).

This warehousing of Michael Tanzi continued for nearly a year. In January 1993, Michael, now fifteen years old, was transferred to the Brightside Center in Springfield, Massachusetts. (T. 1083; 1086). Though Brightside was considered "state of the art," Michael did not show any progress until the fall, when Michael

was caught committing frottage against one of his teachers. (T. 1093). The staff felt that they were able to use this incident to make progress in Michael's treatment, but by then he was ten months behind in the program. (T. 1093). They had just begun trying to teach Michael techniques such as covert sensitization[1] when he was discharged, still at an elementary level. (T. 1102-04). Michael's doctors recommended keeping him in the program for another year. (T. 1092-93).

This recommendation was overridden: Michael's mother overestimated his progress, and wanted him closer to home, (T. 1093; 1370-71), and social services, faced with a budget crisis, was not eager to pay for extended treatment. (T. 1093). Against the advice of his doctors, Michael was discharged prematurely in May of 1994, with diagnoses of attention deficit hyperactivity disorder, conduct disorder, and pedophilia. (T. 1088, 1093).

It did not take long for the folly of this decision to become clear. Back in his mother's home, Michael began making sexually violent obscene phone calls to a neighbor, as many as 25 to 30 calls a day. (T. 1094; 1372). He also made harassing phone calls to his aunt. (T. 1372). By July 1, 1994, Michael had been arrested and committed to yet another residential treatment program, the Chamberlain School. (T. 1094).

Michael did poorly at Chamberlain. (T. 1094). He stared at the girls there

[1] Covert sensitization involves pairing deviant fantasies with fantasies of negative consequences. (T. 1104-05).

and made them uncomfortable. (T. 1094). He masturbated compulsively. (T. 1094). Michael was assigned to a female therapist, but she eventually refused to work with him because of his sexually violent fantasies about her. (T. 1094). He participated in a sex offenders' group, but that too was run by a female therapist, and did not work. (T. 1096-97). Michael seemed to be unable to understand that he had a continuing problem. (T. 1099). He seemed now unable to learn to use covert sensitization. (T. 1105; 1107-09). Only medication helped relieve his compulsive sexual fantasies. (T. 1096). Linda Sanford, who supervised Michael's treatment there, explained his functioning at this time:

> [H]e was retreating into these violent fantasies quite a bit. When he didn't understand what was asked of him academically or socially or in relationship to other kids, he would just go into his own mind and have these sexually violent fantasies. That was his retreat. And by 17 years old he was pretty much compulsive about it. The prognosis was not good. (T. 1100).

Another evaluator at Chamberlain observed:

> [Michael] was a deeply feeling kid with a lot of anxiety and a lot of pain that he was totally out of touch with. And so what would happen often is that Michael's feelings would sort of overwhelm him at times, and that would be when he would act out. (T. 1099).

Despite the fact that he could have signed himself out in February of 1995, Michael chose to remain at Chamberlain. (T. 1099). Once he achieved his high school diploma through the program, however, his funding was slashed. (T. 1099). The Chamberlain School tried to get Michael into various highly supervised

independent living programs, but he was rejected by all of them. (T. 1098). Michael was discharged into the community in August, 1995 at the age of 18. (T. 1097-98).

**Michael's Adult Years**

In the years that followed, Michael was frequently in trouble. (T. 1375). He abused alcohol and drugs, including marijuana and cocaine. (T. 1163). In 1997 he was hospitalized after taking an overdose of inderal, which he sometimes admitted and sometimes denied was a suicide attempt, though he was then diagnosed with major depression. (T. 1155, 1535). In the next year, Michael was repeatedly hospitalized for depression and substance abuse. (T. 1156-57). Finally, in January, 1998, Michael was arrested for offenses including more obscene phone calls, and was sent to Taunton State hospital for a four-month period of observation. (T. 1154-55; 1375; 1493; 1536). An evaluation there indicated posttraumatic stress disorder, polysubstance abuse and antisocial personality disorder. (T. 1286-87; 1494).

In August of 1998, Michael Tanzi was arrested in Massachusetts in connection with a car theft, pled guilty to breaking and entering and receiving a stolen motor vehicle, and was sentenced to jail followed by probation. (T. 81-84). He was released from jail a year later, in August, 1999. (T. 100).

Michael then drifted to New York, where he lived on the streets. (T. 1039; 1244). He attached himself to a street performer, a 50 year old drummer named

Ronald Williams. (T. 1039; 1050). Williams paid Michael to watch the drums and help him set up. (T. 1040). Michael would sleep outside on the street to watch the drums, "because it was basically the only thing that I had." (T. 1041). Over the ensuing months, Michael became fixed in orbit around the older man, following Williams around the country as he performed, traveling in a van to Washington, D.C., Savannah, Jacksonville, Tampa, Miami, New Orleans, and Key West. (T. 966; 1042-46).

Ronald Williams cast Michael out from this world on April 23, 2000. (T. 969; 1051). Williams and his wife were tired of sharing a hotel room with Michael and thought he was stealing. (T. 1969, 1050-51). Williams drove Michael back to Miami and left him on the streets with $40 for bus fare to Massachusetts. (T. 969; 1051-52). Michael spent the next day on South Beach, drinking and smoking all night long, sleeping on the beach that morning. (T. 1051-53).

**The Crime**

Later that day, Michael walked along the MacArthur Causeway, desperate for a way to get back to Key West. (T. 992-994). When he reached Watson Island and the Japanese Gardens, he found Janet Acosta, who was sitting in her van. (T. 393; 992). According to Michael's recorded confessions, he forced his way into the van, struck Ms. Acosta, and drove away with her toward the Keys. (T. 994-96). When he reached Homestead, he forced her to perform oral sex on him, and bound and gagged her. (T. 413-14; 996-98; 1003-04). Michael forced Ms. Acosta to

reveal her bank PIN, and stopped at ATMs along the way to retrieve cash. (T. 1001). When he reached Cudjoe, Michael proceeded to a secluded area at the end of Blimp Road, where he strangled Janet Acosta with a rope he found in the van, and left her body. (T. 418-19; 1008-18).

Michael continued to Key West, spending Janet Acosta's money there on crack cocaine, marijuana, alcohol, and clothing. (T. 450; 1021-26). He did not attempt to disguise or discard the van, and he continued to use Ms. Acosta's ATM card. He told acquaintances that his mother had won the lottery. (T. 928). Michael eventually caught up again with Ronald Williams, and took pictures of him performing. (T. 1029).

Following the trail of ATM activity, the detectives arrived in Key West on April 27, 2000, in search of the van which they found in fifteen minutes parked at the intersection of Front and Duval Streets, perhaps one of the most public places in Key West. (T. 262, 265-67; 453). Michael soon returned to the van, where the police arrested him. (T. 269-72; 957-60). He offered no resistance, and ultimately confessed on audio and video tape. (T. 402-18; 435-451; 455; 988-1060). Michael led the detectives to the body, and showed them where he had thrown out items from inside the van. (T. 394; 418-422; 457; 981).

A sample of Michael's blood taken April 28, 2000, tested positive for cocaine and marijuana. (T. 1288). Testing in the jail indicated Michael had a

Global Assessment of Functioning (GAF) of 35. (T. 1619). People with a GAF between 31 and 40 have "some impairment for reality testing or communication, or major impairment in several areas such as work, school, family relations, judgment, thinking or mood." (T. 1619-20). Dr. Raphael testified that Michael's records showed a chronically low GAF. (T. 1305).

**The Guilty Plea**

Michael Tanzi's attorneys advised him his best chance for a life sentence would be to plead guilty and waive the penalty phase jury. (R. 2340-42; 2408). Assistant Public Defenders Nancy Rossell and William Kuypers believed a jury would find Michael Tanzi guilty and recommend the death penalty. (R. 2131; 2340). Rossell – who was lead counsel – and Kuypers told Mr. Tanzi that Judge Payne had a reputation as a fair sentencer and was not seeking reelection, and that a judge-only sentencing would be his best chance for a life sentence. (R. 2131; 2341; 2407). The attorneys advised this course of action for at least two months, as reflected in handwritten notes of a meeting between Kuypers and Michael on November 27, 2002:

> no contest – everything else but sex. bat. charges
> –plea waives denial of pretrial motions + other pretrial issues
> –don't give up issues that arise at sentencing, e g –weighing aggravators
> – " mitigators
> **–don't give up 3.850 issues, i.e., incompetent counsel**
> **–if waive jury – for sent – waive Ring/Bottoson issues**
> **–if NOT – risk jury rec. of death**
> **– ? more likely to get life from judge if pleads nolo + waives**

**jury**[2] (R. 2264; 2420).

Although the attorneys had long been recommending this course of action, they did not research the law governing the waiver of the penalty phase jury until January 29, 2003, just two days before the guilty plea. (R. 2269; 2422-23).

On January 30, Michael agreed to enter a plea and waive the sentencing jury. (R. 2269; 2276; 2423-25). That day, Mr. Kuypers made the following entry in his Case Diary and Time Sheet: **"saw ? at jail – wants to enter guilty plea under Alford; all charges except sex bats + waive jury for penalty phase."** (R. 2269; 2425). Kuypers also generated a separate, handwritten note memorializing the decision. It reads: **"JAIL 1-30-03 ® Guilty – Alford – all counts except 2 sex bats; waive jury for penalty phase."** (R. 2276; 2425).

Michael changed his plea the following day. That morning, Kuypers presented him with two documents to review and sign. One was a standard change of plea form. (R. 2254-56; 2343; 2403). The other, titled, "Affidavit," was prepared by Kuypers himself. (R. 2257-60; 2344; 2403). The affidavit provides a more case-specific memorialization of the terms of the plea change and its consequences. In part, the affidavit specifies:

> 3. [Michael Tanzi] wishes to change his plea from not guilty to guilty in his best interest …

[2] At the evidentiary hearing on the motion to withdraw the plea, Mr. Kuypers made the peculiar claim that this last notation was something Michael had said. (R. 2407). If so, Michael was only repeating his lawyers' advice. (R. 2340-42; 2408).

> 4. He understands that if the Court accepts his change of plea to first degree murder he is still entitled to a penalty proceeding before a twelve person jury and the Court for that offense after which he will receive either a life sentence in prison without parole or the death penalty…
>
> 5. Understanding that on the charge of first degree murder he has a right to a penalty proceeding before a twelve person jury, **he wishes to waive, or give up, his right to a jury for the penalty proceeding** on the charge of first degree murder that will follow this change of plea.
>
> 6. **He wishes that the penalty proceeding on the charge of first degree murder be conducted solely by the judge without a jury and wishes to be sentenced solely by the judge without a jury.**
>
> 7. He understands that by changing his plea to guilty in his best interest to each of the charges to which he is pleading and **by choosing to be sentenced solely by the judge without a jury** on the charge of first degree murder he gives up his right to appeal any preplea motions that he has made and that the Court has denied with respect to those charges to which he is changing his plea, including those motions relating to the constitutionality of Florida's death penalty statute after the recent U.S. Supreme Court ruling in the case of **Ring v. Arizona**, 122 S. Ct. 2428 (2002) relating to jury findings and the imposition of the death penalty. He has discussed that case with his attorney, has been provided with a copy of that case, and understands its provisions. (R. 2257-58).

Mr. Kuypers went over this document with Michael before he signed it. (R. 2344-45; 2427). As Michael later testified, when **he entered the guilty plea he believed he would receive a jury waiver and bench penalty phase as a result**. (R. 2345).

The defense attorneys never informed the trial court that the reason for

entering the guilty plea was to obtain a jury waiver. The defense attorneys feared that the prosecution might, if prepared, persuade the court not to accept the waiver. (R. 2131; 2401). They decided, therefore, to conceal the planned waiver until after the change of plea. (R. 2131; 2401). They withheld the detailed "Affidavit," which set forth Michel Tanzi's understanding of the plea, (R. 1887; 1921), and instructed Michael not to bring up the issue of the waiver during the plea colloquy. (R. 2345-46).

The trial judge was thus at a distinct disadvantage as he conducted the plea colloquy: He was deliberately kept in the dark regarding the primary reason for Michael's change of plea. While the judge was careful to question both Michael and his lawyers to make sure he understood he could still receive the death penalty, (R. 1888-89; 1897-98), he did not question Michael at all about his understanding of what might happen when the defense announced its intention to waive the penalty phase jury. Indeed, when the judge mentioned during the colloquy that a jury would recommend the appropriate sentence, no one brought up the anticipated waiver. (R. 1889; 1894).

This was not the only information that the attorneys kept from the judge in their eagerness to have the guilty plea accepted. They hid Michael's longstanding problems with his attorneys, particularly Ms. Rossell. Michael had masturbated in her presence, and he had made plainly delusional allegations to the predecessor

Judge Mark Jones and to the Florida Bar, that she enjoyed watching him masturbate and had engaged in consensual touching with him. (R. 2045; 2069-74). As a result, Ms. Rossell – who as lead counsel had primary responsibility for the guilt phase – limited her visits with Michael and either brought witnesses to the meeting or sat outside his cell. (R. 2131-33).

Yet when the state asked the court to inquire of Mr. Tanzi if the issues between him and his attorneys had been resolved, Ms. Rossell stated:

> Judge, I know that Mr. Tanzi was concerned about the frequency of visits at one point, specifically how often I would see him at the jail. That's really the only thing I recall him putting on the record. That was some time ago, and I don't believe that that's an issue. (R. 1902).

Neither the prosecution nor Mr. Kuypers corrected this statement.

The change of plea was immediately followed by an unrelated evidentiary hearing, then a lunch break. (R. 1246, 1908-17). Following the break, Mr. Kuypers raised the jury waiver, pretending the possibility had just come up:

> Judge, over lunchtime I had an opportunity to discuss with Mr. Tanzi his desire to waive a jury for the penalty phase of the trial. Pursuant to that discussion, I prepared an affidavit. He's signed it, but it hasn't been notarized because we didn't have a notary available. (R. 1921).

The prosecution stated its opposition to the waiver. (R. 1923). Both the defense and prosecution agreed, however, that the decision to permit the waiver lay in the court's discretion. (R. 1923-24). The judge refused to accept the waiver, because the question of Michael's sentence was "momentous." (R. 1925-26).

The court then proceeded to a discussion of jury instructions before hearing several hours of testimony on pending motions. (R. 1247, 1925-2044).

**Pro Se Pre-Sentence Motion to Withdraw Plea**

When the hearing concluded, Kuypers told the judge that Michael wanted to withdraw his plea, but pointedly refused to assist him:

> Judge, Mr. Tanzi has asked me to advise the Court that he would like to address the Court with respect to the issue of withdrawing the plea that he made this morning. I told him that I would tell the Court that that's what he wants to do, and he's got his own reasons for doing it. (R. 2044).

Even though defense counsel made no effort to represent Michael at this critical stage of the proceedings, the court did not appoint outside counsel. Instead, the court required Mr. Tanzi to represent himself. (R. 2044).

Abandoned by his lawyers, Michael focused first on the problems with counsel that he – like the prosecutors and defense attorneys – had hidden from the court during the plea colloquy. (R. 2044-46). He then expressed his surprise and confusion at having just given up his right to a jury trial on the first phase, with the attendant loss of any issues on appeal, if he wasn't going to receive the anticipated benefit of a bench trial at the penalty phase:

> [N]ow 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, … the Court [would] waste[] all the time, all the money, all the procedure preparing and everything to get a jury … So what kind of – I wouldn't be getting no finalization as to, as to me taking this plea … 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. 2046-47) (e.s.).

Michael also expressed his sense of betrayal that his lawyers had "lie[d] to [him] as to what she, he or she thinks is going to happen" as a consequence of entering a guilty plea:

> 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**. (R. 2046) (e.s.).[3]

Without ruling on Mr. Tanzi's motion to withdraw the plea, the court ordered him to sit down. (R. 2048).

**Post-Sentence Hearing on Pre-Sentence Motion to Withdraw**

After the court sentenced Michael to die, appellate counsel filed a motion to withdraw his plea pursuant to Florida Rules of Procedure Rule 3.170(f) and (l). (R. 2134-58). Both the state and the trial court ultimately agreed that the motion was properly considered a presentencing motion pursuant to Rule 3.170(f). (R. 2280; 2490). The trial court conducted a hearing on the motion on November 15, 2004. (R. 2312-2497).

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[3] The meaning of Michael's reference to "another attorney" emerged during a subsequent *Nelson* hearing in which Michael complained that, because his attorneys' advice about the waiver had changed over time, he was confused about it and had asked another attorney, who had contradicted his own. (R. 2065-66). Notably, it was the prosecution that moved for the *Nelson* hearing, after watching the implosion of Michael's relationship with counsel when Michael found out that the waiver was rejected.

The evidence presented at the hearing reflected three distinct understandings of the connection between the guilty plea and the jury waiver that defense counsel had imparted to Michael. Michael believed that the guilty plea meant he would receive a bench penalty phase. (R. 2345, 2348). Ms. Rossell averred that the attorneys had expressed "confidence" Judge Payne would accept the jury waiver. (R. 2132). By the time of the evidentiary hearing, Mr. Kuypers claimed he had made no estimate whatsoever of the likelihood of the court accepting the waiver. (R. 2402).

Michael testified that he entered the guilty plea for the purpose of obtaining a jury waiver, and that he would not have pled but for his belief that the jury would be waived. (T. 2339, 2348). Kuypers told him that if he entered a plea, he would still face a penalty phase, and that a jury would recommend death. (R. 2340). They discussed the possibility of waiving the jury for the penalty phase. (R. 2341). Mr. Kuypers told Michael that he had known Judge Payne for some 20 years, and speculated that the judge would be a better sentencer than a jury because he was fair, wasn't seeking reelection, and "wasn't an active participant for the death penalty." (R. 2341). Kuypers advised Michael that he should plead guilty and he would get a jury waiver. (R. 2341). On January 30, 2003, that is what Michael decided to do. (R. 2342).

The following morning, Michael met again with his lawyers in the jury

room, but they had to speak quietly because one of the prosecutors was seated there, too. (R. 2342). There he reviewed and signed the change of plea form and the "Affidivat" prepared by Mr. Kuypers. (R. 2343-45). As noted, *infra*, the affidavit stated that, in exchange for his guilty plea, Michael was "choosing to be sentenced solely by the judge without a jury." (R. 2257-58). Having read and signed the "Affidavit" in the jury room, Michael felt certain that he would receive a jury waiver as a direct result of the guilty plea. (R. 2345).

Michael's lawyers advised him to answer "yes" and "no" during the plea colloquy, but not to say a word about the jury waiver. (R. 2345). When, during the plea colloquy, the judge said that there would be a sentencing recommendation from a jury, Michael did not say a word about the waiver because his attorneys told him not to. (R. 2346).

When defense counsel did raise the jury waiver and the judge refused, Michael was confused because he did not see this as a possible outcome. (R. 2347). After waiting what he described as "a few seconds to get an understanding of what was going on," Michael spoke to Ms. Rossell. (R. 2347, 2380-81). She told him to wait to speak with Mr. Kuypers. (R. 2347, 2381). But Kuypers had gone off somewhere and Michael had to wait for him to return. (R. 2381). When Michael eventually got to speak with him, Kuypers said they would wait until "they could get some time from the judge" to make the motion. (R. 2370).

Kuypers told Michael that he did not think it was in his best interest to withdraw the plea. (R. 2370, 2381). This surprised Mr. Tanzi, since Kuypers had told him a jury "would come back 12-0 for the death penalty." (R. 2340, 2348).

Michael agreed that Kuypers never said he "guaranteed" or "promised" a jury waiver. (R. 2367-68). Nor could he recollect the exact words Kuypers used. (R. 2368). But he recalled Kuypers' body language and expressions of confidence and belief that the jury would be waived. (R. 2369).

The State cross-examined Michael concerning a statement during the *Nelson*[4] inquiry after he attempted to withdraw his plea. (R. 2375). The State attempted to show that Kuypers had in fact told Michael he would *not* be permitted to waive the penalty phase jury. (R. 2375). The prosecutor was referring to this statement:

> [MICHAEL TANZI]: … We were talking about the plea, some type of plea, and it had to do with, it had to do with – **the plea had to do with something about a jury, had something to do with the jury, whether I wanted to waive the jury or not or whether I could waive the jury or not for the guilt phase**. Mr. Kuypers last Tuesday, this past Tuesday, told me that we hadn't discussed it, but we had discussed it but not in depth. He sent me a memo saying I would be able to waive the jury part of the guilt phase, but I wouldn't be able to waive the jury part of the trial of the penalty phase.
>
> THE COURT: And [another defense attorney] told you that was a lie?
>
> [MICHAEL TANZI]: Well, he told me on the grounds that what

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

they were saying was not true. (R. 2065-2066).

Michael explained, "That was what Mr. Kuypers told me. Then later he came back and told me it was different." (R. 2376). It was this confusion that Michael was talking about when he tried to withdraw his plea pro se: "[I]t'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." (R. 2046).

The trial court also received in evidence the affidavit of Michael's lead attorney Nancy Rossell.[5] (R. 2392-93). In it, she averred that Kuypers had practiced before Judge Payne for years, and believed "Judge Payne would be less likely to impose a death penalty in the absence of a penalty phase jury." (R. 2131). She also stated:

> It was Mr. Kuypers' and my expressed opinion that, because the state had no right to a jury trial in the penalty phase, Judge Payne would probably accept Mr. Tanzi's waiver of the penalty phase jury, in the interests of judicial economy. It was Mr. Kuypers' and my expressed strategy to conceal from the state until just after the guilty plea was entered, Mr. Tanzi's desire to waive the penalty phase jury. The plan was to catch the state off-guard, if possible, and thereby avoid having the state prepare a persuasive and cogent argument against the waiver.
>
> Mr. Kuypers and I planned to meet with Mr. Tanzi to discuss the plea. At that meeting, Mr. Kuypers and I expressed confidence that, in the event Mr. Tanzi entered a plea, Judge Payne would probably accept the defense waiver of the penalty phase jury, and that a bench trial on the second phase was Mr. Tanzi's best shot at a life sentence. Mr. Kuypers and I asserted that this course of action was in Mr. Tanzi's

[5] Ms. Rossell died prior to the evidentiary hearing and was unavailable as a witness.

> best interests, and recommended that Mr. Tanzi follow this course. The following day, Mr. Tanzi agreed to do so. . .
>
> [After the plea and the court's decision to reject the waiver], Mr. Tanzi made a pro se motion to withdraw his guilty plea, because of the rejection of his jury waiver. Although Mr. Tanzi expressed himself inartfully, it was my understanding, based on my knowledge of Mr. Tanzi, that he saw no point in waiving a jury for the first phase, and in waiving his right to appeal potentially meritorious pre-trial appellate issues, if the court insisted upon impanelling a jury to hear the penalty phase. Mr. Kuypers and I declined to argue this motion on Mr. Tanzi's behalf, because we felt that his interests were best served by maintaining his guilty plea even if he had to submit his penalty phase presentation to the deliberation and recommendation of a jury. (R. 2131-33).

Mr. Kuypers testified for the prosecution. (R. 2394-2435). He told the court that Michael had been willing to enter a plea agreement for a life sentence, but the state would not make that offer. (R. 2398). "And then our best option, we thought, would be to just go ahead and try the penalty phase without a jury. We thought that was our best option." (R. 2399-400; 2408). Kuypers agreed that he told Mr. Tanzi in substance that his best option was to "[P]lead no contest and get a jury waiver." (R. 2408).

Kuypers claimed he had made no predictions whatsoever concerning the likelihood of the waiver being accepted because

> …it's not my practice to predict what the Court's going to do, and I can tell him this, you know, these are the pros, these are the cons; he might do it for these reasons, he might not do it for these reasons. But to say what the Court's going to do, I don't do that.

(R. 2402). Kuypers testified he told Michael that the court would make a decision

on the waiver, and he appeared to understand. (R. 2400-01). Kuypers conceded, "It's possible" that telling Michael one thing doesn't mean necessarily that he gets it the way you mean it or the way you explain it, (R. 2435); but Kuypers did not have that concern in this instance. (R. 2435). Kuypers disputed Ms. Rossell's account that the attorneys had expressed confidence that Judge Payne would accept the waiver. (R. 2401).

Kuypers did not contradict Michael's testimony that the defense attorneys instructed him not to talk about the jury waiver during the plea colloquy. Indeed, he confirmed Ms. Rossell's account of their decision to conceal from the judge Michael's intent to waive the jury. (R. 2401). "It was done in the hope that the State would not be prepared to argue the merits of that issue and that we would be more likely to prevail," he testified. (R. 2401). Asked by the prosecutor if he encouraged Michael to lie to the court, Mr. Kuypers said, "No." Asked if he encouraged Michael to be honest on all questions asked, he replied: "Well, no, I didn't encourage him either way. I didn't encourage him or discourage him, I just expected that he would." (R. 2405).

Kuypers testified that Michael did not "object to [him]" at the time the court denied the jury waiver. Instead, Michael told him "when we came back in the afternoon." (R. 2404). (Here, Mr. Kuypers was plainly confused. The official transcript and the court reporters notes confirm that it *Kuypers* waited until

everyone returned to court in the afternoon before he even raised the issue of the jury waiver.) (R. 1247; 1917). According to Kuypers, Michael did not say why he wanted to withdraw his plea, and Kuypers did not say whether he believed the motion was in Michael's best interests, because Ms. Rossell was arguing a motion at the time, "and the situation didn't lend itself towards, you know, discussion of it." (R. 2404-05). In fact, Kuypers claimed there was *never* such a discussion. (R. 2405). At the evidentiary hearing, Kuypers asserted that he did not realize until after sentencing that Michael wanted to withdraw his plea because he didn't get a jury waiver. (R. 2406).

**Exclusion of Defense Expert**

Dr. Leonard F. Koziol is a neuropsychologist. (R. 2439). The state maintained that Dr. Koziol's testimony could only be relevant if he were to testify that Michael was incompetent at the time of the plea. (R. 2317). The defense responded that under Florida Rule of Criminal Procedure 3.170(f), the defendant need show only good cause, such as by showing that the plea was entered under mental weakness, mistake, surprise, misapprehension, fear, promise, or other circumstances affecting his rights. (R. 2319). Dr. Koziol's testimony would be relevant to show Michael's mental weakness, which would demonstrate that Michael did indeed enter his plea under a misapprehension resulting in mistake and surprise. (R. 2319, 2323-25). Michael's attorney asked the court to hear Dr. Koziol's testimony as a proffer before ruling on its relevance, (R. 2319-20):

> [Dr. Koziol is] going to specifically explain to this Court that Mr. Tanzi has very serious deficits in the area of attention, and he's going to demonstrate how he did testing to show what Michael's problems are there, and he's going to be able to explain to the Court why those deficits would cause Michael to make the kind of mistake that he did in understanding what he was doing in this case. (R. 2325).

The judge excluded Dr. Koziol's testimony, (R. 2325), and even refused to listen to the testimonial proffer, saying he was "not going to sit here and listen to it," but that counsel could "put everything on the record." (R. 2326).

Dr. Leonard F. Koziol has been a neuropsychologist for more than 25 years. (R. 2439). He teaches and publishes in his field, particularly in the area of attention. (R. 2440). A fellow of both the National Academy of Neuropsychology and the American College of Professional Neuropsychology, Dr. Koziol has a clinical and forensic practice, concentrating on areas of attention, learning, and memory. (R. 2440-42).

Dr. Koziol testified that Michael suffered from a major disturbance of attention that constricts his comprehension of events. (R. 2449-50). Michael's misapprehension of the relationship between his guilty plea and the jury waiver was consistent with his neurological deficits. (R. 2451).

In reviewing Michael's history, Dr. Koziol noted a diagnosis of attention deficit hyperactivity disorder made while Michael was in second grade and again, repeatedly, during his adolescence in mental institutions. (R. 2445). He also noted that, although Dr. Charles Golden, another defense neuropsychologist, had not

systematically evaluated Michael for attentional deficits, (R. 2446; 2464-65), there were some results in Golden's testing that raised Dr. Koziol's suspicions. (R. 2447).

Dr. Koziol himself administered a battery of neuropsychological tests designed to evaluate Michael's attention. (R. 2447-48). Dr. Koziol summarized his findings as follows:

> The major finding was of a disturbance in attention, and that disturbance has two essential features. One of the features is characterized by the fact that on these various tests, **Mr. Tanzi was unable to consistently register the same range of information as you would expect of nonimpaired individuals within the general population**, and that has practical implications for eliciting the reading comprehension. And the second aspect of the data, equally important, concerned Mr. Tanzi's distractibility, **his inability to not respond or not act on information that was of a distracting nature or not essential to the situation.** (R. 2449) (e.s.).

Dr. Koziol concluded that Michael Tanzi continued to suffer from a persistent attentional problem, and continued to meet the criteria for attention deficit disorder. (R. 2449). The doctor explained the practical impact of this finding:

> I believe that his comprehension of situations is often superficial, lacking in detail, lacking in completeness; that he makes decisions on the basis of what the finds to be the most attractive possibility at the time, in terms of his own needs, without considering the relevance and consequences of alternative information.

(R. 2450). This finding was consistent with historical IQ testing in which Michael's scores fell in the low average range. (R. 2457-2462; 2466).

Dr. Koziol further explained that Michael's misapprehension of the

connection between his guilty plea and the jury waiver was consistent with these deficits in attention and impulsivity. (R. 2450-51). In order to make sure that Michael properly understood the connection between the guilty plea and the jury waiver – and the possibility of negative outcomes – it would be necessary, Dr. Koziol said, that he be carefully directed to the negative possibilities:

> The point that I'm trying to make is that his attention would need to be directed to the potentially negative possibilities and the ramifications in order to be sure as an observer that he understood those as well as he understood the positive option. (R. 2453).

The trial court denied the motion. (R. 2302-08). While the court treated the motion as one made pursuant to Florida Rule of Criminal Procedure 3.170(f), and agreed that the motion was properly judged under the pre-sentence standard, its order does not discuss the factors of "mental weakness, mistake, surprise, misapprehension, fear, promise, or other circumstances affecting his rights," which would establish good cause to withdraw a plea under Florida Law. *Yesnes v. State*, 440 So. 2d 628, 634 (Fla. 1st DCA 1983). Instead, the court denied the motion on the grounds that Michael was **not incompetent**, and that he had not established ineffective assistance of counsel, (R. 2302-07).

The trial court's order also mischaracterized the available evidence. The order states: "The Defendant proffered testimony by new experts that he was not competent to enter a plea." (R. 2303). In fact, as counsel proffered, Dr. Koziol's testimony would demonstrate that Michael was operating under a mental

weakness, and that an understanding of that mental weakness would explain why the plea was the product of misapprehension, mistake, or surprise. (R. 2319, 2323-25). Had the court considered the proffer of Dr. Koziol's testimony, it would have known that the doctor did not evaluate Michael for competency, but for attention. (R. 2456; 2447-48).

The trial court also mischaracterized Michael's testimony in reaching its ruling. The order states:

> In his own testimony, the Defendant admitted that Counsel **never advised him directly or indirectly** that his guilty plea would likely result in the Court granting his motion to waive. The Defendant testified that he had arrived at this conclusion on his own based on Counsel's "body language." (R. 2305) (e.s.).

In fact, in the portion of the State's cross-examination to which the court refers, Michael stated he did not remember the precise words Mr. Kuypers used. (R. 2368). He then testified:

> [Prosecutor]: … you have no specific recollection what Mr. Kuypers may have told you?
>
> [Michael Tanzi]: His body language, his expressions of confidence, his belief that Judge Payne would grant the jury waiver, that was my understanding what Mr. Kuypers –

The order also mischaracterizes the testimony of William Kuypers when it says:

> Counsel testified that he told the Defendant that any such opinion [as to whether the Court would grant the requested waiver] would be pure speculation on his part. (R. 2305).

In fact, Mr. Kuypers merely denied making a prediction as to the likelihood the

judge would grant the motion. (R. 2402).

**Penalty Phase**

The State's case in chief was devoted to proving the details of the abduction and killing of Janet Acosta, through forensic evidence and Michael Tanzi's confession. Prior to the penalty phase, over defense objection that the statutory requirements had not been met, the trial court ruled that the State could admit, pursuant to section 92.565, Florida Statutes, Michael's confessions to forcible oral sex. (R. 1034-35; 1893, 2043-44). Despite Michael's repeated denial of any other sexual battery, the state sought to prove a vaginal sexual battery through evidence of a drop of Michael's blood on the inside of Ms. Acosta's pants pocket and very small vaginal tears and bruising, (T. 817-18, 821-22; 879-81), although the injuries could have occurred days earlier, (T. 909-11), and they could have resulted from consensual sex. (T. 1234-35).

The defense presented testimony from Linda Sanford, a forensic social worker who had evaluated Michael for the Chamberlain School and supervised his treatment there. (T. 1080; 1100). Ms. Sanford has taught and published in the areas of child sexual abuse and the treatment of sexual aggression (T. 1078). Ms. Sanford reviewed Michael's extensive history, and his continuous commitment in various mental institutions from 1991 through 1995. (T. 1082-1101). She also testified to the failure of Michael's sexual offender treatment. It was not until 1993 that Michael was finally placed in an appropriate program at Brightside. Although

initially resistant to treatment, after ten months there he was confronted with the frottage incident, a possible turning point; but he was discharged shortly afterwards, against medical advice, due to budget constraints and his mother's overestimation of his progress. So he quickly reoffended. (T. 1092-94; 1102-04). Though Brightside and Chamberlain tried to teach Michael techniques such as covert sensitization, Ms. Sanford was never sure Michael fully understood them. (T. 1105; 1108). He seemed to be able to learn the techniques in a classroom way, but didn't appear to be able to use it on a day-to-day basis. (T. 1108).

Dr. William Vicary, a forensic psychiatrist, testified, based on his examination of Michael and review of the records, that Michael suffered from severe mental illness, including bipolar disorder. (T. 1159). Dr. Vicary explained that until recently bipolar disorder in children was not well understood, being frequently misdiagnosed as attention deficit hyperactivity disorder. (T. 1160; 1188, 1190). People with bipolar disorder tend to go on sprees or engage in destructive behavior "without regard to the repercussions or consequences." (T. 1160).

Michael's history of impulsive behaviors – unable to stay quiet, irritable, volatile and angry, friendless, fighting with peers and teachers, suspended, setting fires – was consistent with a classic case of misdiagnosed child onset bipolar disorder. (T. 1161).

Dr. Vicary's conclusion was also consistent with that of the psychiatrists at the Monroe County jail, who had diagnosed Michael with bipolar disorder and were treating him with mood stabilizing antidepressant medications, including lithium, Depakote, Prozac, and Geodon. (T. 1162; 1191). Dr. Vicary's opinion was that Michael was bipolar at the time of the offense; he estimated the magnitude of this disorder at an 8 or 9 on a scale of 1 to 10. (T. 1162, 1168).

Dr. Vicary also diagnosed Michael with substance abuse paraphilia and antisocial personality disorder. (T 1159). The diagnosis of substance abuse was based on Michael's long history of drug use, including marijuana, cocaine, PCP and heroin, and his abuse of alcohol. (T. 1159; 1163). The paraphilia stemmed from Michael's early exposure to pornography and sexual abuse, leading to the heavily-documented sexual conduct in childhood. (T. 1163-65).

According to Dr. Vicary, Michael was suffering from all four of these psychiatric disorders at the time of the offenses, which would not have occurred otherwise. (T. 1167-68). These illnesses substantially affected Michael's ability to appreciate the criminality of his conduct, and to conform his conduct to the requirements of the law. (T. 1168).

Before Dr. Vicary took the stand, the defense moved in limine to exclude evidence of a 1998 California Medical Board matter resulting in the doctor's license suspension and probation. (R. 1290-91; 1293-1302); (T. 1121-36). The

disciplinary action arose out of Dr. Vicary's involvement in the case of Eric Menendez, during which he deleted passages from his notes at the request of defense counsel. (R. 1295). Over defense objection to improper impeachment, the trial court admitted the disciplinary matter as evidence of bias. (T. 1124; 1126-31). The defense elicited the evidence during Dr. Vicary's direct examination in an effort to "draw the sting." (T. 1134; 1147-52). The state revisited the matter in detail during cross-examination, and admitted the California disciplinary record over defense objection. (T. 1204-08).

The defense also called Dr. Alan J. Raphael, a psychologist with extensive forensic[6] experience over the course of 20 years of practice, and President of the [Test] Assessment Psychology Division of the American Psychological Association. (T. 1261-62, 1264, 1266). As part of a group called International Assessment Systems, he and two other doctors from the group tested Michael Tanzi. (T. 1266, 1269-71).

Dr. Raphael's evaluation was based on his review of the records of Michael's treatment, as well as extensive new testing, including a personal evaluation of Michael. (T. 1272-77, 1290). Dr. Raphael identified the death of Michael's father as a critical moment:

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[6] Bizarrely, the prosecution was permitted to repeatedly suggest that Dr. Raphael had exaggerated his forensic experience and that he did not know what forensic psychology meant because "forensic" practice was really limited to criminal law. (T. 1268-69; 1316-19). No objection was raised to this distortion.

> After his father's death he, he blamed his mother for the father's death. He did not believe the father was in the casket, and he started to hear voices, and that was as best we can tell, **that was when he really started to fall apart, and he was only eight. He wasn't well put together and he fell apart.** (e.s.)

(T. 1281). Michael's hearing voices was documented again when he was 14. (T. 1284). Dr. Raphael also reviewed Michael's history of acting out in school and at home, including repeated diagnoses of attention deficit hyperactivity disorder, and subsequent notations of depression and narcissistic personality traits. (T. 1281-1285). One of Michael's treating doctors noted he was close to meeting the criteria for schizoid personality disorder. (T. 1285). Still later, an evaluation when Michael was 21 suggested posttraumatic stress disorder. (T. 1286-87).

In May of 2000, the Monroe County Jail diagnosed Michael as suffering from hallucinations, alcohol and cocaine dependence, a history of posttraumatic stress disorder, history of attention deficit disorder, and depression, in addition to bipolar disorder. (T. 1289). A month later, Michael was diagnosed with posttraumatic stress disorder flashbacks and hallucinations in the jail. (T. 1289). At one time the jail medicated Michael with Haldol, an anti-psychotic medication. (T. 1290).

Dr. Raphael diagnosed Michael Tanzi with polysubstance abuse, posttraumatic stress disorder, exhibitionism, sexual sadism, and voyeurism. (T. 1300-01). Dr. Raphael also concluded that Michael suffered from one of the

following major psychotic disorders: schizophrenia, schizoaffective disorder, and psychotic disorder. (T. 1302). As Dr. Raphael explained:

> These are all psychotic disorders. They are severe … They really mean that you have hallucinations, you're hearing voices, seeing things. Your reality contact, your ability to perceive the world you live in accurately is grossly distorted, and this, this kind of diagnosis or symptoms of it go back to 1992, with a Dr. Pruett, and Dr. Cusack, and two references in '94. Donna Sussek and Linda Sanford and at EMSA, which I think is here in 6-2000. Same thing. They put him on Haldol in the prison because he was psychotic. So it's one of those three. Which one we were not able to ascertain. (T. 1302).

Dr. Raphael also diagnosed Michael with attention deficit hyperactivity disorder, learning disabilities, bereavement, and antisocial personality disorder. (T. 1302-03).

Dr. Raphael ruled out the possibility of malingering, noting Michael's performance on neuropsychological tests for malingering, like those contained in the TOMM and the Bender Gestalt[7]. (T. 1296-97). Furthermore, following his administration of the Rorschach test, Dr. Raphael – who teaches the Rorschach at the University of Miami – concluded that Michael exhibited severe pathology that could not be faked. (T. 1307-08).

Dr. Raphael testified that when Michael Tanzi was under the influence of drugs he had the maturity of a 2 to 4 year old. (T. 1310). Even without drugs, Michael never matured psychologically beyond 10 or 11. (T. 1310). Dr. Raphael

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[7] Dr. Raphael developed the scoring form for the Bender Gestalt test and has published a book on it. (T. 1297).

described Michael's disorders as mental or emotional disturbances on a magnituide of 8 or 10 on a scale of 10. (T. 1311-13). Dr. Raphael opined that Michael was suffering from them at the time of the commission of the offense, and that they affected his ability to appreciate the criminality of his conduct. (T. 1312).

Asked by the prosecution whether the crime was motivated by sex or money, Dr. Raphael responded:

> I think initially it wasn't motivated by either. I think it was motivated by a rejection that he felt that was grossly out of proportion to the reality of it and it just went downhill from there.

(T. 1345).

On cross-examination, Dr. Raphael conceded he couldn't be certain that Michael was suffering from posttraumatic stress disorder at the time of the offense because some of the facts he relied on occurred afterward, or because Michael was actually under the influence of drugs at the time of the homicide. (T. 1333-35).

Michael Tanzi's mother testified concerning Michael's difficult childhood. (T.1354-77). The defense also called John Welch, a social worker who counseled Michael when he was living on the street in New York City. (T. 1241-69).

Although neither of the state's experts examined Michael -- the prosecution had failed to timely file a notice of intent to seek death -- they nevertheless endeavored to contradict the conclusions of the defense experts who had examined Michael. Based on her review of the records and competency reports,

neuropsychologist Jane Ansley concluded that Michael's "central diagnostic issue" is antisocial personality disorder, with paraphilia, not otherwise specified, and polysubstance abuse. (T. 1507-08). Without elaboration, Dr. Ansley rejected extreme emotional disturbance, or that Michael's ability to comprehend the criminality of his conduct was substantially impaired, instead applying the **M'Naghten standard** to conclude that Michael knew the nature and consequences of his actions. (T. 1509-10). Dr. Ansley also disagreed that Michael suffered from posttraumatic stress disorder, a major psychotic disorder, or bipolar disorder, admitting however that she had not known of Michael's treatment with lithium, which she described as "the drug of choice for bipolar disorder." (T. 1512-16, 1548-49).

The state's second expert, Dr. Edward Sczechowicz, a forensic psychologist specializing in the treatment of sexual offenders, conceded that his ability to reliably evaluate Michael was impaired by never having examined him. (T. 1556; 1571). Dr. Sczechowicz diagnosed Michael with paraphilia not otherwise specified, possible learning disability, polysubstance abuse, a rule-out for attention deficit hyperactivity disorder, depression, and antisocial personality. (T. 1571-74). Dr. Sczechowicz disagreed with the diagnoses of psychosis and bipolar disorder, and disagreed that Michael was on drugs at the time of the offense, partly because of Michael's limited funds and the doctor's belief that it would be impossible to

walk from Miami Beach to Watson Island while smoking drugs and drinking alcohol without arousing suspicion. (T. 1589-90). Dr. Sczechowicz testified that Michael was not under the influence of extreme emotional or mental disturbance because "I would reserve that for maybe psychosis." (T. 1581). He opined that Michael's mental illnesses did not impair his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law. (T. 1583).

Dr. Sczechowicz also testified concerning the sexual offender treatment Michael received in Massachusetts. He believed that the frottage incident at Brightside meant that treatment would not be effective: Michael could "talk the talk, but not walk the walk." (T. 1568). Although Dr. Sczechowicz considered covert sensitization an advanced technique at the time, (T. 1566), he offered no evidence that the technique was successful for someone of Michael's age, history, and problems. In fact, Dr. Sczechowicz testified that while he had used covert sensitization in his own practice, he had replaced it with olfactory conditioning, "which we find to be more effective." (T. 1566).

Over repeated defense objection, the state elicited through Drs. Ansley and Sczechowicz that Michael lacked remorse. (T. 1459; 1461; 1463; 1464; 1468; 142-93; 1576). The trial court accepted the state's argument that lack of remorse was admissible because it is a factor in the diagnosis of antisocial personality disorder.

(T. 1460-61). The state repeated these references to lack of remorse in its closing argument, again over defense objection. (T. 1724-25; 1733-34).

The state also called a series of non-expert witnesses in rebuttal. Ben Faquenot, an acquaintance in Key West, had seen Michael 50 or 60 times, for an hour or so each time, in the 4 months before April 25, 2000. (T. 1385). He did not think he had seen Michael manic, depressed, hallucinating, or psychotic, and he had not seen Michael get too intoxicated, but on most of those occasions, Michael was working and in any case he did not know Michael very well. (T. 1385-90). Three of the detectives who interrogated Michael Tanzi testified to their opinions that he did not appear to be manic, depressed, hallucinating, or under the influence of controlled substances. (T. 1391-93; 1395-99; T. 1408-11).

The jury returned a sentencing recommendation of death, by a vote of 12 to 0. (R. 1430); (T. 1821). After receiving sentencing memoranda from the defense, (R. 1712-29) and state, (R. 1645-59), and conducting a *Spencer*[8] hearing, (R. 2213A-V), the court sentenced Michael Tanzi to death. (R. 2197-2212). In its sentencing order, the court expressly found the felony murder aggravator **twice**, based on the application of kidnapping and sexual battery. (R. 1807-9). The court gave each felony murder aggravator great weight. (R. 1809). The court also found that Michael Tanzi was on felony probation (great weight), as well as murder for

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

the purpose of avoiding arrest (great weight), pecuniary gain (great weight), HAC (utmost great weight), and CCP (great weight). (R. 1805-06; 1810-1817). With regard to mitigating circumstances, the court found that Michael Tanzi suffered from mental illnesses or personality disorders (some small weight), he had been committed to mental health facilities as a child and adolescent (some weight), his behavior is positively affected by the administration of psychotropic drugs (some weight), he lost his father to cancer at the age of 8 (some weight), he was repeatedly sexually abused by older males as a child and adolescent (some weight), he attempted to join the military twice (some weight), he cooperated with the police, confessed, and led police to the body (some weight), he assisted illiterate inmates by writing letters for them (some weight), he is an avid reader and enjoys discussing what he learns from books (some weight), and he has a loving relationship with his mother, aunts, uncles, cousins, and grandparents (some weight). (R. 1824; 1823; 1826; 1827-28; 1829-30). The court rejected Michael's history of drug use and dependence as mitigation, as well as the availability of a life sentence. (R. 1824-25; 1829).

## SUMMARY OF THE ARGUMENT

Michael Tanzi entered an open plea to capital murder. Consistent with the affidavit prepared by defense counsel in conjunction with the plea, what Michael expected to get out of this was the opportunity to waive his right to a penalty phase

jury. But because his attorneys had deliberately concealed from the court what Michael wanted in return for the plea, there was no colloquy about Michael's understanding that the trial judge might reject the jury waiver. Shortly after the plea was entered, defense counsel announced Michael's waiver of the penalty phase jury, and the trial judge rejected it.

Upon learning that he would not be able to waive the penalty phase jury, Michael wanted to withdraw his plea, but his defense attorneys refused to help him. Arguing pro se, Michael vented his dissatisfaction with his attorneys, but he also made it clear that if he was forced to have a jury in the penalty phase he preferred to exercise his right to a jury trial on guilt. Even as Michael struggled to explain himself, it was clear he was confused about the relationship between the guilty plea and the jury waiver.

Evidence presented by appellate counsel at a subsequent hearing on Michael's motion to withdraw his plea substantiated Michael's pro se allegations of mistake, surprise and misapprehension. The defense attorneys had advised Michael for months to plead guilty in exchange for a penalty phase jury waiver because he would have a better shot at life before the judge alone. It was not until two days before the plea that the defense attorneys researched the law controlling Michael's right to waive the penalty phase jury. While one of the attorneys testified that they gave Michael no estimation whether the trial judge would accept

the waiver, the other attorney averred that they expressed confidence to Michael that the judge would accept it. Michael himself testified that he understood he was entitled to waive the jury as a result of the plea. The affidavit drafted by his attorneys just before the plea reflects precisely this understanding.

In addition to this evidence of mistake, surprise and misapprehension, appellate counsel proffered expert testimony that, due to mental deficits documented from Michael's childhood throughout his adolescence in mental institutions, Michael had an impaired capacity to comprehend the possibility of negative outcomes from competing choices. As a result of his impairment, such consequences must be carefully and exactingly explained to him. This might have happened had the defense attorneys not concealed from the trial judge Michael's expectation from the plea.

The trial court refused to admit the proffered expert evidence and denied the motion because it applied an involuntariness standard, rather than the "good cause" standard applicable to pre-sentence motions to withdraw a plea, pursuant to Rule 3.170(f). Presentence motions to withdraw should be liberally granted because the law favors a trial on the merits. Under the proper standard, the evidence presented and proffered at the hearing on the motion established misapprehension, surprise, mistake and mental weakness sufficient to comprise good cause to vacate Michael's open plea to capital murder. Therefore, this Court should vacate the

guilty plea and allow Michael to have a jury trial on the merits.

The trial court erred in permitting the state to introduce and argue evidence of lack of remorse during the penalty phase. It is well established that lack of remorse should play no part in a Florida capital sentencing. The court further erred in permitting the state to impeach defense expert Dr. William Vicary with his discipline by the California medical board in a completely unrelated matter. The law does not permit impeachment based on specific acts of misconduct, and the evidence was not probative of any bias in Michael Tanzi's case.

The court erred in granting the state's request to admit confessions to sexual battery pursuant to section 92.565, Florida Statutes. The court failed to follow the requirements of the statute, did not make the required findings, and applied the wrong standard. The state, moreover, failed to establish through corroborating evidence that statements were trustworthy.

The trial court improperly assessed the felony murder aggravator as two aggravating factors. The court also rejected as not mitigating the valid mitigating factors of Michael Tanzi's history of drug abuse and dependence, and the alternative sentence of life without parole. The court, moreover, abused its discretion in assigning disparate mitigating factors – such as Michael Tanzi's tragic history as the victim of sexual abuse and rape and the fact that he enjoys reading – the same rote value of "some weight." Finally, Florida's death penalty statute is

unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002).

## ARGUMENT

### I. THE TRIAL COURT ERRED IN DENYING MICHAEL TANZI'S PRESENTENCING MOTION TO WITHDRAW HIS GUILTY PLEA.

#### A. Michael Tanzi Was Entitled To Withdraw His Plea Under The More Lenient "Good Cause" Standard Of Florida Rule Of Criminal Procedure 3.170(f).

"A court may, in its discretion, **and shall on good cause**, at any time before a sentence, permit a plea of guilty to be withdrawn." Rule 3.170(f) (e.s.). This Court has adopted the following explanation of the rule:

> In any event, this rule should be liberally construed in favor of the defendant. *Adler v. State*, 382 So. 2d 1298, 1300 (Fla. 3d DCA 1980). The law inclines toward a trial on the merits; and where it appears that the interests of justice would be served, the defendant should be permitted to withdraw his plea. *Morton v. State*, 317 So. 2d 145, 146 (Fla. 2d DCA 1975). A defendant should be permitted to withdraw a plea "if he files a proper motion and proves that the plea was entered under ***mental weakness*****, mistake, surprise, misapprehension, fear, promise, or** ***other circumstances affecting his rights*** " (e.s.). *Baker v. State*, 408 So. 2d 686, 687 (Fla. 2d DCA 1982).

*Robinson v. State*, 761 So. 2d 269, 274 (Fla. 1999) (b.e.s.), *quoting Yesnes v. State*, 440 So. 2d 628, 634 (Fla. 1st DCA 1983).

The standard for judging presentence motions to withdraw a plea is far more liberal than that applied to motions made after sentencing. *Compare* Fla. R. Crim. P. 3.170(l); *see also State v. Partlow*, 840 So. 2d 1040, 1044-45 (Fla. 2003) (Cantero, J. concurring) (contrasting standards under Rule 3.170(f) and (l)); *James*

*v. State*, 696 So. 2d 1194, 1195 (Fla. 2nd DCA 1997). The liberal standard for withdrawing a plea before sentencing is intended to allow a defendant "time to reflect on the plea, and its consequences, and determine whether a plea is in his best interests." *Partlow*, 840 So. 2d at 1044 (Cantero, J., concurring) (proposing that Rules of Criminal Procedure be amended to allow time certain for withdrawal of plea under Rule 3.170(f) so that defendant's "right of reflection" is not "snatched away" by immediate imposit ion of sentence). The defendant's burden is "much heavier" after sentencing under Rule 3.170(l), which requires a showing of "manifest injustice," because the "the interest in finality" is then much stronger. *Id.*; *see also Harrell v. State*, 894 So. 2d 935, 939 (Fla. 2005) ("The criminal rules establish sentencing as a critical juncture in a defendant's ability to withdraw a plea.").[9]

A trial court's ruling on a motion to withdraw plea is subject to considerable

[9] The Florida rules are consistent with the American Bar Association Standards for Criminal Justice, which provide that, after a plea is entered "and before sentence, the court should allow the defendant to withdraw the plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance on the defendant's plea." ABA STANDARDS FOR CRIMINAL JUSTICE Standard 14-2.1(a) (2d ed. 1980 & Supp. 1986) (e.s.). The commentary explains that, although the right to withdraw a plea before sentence should not be absolute, **the very fact that a defendant "has second thoughts about having pleaded guilty . . . should place the judge and others on notice that the plea possibly was entered without sufficient understanding and contemplation**." *Id.* (comment). A blind plea of guilty in a case in which the state is seeking the death penalty should be viewed with even greater caution. *See* ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN CAPITAL CASES, Guideline 10.9.2 comment (Rev. ed. 2003).

appellate scrutiny. "Under 3.170(f) … the court has discretion to deny the motion unless the defendant establishes 'good cause,' in which case the court **must grant it**." *Harrell*, 894 So. 2d at 939 (e.s.). Even where the decision lies within the trial court's discretion, an appellate court will not hesitate to interfere if that discretion is abused. *See State v. Braverman*, 348 So. 2d 1183 (Fla. 3d DCA 1977).

Michael Tanzi moved to withdraw his guilty plea to first degree murder within hours of entering it. His attorneys refused to argue the motion for him, and the trial court failed to rule on the motion until it was re-raised by appellate counsel after sentencing. At that hearing, counsel preserved good cause for the withdrawal of Michael's plea, demonstrating that he entered the plea in the mistaken belief that the sentencing jury would be waived.

The State of Florida conceded that the motion must be judged under the more lenient standard of Rule 3.170(f). (R. 2490). In principle (if not in practice), the trial court agreed. (R. 2302-03).

### B. The Trial Court Did Not Apply The More Lenient, Pre-Sentencing Standard Required By Rule 3.170(f), And Failed To Consider The Factors Of Mental Weakness, Mistake, Surprise, Misapprehension, Fear, Promise, Or Other Circumstances Affecting Michael Tanzi's Rights.

Where a trial court does not rule on a presentencing motion to withdraw plea until after sentence is imposed, it creates "an 'appearance of prejudgment' by the court as well as an appearance that 'it [would] not be humanly possible to judge the

motion by the correct standard.'" *Lee v. State*, 875 So. 2d 765, 767 (Fla. 2d DCA 2004), *quoting United States v. Bell*, 572 F.2d 579, 581 (7th Cir. 1978).

This warning proved prophetic in Michael Tanzi's case. The trial court's order briefly mentions the "good cause" standard rather than "manifest injustice" should apply. (R. 2303). However, the order considers none of the factors relevant to a showing of good cause under Rule 3.170(f). Instead, the court denied the motion under two inapplicable standards: (1) that Michael had failed to establish incompetence,[10] and (2) that Michael had failed to establish his attorneys' ineffectiveness.[11] Although these showings would have entitled Michael to withdraw his plea under the more stringent standards of Rule 3.170(l) or even Rule 3.850,[12] it was error to apply them to a Rule 3.170(f) motion.

Good cause to withdraw a plea is established on a showing that the plea was entered under "***mental weakness*****, mistake, surprise, misapprehension, fear, promise, or** ***other circumstances affecting his rights*** " *Robinson v. State*, 761 So.

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[10] Relying on *Porter v. State*, 788 So. 2d 917, 927 (Fla. 2001) (expert testimony contradicting previous competency findings, alone, does note entitle postconviction movant to evidentiary hearing). (R. 2303-04).

[11] Citing *Sireci v. State*, 469 So. 2d 119 (Fla. 1985) (counsel's strategy decision not deficient where reasonable under prevailing professional norms), and *Gamble v. State*, 877 So. 2d 706, 714-15 (Fla. 2004) (no merit to ineffective assistance of counsel claim where defendant consented to strategy). (R. 2306-07).

[12] *See, e.g., Walker v. State*, 789 So. 2d 364 (Fla. 2d DCA 2001) (unrefuted allegation of mental incompetence sufficient to challenge voluntariness of plea pursuant to Rule 3.850); *Barnhill v. State*, 828 So. 2d 405 (Fla. 5th DCA 2002) (Rule 3.850 may be used to challenge counsel's effectiveness in ensuring that plea was knowingly and voluntarily entered).

2d 269, 274 (Fla. 1999), *quoting Yesnes v. State*, 440 So. 2d 628, 634 (Fla. 1st DCA 1983) (bold e.s.). Counsel for Michael repeatedly invoked these factors as the basis of the motion, with particular emphasis on mental weakness, mistake, surprise, and misapprehension, specifically arguing that Michael Tanzi labored under a mental weakness that caused him to misapprehend the connection between his plea and the jury waiver. All evidence introduced or proffered by the defense was directed to these factors.

Yet nowhere does the trial court's order even mention "mental weakness, mistake, surprise, [or] misapprehension," much less apply these factors to the evidence. In refusing to even consider these factors, the court "snatched away" Michael Tanzi's "right of reflection" under Rule 3.170(f). *See State v. Partlow*, 840 So. 2d 1040, 1044 (Fla. 2003) (Cantero, J., concurring).

### C. The Trial Court Erred In Denying Michael Tanzi's Motion To Withdraw His Plea Pursuant To Florida Rule of Criminal Procedure 3.170(f).

It is undisputed that Michael Tanzi entered his plea for the purpose of obtaining a bench penalty phase, and that the defense withheld this information from the court. (R. 2304-05; 2340-42; 2348; 2130-33; 2399-2400). While the defense attorneys disagreed with each other and Michael about their advice concerning the plea waiver, Michael testified that his understanding was that the waiver would flow from the plea. (R. 2340-42; 2348). The affidavit drafted by

Kuypers and signed by Michael just before the plea reflected this understanding. (R. 2257-60). Michael moved to withdraw his plea within hours of entering it, and told the court that if he had to have a jury in the second phase he wanted one for the guilt phase. (R. 2046). Michael's responses during his *pro se* attempt to withdraw his plea and the *Nelson* hearing the same day show that he was confused about the law governing the jury waiver. (R. 2046; 2065-66). At the time Michael originally sought to withdraw his plea, the state would not have been prejudiced in the least. If under, these circumstances and in the context of a capital case, Michael Tanzi is not entitled to withdraw his plea, then Rule 3.170(f)'s "right of reflection," *Partlow*, 840 So. 2d at 1044 (Cantero, J., concurring), is a hollow one.

Florida's courts have held that a rule 3.170(f) motion must be granted where the defendant misunderstands the terms of his plea. *See*, *e.g., Soto v. State*, 780 So. 2d 168, 169-70 (Fla. 2nd DCA 2001) (defendant should have been permitted to withdraw plea based on misunderstanding regarding length of sentence); *Graham v. State*, 779 So.2d 604 (Fla. 2d DCA 2001) (defendant entitled to withdraw his plea based on counsel's mistaken advice that his photo would not be placed on the Internet); *Timothee v. State*, 721 So. 2d 776, 777 (Fla. 4th DCA 1998) (defendant should have been allowed to withdraw plea based on misunderstanding of terms of substantial assistance agreement); *Edwards v. State*, 610 So. 2d 707 (Fla. 4th DCA 1992) (misunderstanding concerning concerning length of sentence); *Elias v. State*,

531 So. 2d 418 (Fla. 4th DCA 1988).

If any motion to withdraw meets the standards for withdrawal of a plea entered due to mistake or misapprehension concerning the consequences, it is Michael Tanzi's Rule 3.170(f) motion. The record supports his claim that he misapprehended the connection between the guilty plea and the jury waiver. The circumstances leading up to the plea made this misunderstanding likely. The attorneys' decision to hide the connection between the plea and the jury waiver made it both still more likely and difficult to detect. Michael Tanzi's statements confirm that he was, in fact, confused on this crucial point. Under the circumstances of this case, a system that "favors trials on the merits" should have granted a motion to withdraw pursuant to a rule "liberally construed in favor of the defendant."

The record is fully consistent with Michael's testimony that he changed his plea believing the judge would permit the jury waiver. A guilty plea and jury waiver were under consideration for at least two months before the plea was entered. In defense counsel's log entries and notes during this time, the option is always referred to as a "waiver." There is **never** any mention of a "request for waiver" or a need for judicial approval. Testimony and documentation show that during these two months defense counsel gave Mr. Tanzi careful advice concerning waiver of pretrial issues, preservation of specific sentencing issues,

continued viability of a postconviction attack on ineffectiveness of counsel, that waiving the jury would waive *Ring/Bottoson* issues, and that failing to waive the jury would result in a jury recommendation of death. (R. 2264, 2420). **There is no evidence of any kind, however, that Michael Tanzi's lawyers advised him of the risk the waiver could be rejected until the eve of the entry of the guilty plea.** This is not surprising, because Mr. Kuypers did not even research the question until two days before the plea. (R. 2269; 2422-23).[13]

Michael Tanzi and his two defense attorneys had three very different impressions of how this information was conveyed. Mr. Tanzi came away with the belief that he would in fact receive a jury waiver if he entered the guilty plea. (R. 2422; 2341; 2269). Although he admitted he did not recall the exact words Kuypers used, he remembered his attorney's "body language, his expressions of confidence, his belief that Judge Payne would grant the jury waiver." (R. 2368-69). Lead counsel Nancy Rossell believed the attorneys had expressed "confidence" to Michael that Judge Payne would accept the jury waiver.[14] (R. 2132). By the time of the evidentiary hearing, Mr. Kuypers claimed the attorneys had made no estimate of the likelihood of the court accepting the waiver, though he could have

[13] Kuypers testified that he did legal research before "representing to Mr. Tanzi what the status of the law was," concerning jury waivers. (R. 2400). He testified, and his notes show, that that research occurred on January 29, 2003. (R. 2269; 2422-23).

[14] Ms. Rossell's affidavit disagrees as to the timing of this conversation, placing it on the 28th. (R. 2132).

given reasons why the court would or would not have accepted the waiver. (R. 2400-02).

The "Affidavit" drafted by William Kuypers cemented Michael Tanzi's misapprehension of his plea, leaving him to think the jury waiver was a "done deal." (R. 2257-58; 2345, 2347). Michael Tanzi read and signed both the affidavit and the standard change of plea form in the jury room before entering his guilty plea on January 31, 2003.[15] (R. 2342-45). Sitting in the jury room at the same time was one of the prosecutors on the case. Given the "strategy" to conceal the waiver from the prosecution before the plea, there could be little meaningful dialogue beyond the four corners of the affidavit. (R. 2342). The affidavit Michael Tanzi read and signed before pleading guilty to a capital offense states, in part:

> 3. [Michael Tanzi] wishes to change his plea from not guilty to guilty in his best interest to the following charges listed in paragraph two above: first degree murder …

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[15] Michael Tanzi's testimony on this point is unrebutted. At the hearing on the motion to withdraw plea, Mr. Kuypers merely testified that he prepared the Affidavit. (R. 2403). At the time of the attempted plea waiver Mr. Kuypers plainly dissembled to the court when he suggested the idea of waiving the jury had just come up and he had prepared the document over lunch. (R. 1921). Plainly, had he done so, the document would have reflected the fact that Michael Tanzi had already changed his plea to guilty, rather than expressing his wish to do so and devoting 11 paragraphs to the terms of a plea that had supposedly already occurred. (R. 2257-60). It is clear the defense attorneys withheld the Affidavit as part of there plan to surprise the prosecution with the eventual attempted jury waiver.

> 4. He understands that if the Court accepts his change of plea to first degree murder he is still entitled to a penalty proceeding before a twelve person jury and the Court for that offense after which he will receive either a life sentence in prison without parole or the death penalty …
>
> 5. Understanding that on the charge of first degree murder he has a right to a penalty proceeding before a twelve person jury, **he wishes to waive, or give up, his right to a jury for the penalty proceeding** on the charge of first degree murder that will follow this change of plea.
>
> 6. **He wishes that the penalty proceeding on the charge of first degree murder be conducted solely by the judge without a jury** and wishes to be sentenced solely by the judge without a jury.
>
> 7. He understands that by changing his plea to guilty in his best interest to each of the charges to which he is pleading and **by choosing to be sentenced solely by the judge without a jury** on the charge of first degree murder he gives up his right to appeal … (R. 2257-58).

There is nothing in this language (or any other part of the affidavit) to suggest to the reader that the jury waiver might be rejected by the trial court. In fact, it makes it clear that the penalty phase jury is **Michael Tanzi's right**. The language of the affidavit inexorably links the entry of the plea and the waiver of the penalty phase jury. Mr. Tanzi "wishes to change his plea from not guilty to guilty in his best interest." Likewise, "he wishes to waive, or give up, his right to a jury for the penalty proceeding," and "He wishes that the penalty proceeding on the charge of first degree murder be conducted solely by the judge without a jury." The natural reading of this document would be the one Michael Tanzi testified he

reached. "I thought I was going to get a jury waiver for the penalty phase." (R. 2345).

The defense team's secrecy campaign prevented the plea colloquy from revealing Mr. Tanzi's belief the jury would be waived as a consequence of the plea. Because they instructed Mr. Tanzi not to mention the plea waiver, he did not bring it up, and the court had no way of knowing to question him about this most crucial aspect of the plea. (R. 2345-46). In their eagerness to have Michael Tanzi's plea accepted, the defense even misled the court concerning Mr. Tanzi's extensive problems with Ms. Rossell. (R. 1902, 2045; 2069-74).

Michael Tanzi's behavior following the court's rejection of the jury waiver is entirely consistent with his understanding that the waiver would follow from the plea. He testified at first he was confused because he did not see this as a possible outcome. (R. 2347). He waited what he described as "a few seconds to get an understanding of what was going on," and then spoke to Ms. Rossell. (R. 2347, 2380-81). She told him to wait to speak with Mr. Kuypers. (R. 2347, 2381). At this point, Mr. Tanzi had to wait for Kuypers to come back to speak to him. (R. 2381). When Mr. Tanzi eventually spoke to Mr. Kuypers, Kuypers said they would wait until "they could get some time from the judge" to make the motion.[16]

[16] Kuypers, on the other hand, testified that Michael Tanzi did not "object to [him]" at the time the Court denied the jury waiver. Instead, Michael told him "when we came back in the afternoon." (R. 2404). Kuypers, however, did not even attempt

(R. 2370).

Michael Tanzi's statements during and after the his *pro se* motion to withdraw show his confusion, mistake, and surprise concerning the jury waiver. When his attorneys forced him to represent himself, Michael Tanzi "got sidetracked." (R. 2373) He began by revealing the extensive history of his allegations against counsel a history both defense counsel and the prosecutors had been hiding from the court. (R. 2044-46). But he went on to link his dissatisfaction with – and confusion about – counsels' advice to his desire to withdraw the plea if he was required to have a sentencing jury:

> 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.**
>
> [N]ow 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, … the Court [would] waste[] all the time, all the money, all the procedure preparing and everything to get a jury … So what kind of – I wouldn't be getting no finalization as to, as to me taking this plea … 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. 2046-2047) (bold e.s.).

Michael Tanzi never got to say more about his reasons for wanting to withdraw his plea. The judge's questions returned Mr. Tanzi to his allegations against

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to waive the jury until after "they came back in the afternoon," so it is not surprising that that is when Michael complained, first to Nancy Rossell, and later to Kuypers. (R. 1247; 1917).

counsel, (R. 2047), and a page later the court ordered him to sit down without asking if he had further grounds, hearing argument from counsel on his behalf, or ruling on the motion. (R. 2048).

Shortly after Michael revealed to the judge his troubled history with counsel and his belief that counsel had lied to him about the consequences of the plea, the prosecutors moved for a *Nelson* hearing. During that hearing, Mr. Tanzi's somewhat vague-sounding complaint that counsel was lying to him was shown to concern advice he apparently received at one point that he could waive the guilt phase jury but not the penalty phase jury.[17] He was speaking of the jury waiver, then, when he said, **"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."** This is further evidence that Michael Tanzi was operating under a misapprehension on the date of

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[17] [MICHAEL TANZI]: … **We were talking about the plea, some type of plea, and it had to do with, it had to do with – the plea had to do with something about a jury, had something to do with the jury,** whether I wanted to waive the jury or not or whether I could waive the jury or not for the guilt phase. Mr. Kuypers last Tuesday, this past Tuesday, told me that we hadn't discussed it, but we had discussed it but not in depth. He sent me a memo saying I would be able to waive the jury part of the guilt phase, but I wouldn't be able to waive the jury part of the trial of the penalty phase.

THE COURT: And [another defense attorney] told you that was a lie?

[MICHAEL TANZI]: Well, he told me on the grounds that what they were saying was not true. (R. 2065-66).

the plea.

Even setting aside the legal advice embodied in the affidavit Kuypers drafted and the affidavit of lead counsel Rossell, Kuyper's testimony that he eventually gave Michael correct legal advice could not be dispositive of Michael Tanzi's motion. **The controlling question is whether or not Michael Tanzi misunderstood**. *See, e.g., Elias v. State*, 531 So. 2d 418, 419-20 (Fla. 4th DCA 1988) (reversing denial of 3.170(f) motion where defense attorney, state, and judge were under mistaken impression defendant understood sentence). *Costello v. State*, 260 So. 2d 198, 201 (Fla. 1972) (in reversing denial of 3.170(l) motion, focusing on importance of psychological effect on defendant of counsel's statements). As the preceding discussion of the facts shows, Mr. Kuypers' claims are not incompatible with Michael Tanzi's misunderstanding. Just as Ms. Rossell felt the attorneys expressed confidence where Kuypers felt he did not, Michael Tanzi took away a sense of certainty. This is not difficult to understand in the context of the way the plea was presented in the preceding months, the way the plea was entered on January 31, 2003, or Mr. Tanzi's expressed confusion the same day. It makes all the more sense in light of the erroneously excluded testimony of Dr. Koziol.

The state may argue that decisions granting relief under Rule 3.170(f) on the grounds of misapprehension or misunderstanding have generally involved claims where counsel directly supports the claim of miscommunication, *see, e.g., Soto v.*

*State*, 780 So. 2d 168, 170 (Fla. 2nd DCA 2001) (defendant's testimony supported by attorney's notes), or where the defendant's claim is entirely undisputed in the record, *see, e.g., Graham v. State*, 779 So. 2d 604, 605 (Fla. 2d DCA 2001) (defendant entitled to withdraw his plea based on counsel's mistaken advice that his photo would not be placed on the Internet); *Elias v. State*, 531 So. 2d 418 (Fla. 4th DCA 1988). This argument would do nothing, however, to put Mr. Tanzi's entitlement to withdraw his plea into question. Initially, as noted above, Kuypers' testimony does not preclude the claimed misapprehension, in light of the record. Moreover, the affidavit of Nancy Rossell does lend support to Mr. Tanzi's testimony.

More importantly, such an argument would reduce to an argument to eliminate the more generous standard for withdrawal of pleas before sentencing under Rule 3.170(f). Each of these cases involve pleas that were involuntary, and subject to withdrawal after sentencing under Rule 3.170(l) or indeed Rule 3.850. *See Costello v. State*, 260 So. 2d 198, 201 (Fla. 1972) (plea in capital case subject to withdrawal under Rule 3.170(l) based on promise of leniency conveyed by defense counsel); *Graham*, 779 So. 2d at 605 (plea based on deficient advice about even collateral matters could be involuntary);[18] *Elias*, 531 So. 2d at 418 ("Since the

[18] Generally, mistaken advice by counsel concerning a collateral consequence of the plea may constitute ineffective assistance of counsel. *See, e.g., Leroux v. State*, 689 So. 2d 235 (Fla. 1997) (misadvice concerning eligibility for gain time); *Sallato*

defendant misunderstood the nature and scope of substantial assistance agreement as well as the length of the sentence, his guilty plea was not voluntarily made.").

Mr. Tanzi is required to show good cause, not proof of incompetence, ineffective counsel, or an involuntary plea. It is plain enough that if Mr. Kuypers had agreed that his advice might have misled Michael Tanzi to believe the jury would be waived as a consequence of the plea, the motion would be granted under any standard. Michael Tanzi has made a credible claim that he misapprehended the consequences of his plea. He has produced evidence to support this claim. The record of events leading up to the plea and on the day of the plea support the claimed misunderstanding. The proffered testimony of Dr. Koziol, moreover, demonstrates that this misunderstanding is consistent with Michael Tanzi's diagnosed mental weakness. Mr. Tanzi submits that if Rule 3.170(f) is truly to be liberally construed in favor of the defendant, a motion to withdraw a plea made within hours of its entry and corroborated by proof in a capital case must be granted. A system that truly favor trials on the merits cannot accept a different result.

### D. The Trial Court Relied On Factual Errors To Reach Its Conclusions, And Ignored Available Evidence.

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*v. State*, 519 So. 2d 605 (Fla. 1988); *Roberti v. State*, 782 So. 2d 919 (Fla. 2d DCA 2001). An open question remains as to whether this general rule applies to misadvice concerning future sentencing consequences of the plea. *See Bates v. State*, 887 So. 2d 1214, 1218-1224 (Fla. 2004) (concurring opinions of Pariente, C.J., Well, J., and Cantero, J.).

The trial court's order relies on crucial misstatements of fact to reach its central conclusion. The order incorrectly claims that Mr. Kuypers testified he told Michael Tanzi that any prediction he made concerning the waiver would be "pure speculation." In fact, the attorney merely testified he refrained from offering an opinion. (R. 2402). **More importantly, the order inaccurately states that Michael Tanzi testified he did not believe his attorneys said or implied the jury would be waived.** In fact, in the portion of the State's cross-examination to which the court refers, Mr. Tanzi stated he did not remember the precise words Mr. Kuypers used. (R. 2368). He then testified:

> [Prosecutor]: … you have no specific recollection what Mr. Kuypers may have told you?
>
> [Michael Tanzi]: His body language, his expressions of confidence, his belief that Judge Payne would grant the jury waiver, that was my understanding what Mr. Kuypers –
>
> [Prosecutor]: And that's all you have to offer … (R. 2369).

The court directly relied on both these errors in reaching its central conclusion. The order states:

> **Counsel testified that he told the Defendant that any such opinion** [as to whether the Court would grant the requested waiver] **would be pure speculation on his part.** He knew with certainty that a waiver of the penalty phase jury was entirely within the discretion of the presiding judge. In fact, Counsel testified that he researched the law on the subject the day before the Defendant entered his plea.
>
> In his own testimony, the Defendant admitted that Counsel **never advised him directly or indirectly that his guilty plea would likely**

> **result in the Court granting his motion to waive.** The Defendant testified that he had arrived at this conclusion on his own based on Counsel's "body language." **Consequently**, the Court finds that 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) (e.s.). This "trial strategy" conclusion forms the basis of the Court's ruling against Michael Tanzi. It is, however, based on fiction and entitled to no deference from this Court. *See State v. Novarro*, 464 So. 2d 137, 140 (Fla. 3d DCA 1984) (en banc) (holding in review of motion to suppress, that appellate court need not accept trial court's findings of fact where the evidence does not support those findings).

The Court's order also ignores key evidence presented by the defense: lead counsel Nancy Rossell's affidavit. Though the court received this affidavit in evidence, the order simply ignores the inconsistency between her account and Kuypers' of the advice they had given to Michael. Unlike Mr. Kuypers, lead counsel Rossell believed the attorneys "expressed confidence" the judge would accept the waiver. (R. 2132). The simple fact that Mr. Kuypers and Ms. Rossell could have such divergent understandings their advice to Michael Tanzi is powerful evidence that Michael himself misunderstood the relationship between the plea and the jury waiver. The trial court's order, however, simply makes no attempt to weigh Ms. Rossell's evidence.

### E. The Trial Court Erred In Excluding The Relevent Expert

**Testimony Concerning Michael Tanzi's Mental Weakness.**

The trial court likewise failed to consider the testimony of a neuropsychologist which bore on the issue of Michael's misapprehension. Apparently believing that Michael Tanzi must establish that he was incompetent in order to withdraw his plea, the court mischaracterized the proffered testimony of Dr. Leonard F. Koziol as an attempt to relitigate competency and excluded it as irrelevant. (R. 2303-04; 2324-25). The court ignored the fact that this testimony was directed toward the standard for withdrawal under Rule 3.170(f), and would demonstrate that Michael Tanzi operated under a mental weakness that caused his misapprehension of the relationship between the jury waiver and his guilty plea. The trial court thus prohibited the defense from presenting evidence relevant to establish good cause pursuant to Rule 3.170(f), in violation of Michael Tanzi's right to due process of law under the state and federal constitutions. *See Shield v. State*, 744 So. 2d 564, 565 (Fla. 1st DCA 1999) (fundamental due process required full hearing and psychological evaluation on defendant's Rule 3.170(f) motion); *Sanders v. State*, 662 So. 2d 1372, 1374 (Fla. 1st DCA 1995) (on rule 3.170(f) motion, defendant entitled to present testimony in support of her contentions); *accord Ragoobar v. State*, 893 So. 2d 647, 648 (Fla. 4th DCA 2005) ("When a defendant files a facially sufficient [Rule 3.170(l)] motion to withdraw a plea, due process requires the court to hold an evidentiary hearing unless the record

conclusively shows the defendant is entitled to no relief."); *Snodgrass v. State*, 837 So. 2d 507, 509 (Fla. 4th DCA 2003) (same).

Furthermore, under Florida's evidence code, expert testimony is admissible whenever it "will assist the trier of fact in understanding the evidence or in determining a fact in issue …" § 90.702, Fla. Stat. (2002); *see Angrand v. Key*, 657 So. 2d 1146, 1948 (Fla. 1995). The evidence code particularly favors the admission of expert testimony "where an issue is hotly contested at trial and where the testimony is not merely cumulative but is critical in helping the [factfinder] resolve the factual issues." *Barfield v. State*, 880 So. 2d 768, 770 (Fla. 2d DCA 2004).

Dr. Koziol's testimony was indeed critical to an understanding of the issues before the court: Whether Michael Tanzi entered his plea as a result of "***mental weakness*, mistake, surprise, misapprehension**, fear, promise, or ***other circumstances affecting his rights***." Dr. Koziol's testimony went directly to the question of mental weakness: Dr. Koziol found that Mr. Tanzi suffered from a "major disturbance in attention," and, consistent with his history, continues to meet the diagnosis for Attention-Deficit Hyperactivity Disorder. (R. 2449). His testimony showed that: "Mr. Tanzi was unable to consistently register the same range of information as you would expect of nonimpaired individuals within the general population," and that Michael Tanzi is unable "to not respond or not act on

information that was of a distracting nature or not essential to the situation." (R. 2449). Dr. Koziol concluded:

> I believe that his comprehension of situations is often superficial, lacking in detail, lacking in completeness; that he makes decisions on the basis of what he finds to be the most attractive possibility at the time, in terms of his own needs, without considering the relevance and consequences of alternative information.

(R. 2450). The doctor specifically testified that Michael Tanzi's misunderstanding of the connection between his guilty plea and the jury waiver was consistent with these deficits in attention and impulsivity. (R. 2450-51). Dr. Koziol's testimony established a mental weakness relevant to the only question at the hearing on the motion to withdraw the plea: Whether there was good cause to support the motion.

Dr. Koziol's testimony shed light on how it was possible for Mr. Tanzi to believe that he was getting the jury waiver in exchange for his plea, despite William Kuypers's claim that he never even said it was likely the judge would accept the waiver. As noted above, Michael Tanzi's understanding of the plea likely would be superficial and lacking in detail. At the same time, he would tend to make his decision based on what his lawyers portrayed as the most attractive possibility, "without considering the relevance and consequences of alternative information." There can be no doubt that the defense attorneys told Mr. Tanzi a plea of guilty followed by a jury waiver was the most attractive possibility: Even William Kuypers agreed that he had told him that was the best option. (R. 2450,

2399-400, 2408-09).

More important still was Dr. Koziol's testimony concerning what would be necessary to overcome Michael Tanzi's attentional deficits – because the evidence showed it did not happen. Dr. Koziol explained that in order to make sure that Mr. Tanzi properly understood the connection between the guilty plea and the jury waiver – and the possibility of negative outcomes – it would be necessary that he be carefully directed to the negative possibilities, (R. 2453). In order to ensure that Michael Tanzi truly understood the negative possibility the jury would not be waived, it would be necessary to ask him questions about his understanding of the possible outcomes, and particularly the possibility the jury waiver might not be accepted. (R. 2452-53).

This is, of course, precisely what no one did. While, as noted, there is record evidence that the attorneys took care to ensure that Michael Tanzi understood the other consequences of his guilty plea there was no evidence of a careful exploration of Mr. Tanzi's understanding of the connection between the guilty plea and the jury waiver. Of course, counsel did not even research the law governing the penalty phase jury waiver until January 29, 2003, just two days before the entry of the plea. (R. 2269; 2422-23). The standard written change of plea form, though it reviews many of the rights affected by a guilty plea, does not address the jury waiver. (R. 2254-56). The affidavit prepared by Mr. Kuypers,

written specifically to address both the jury waiver and the guilty plea, **omits any indication that the judge is actually free to reject the jury waiver**. (R. 2257-60). In the context of the affidavit, the penalty phase jury is one of many "rights" which Mr. Tanzi wishes to "waive, or give up" in connection with the plea." (R. 2258).

Michael Tanzi's plea colloquy itself did nothing to ensure that Michael Tanzi understood that it was still possible for the Court to reject the jury waiver, (R. 1886-1902), because defense counsel deliberately concealed the crucial importance of the jury waiver in Michael Tanzi's decision to change his plea (and then lied about it).[19] Consequently, while the trial court asked Michael if he understood that he was waiving his trial rights, and made certain he knew he could still be sentenced to death, it did not ask him if he understood the court could reject the jury waiver and force him to proceed before a jury.

Not only was the trial court unable to ensure that Michael's plea was not the result of mistake, there was no evidence that Kuypers carefully drew Michael's

[19] Nothing in the record explains the attorneys' bizarre strategy of concealing Michael's desire for a jury waiver from the judge. While they hoped to surprise the prosecution, they could have just as easily achieved this surprise by announcing the jury waiver together with the plea. In this way, they might well have gotten the court's decision on the waiver before committing their client to a guilty plea in a death penalty case. Had the court refused to rule on the waiver until after the change of plea was complete, this would at least have ensured that the court knew what the defense hoped to obtain in exchange for the guilty plea, and that Michael Tanzi entered his plea knowing he might not receive it. As it was, the defense only ensured that their client would be surprised.

attention to the "potentially negative possibility" that the jury waiver might be rejected. Although the state was well aware of what Dr. Koziol's testimony would be, it elicited no testimony from Kuypers that he carefully questioned Michael Tanzi concerning his understanding of the possibility that the judge could reject the jury waiver. Instead, Kuypers testified that he gave Michael Tanzi correct advice, and Michael "appeared to" understand, and that "I didn't get any indication that he didn't understand it." (R. 2401). This is, however, precisely the scenario Dr. Koziol's testimony would have warned the court to treat with concern – had the judge ever heard it.

All of the decisions on which the court relied in explaining its decision to exclude Dr. Koziol's testimony involve postconviction challenges to competency, not presentence motions to withdraw pleas. (R. 2303-04). The principal case on which the court relies, *Porter v. State*, 788 So.2d 917, 927 (Fla. 2001), held Porter was not entitled to an evidentiary hearing on his competency at the time of his plea, where he had previously been found competent, but now had been evaluated by an expert who said he was not. 788 So. 2d at 926-27. While this is undoubtedly the rule in postconviction cases brought under Rules 3.850 and 3.851, it is irrelevant to the admissibility of expert testimony relevant to the issues in dispute in a 3.170(f) motion, including: mental weakness, mistake, surprise, and

misapprehension.[20]

Florida courts have never adopted the view that expert testimony concerning a defendant's mental state is only admissible if it establishes incompetence. *See Hickson v. State*, 630 So. 2d 172, 174 (Fla. 1993) (admitting expert testimony on battered spouse syndrome), *quoting Hawthorne v. State*, 408 So. 2d 801, 807 (Fla. 1st DCA 1982), *abrogated on other grounds, Rogers v. State*, 616 So. 2d 1098 (Fla. 1st DCA 1993), *disapproved on other grounds Hickson*, 630 So. 2d at 175 n. 5; *T.S.D. v. State*, 741 So. 2d 1142 (Fla. 3d DCA), *motion for rehearing and rehearing en banc denied* 742 So. 2d 536 (Fla. 3d DCA 1993) (discussing expert testimony on capacity to waive *Miranda* rights); *Fields v. State*, 402 So. 2d 46 (Fla. 1st DCA 1981).

Indeed, one of Florida's most-cited Rule 3.170(f) decisions involved testimony from the defendant's psychologist concerning mental weakness. *See Yesnes v. State*, 440 So. 2d 628 (Fla. 1st DCA 1983). Yesnes moved to withdraw his plea, alleging that he had been under the influence of phenobarbitol and had been coerced by his attorney. *Yesnes*, 440 So. 2d at 633. The prosecution called Yesnes' psychologist, who saw Yesnes immediately after the entry of the plea. 440 So. 2d at 634. He related that Yesnes had said he was taking phenobarbitol

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[20] The court accurately describes *Godinez v. Moran*, 509 U.S. 389 (1993) as holding that the standard of competency for trial and plea is the same. However, it the case does not apply here, where competency is not the issue. The court's reliance on *Agan v. State*, 503 So. 2d 1254 (Fla. 1987), is also inapposite.

and that he seemed sedated, his behavior and attitude toward the case having markedly changed. Asked by the court if Yesnes would have been impaired in his ability to understand what was asked of him during the plea, the psychologist replied, "It is hard to say. It is hard to say." *Id.* The district court wrote that the defendant's testimony "was sufficiently corroborated by the doctor, under questioning by the prosecutor, to establish that defendant was in a state of mental weakness at the time he agreed to plea bargain and announced his plea to the court." *Id.* The court concluded, "The uncontroverted testimony before the court below was no doubt sufficient to warrant allowing defendant to withdraw the nolo contendere plea."[21] *Id.*

Here, to paraphrase *Hickson* and *Hawthorne*, it was precisely because the judge would not understand why Michael Tanzi would remain under a misapprehension concerning the jury waiver that the expert testimony would have aided him in evaluating the case. *See Hickson*, 630 So. 2d at 174 *quoting Hawthorne*, 408 So. 2d at 807. Deprived of this assistance, the trial judge was unable to decide the true issues before it. The trial court erred in excluding relevant expert testimony, and its judgment must be reversed.

### F. Mr. Tanzi's Plea Offends Federal and State Due Process

[21] However, because Yesnes was forced to proceed without the effective assistance of counsel at the hearing on the motion to withdraw his plea, the district court remanded for a fair hearing without deciding whether the trial court abused its discretion. *Yesnes*, 440 So. 2d 634-35.

**Clauses and Rule 3.170(l).**

The due process clauses of the federal and state constitutions require an affirmative record showing that an accused's guilty plea is knowing and voluntary. *Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969); *Koenig v. State*, 597 So, 2d 256, 258 (Fla. 1992). "What is at stake for an accused facing death . . . demands the utmost [judicial] solicitude" mandating the trial court to "canvass" the matter "to make sure he has a full understanding of what the plea connotes and of its consequences." *Boykin*, 395 U.S. at 243. In this case, due to defense counsel's concealment from the judge of the essential basis for Mr. Tanzi's guilty plea - his ability to waive the second phase jury - the judge was totally disabled from performing his crucial due process duty of inquiring into Mr. Tanzi's understanding of this pivotal consideration. Concomittantly, Mr. Tanzi's plea to capital murder violates the federal and state due process clauses and the more rigid standards of Rule 3.170(l) because his court-appointed attorneys gave him a "reasonable basis" for believing that by pleading guilty he could lawfully exercise his right to waive the second phase jury. *See Costello. State*, 160 So. 2d 198, 200-02 (Fla. 1972). All the evidence discussed above demonstrates that Michael Tanzi's plea was not knowingly and voluntarily made.

**G. This Court Should Remand With Directions To Permit Michael Tanzi To Withdraw His Plea.**

Because the trial court erred in denying the motion to withdraw the plea, the

Court should reverse and remand with instructions to grant the motion and reinstate the plea of not guilty. *See, e.g., Lee v. State*, 875 So. 2d 765, 767 (Fla. 2d DCA 2004). In the alternative, the Court must remand for a new hearing at which the court may hear the improperly excluded testimony of Dr. Koziol. Should the court remand for a new hearing, it should vacate the sentence and remand with directions to hold a true presentencing hearing. *See Gunn v. State*, 643 So. 2d 677 (Fla. 4th DCA 1994) (where defendant was denied meaningful opportunity to be heard on Rule 3.170(f) motion, vacating sentences and reversing for proper hearing on motion). Mr. Tanzi submits this is the only way to ensure that his motion is judged under the standard of Rule 3.170(f).

## II. THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTION TO MAKE LACK OF REMORSE A FEATURE OF ITS PENALTY-PHASE PRESENTATION AND ARGUMENT.

"[L]ack of remorse is a nonstatutory aggravating circumstance and cannot be considered in a capital sentencing." *Shellito v. State*, 701 So. 2d 837, 842 (Fla. 1997). The rule in Florida is that "[I]t is error to consider lack of remorse for **any purpose** in capital sentencing." *Colina v. State*, 570 So. 2d 929, 933 (Fla. 1990) (e.s.), *quoting Trawick v. State*, 473 So. 2d 1235, 1240 (Fla. 1985).

The prosecution nevertheless made lack of remorse a feature of its rebuttal presentation. Over defense objection, the state repeatedly introduced evidence that Michael Tanzi was lacking in remorse. (T. 1459, 1463, 1464, 1468, 1492-93,

1576). Then, after assuring the defense it would not do so, the prosecution proceeded to raise this lack of remorse in closing argument, again over defense objection. (T. 1669, 1724-25, 1733-34). The state's repeated invocation of lack of remorse cannot be said to be harmless beyond a reasonable doubt, and the sentence must be reversed. The error in permitting lack of remorse testimony and comments deprived Mr. Tanzi of a fair penalty phase, and allowed his sentence to be decided on the basis of factors outside Florida's scheme for channeling capital sentencing, in violation article I, sections 9 and 17 of the Florida Constitution and the sixth, eighth and fourteenth amendments to the United States Constitution.

The prosecution repeatedly used its psychologists to tell the jury that Michael Tanzi lacked remorse. The opening salvo came during the testimony of Dr. Jane Ansley. (T. 1459-61). The prosecutor read from a document concerning Michael Tanzi's time at Pembroke Hospital:

> [Prosecutor:] This statement in the report by the doctor who authored this for Pembroke, Dr. John Sheff, it says, Reports by Dr. Beroski (Phonetic) indicated that Michael tended to exhibit little to no remorse or guilt for his misbehavior in the community and talked about his misbehavior in a very matter-of-fact manner.
>
> Would you explain to the jury how that works into a conduct disorder.

(R. 1459). The defense immediately objected that the state was attempting to get lack of remorse "in by the back door." (R. 1459. The prosecutors maintained that evidence that Michael Tanzi lacked remorse was admissible because it is one of the

criteria for conduct disorder and antisocial personality disorder. (T. 1460). The court overruled the objection. (T. 1461).

The prosecution promptly returned to "that quote by Dr. Beroski that indicated that Michael tended to exhibit little to no remorse for his misbehavior in the community and talk about his misbehaviors in a very matter-of-fact-matter." (T. 1461). Then, after, having the doctor list lack of remorse as a criterion for antisocial personality disorder, (T. 1463), the prosecutor asked once again whether "lack of remorse" was evident "at a very early stage." The doctor answered "yes." (T. 1464).

It did not take long for the state to find yet another opportunity to reinforce its point. When Dr. Ansley testified that personality disorders are necessarily dysfunctional, the prosecutor asked whether the dysfunction included "no remorse." (T. 1468). Later, the state had Dr. Ansley read another excerpt from Mr. Tanzi's treatment records stating that Michael described his history of problems, "without suggestion of any remorse, any guilt, et cetera." (T. 1492-93).

The state returned to its theme during the testimony of Dr. Edward Sczechowicz, in which he identified "lack of remorse" as characteristic of Michael's "behaviors." (T. 1576).

During the charge conference, the defense first raised the possibility of there being an instruction to the effect that lack of remorse was not an aggravator. (T.

1668). The prosecution responded that lack of remorse would not be argued, saying "We know better." (T. 1669). The court ultimately agreed to give a short instruction that lack of remorse was not an aggravator. (T. 1675).

The state apparently did *not* "know better" after all. In closing argument, the prosecutor said:

> … Going back to Dr. Golder, this description of Michael Tanzi. This is a young man with some interest in others, but it appears to be largely based on a narcissistic concern as to how they may be able to meet his own needs. Prophetic words. Very, very prophetic words. August 8, 1991, ladies and gentlemen, Dr. Golder, Pembroke Hospital, discharge summary.
>
> Dr. Horowitz, reports by Dr. Horowitz indicated that Michael tended to exhibit little to no remorse or guilt for his misbehavior in the community and talked about his misbehavior in a very matter of fact (T. 1724-25).

Defense counsel promptly requested a sidebar and objected. The judge concluded the argument was not improper because lack of remorse was "one of the ways they conclude that he qualifies as a narcissistic personality," and noted he would be giving the instruction that lack of remorse was not an aggravator. (T. 1728). Not satisfied, the prosecutor soon reminded the jury of Michael Tanzi's lack of remorse one last time. (T. 1733-34).

His proper objections overruled, defense counsel was forced to lamely argue "people show remorse in different ways." (T. 1779). Before it retired, the court instructed the jury, "Lack of remorse is not an aggravating factor and you are not

to consider it as such."

The state plainly thought it had found a clever way to inject lack of remorse into Michael Tanzi's penalty phase: The state would not expressly argue it as an aggravator, but it would be forced to discuss it as one of the diagnostic criteria for antisocial personality disorder. This Court, however, has already held that a diagnosis of antisocial personality does not open the door to lack of remorse. In *Atwater v. State*, 626 So. 2d 1325, 1328 (Fla. 1993), the Court wrote:

> Atwater argues that the trial court erred by allowing evidence of lack of remorse before the jury. On direct examination, Dr. Merin discussed Atwater's antisocial personality. We agree that the court erred in permitting the State on cross-examination to ask him whether persons with antisocial personality showed remorse.

626 So. 2d at 1328; *see also Smithers v. State*, 826 So. 2d 916, 930-31 (Fla. 2002) (lack of remorse cannot be considered in connection with antisocial personality trait, but concluding reference was of "minor consequence, **especially in light of the fact that the State did not mention lack of remorse in its closing argument**") (e.s.).

The instruction for jurors not to treat lack of remorse as an aggravating factor did not cure the error. The state and court appear to have believed that lack of remorse was only disfavored when argued or weighed as an extra aggravating factor in its own right. But, as noted above, "[I]t is error to consider lack of remorse for **any purpose** in capital sentencing." *Colina*, 570 So. 2d at 933 (e.s.),

*quoting Trawick*, 473 So. 2d at 1240. The instruction, consistent with the judge and prosecutors' understanding of the law, left the jurors free to use lack of remorse in considering any of the statutory aggravators, in rejecting mitigation, or in the weighing process.

It is the State's burden to demonstrate beyond a reasonable doubt that the error in repeatedly invoking lack of remorse did not contribute to the verdict. *Colina* 570 So. 2d at 933; *Goodwin v. State*, 751 So. 2d 537, 542-46 (Fla. 1999); *DiGuilio v. State*, 491 So. 2d 1129, 1139 (Fla. 1986). Where the Court has found "lack of remorse" error to be harmless, the remarks have been isolated. *See Floyd v. State*, 808 So. 2d 175, 185 (Fla. 2002) (unobjected to isolated reference to lack of remorse in closing harmless); *Shellito*, 701 So. 2d at 842 ("brief reference to lack of remorse was of minor consequence"); *Sireci v. State*, 587 So. 2d 450, 454 (Fla. 1991) (single reference by witness).

The references to lack of remorse here were anything but isolated, and the prosecutor both reemphasized and played upon them in his closing argument. During testimony, the state and its witnesses mentioned lack of remorse again, (T. 1459), and again, (T. 1461), and again, (T. 1463), and again, (T. 1464), and again, (T. 1468), and again, (T. 1492-93), and again, (T. 1576). The prosecutor then reminded the jury of lack remorse during closing argument, in ways designed to both link that lack of remorse to the current crime and to negate mitigation.

Clearly the prosecution wanted lack of remorse to contribute to the penalty phase verdict. It cannot be said beyond a reasonable doubt that that wish was not fulfilled.

## III. THE TRIAL COURT ERRED IN RULING THAT DR. WILLIAM VICARY COULD BE IMPEACHED WITH A SPECIFIC ACT OF MISCONDUCT IN AN UNRELATED MATTER.

The trial court's order permitting the State to impeach Dr. William Vicary with unrelated California disciplinary proceedings was error. "Evidence of particular acts of misconduct cannot be introduced to impeach the credibility of a witness. The only proper inquiry into a witness' character, for impeachment purposes, goes to reputation for truth and veracity." *Farinas v. State*, 569 So. 2d 425, 429 (Fla. 1990). Impeachment by particular acts of misconduct violates sections 90.608, 90.609, and 90.610, Florida Statutes. *See Fernandez v. State*, 730 So.2d 277, 282 (Fla. 1999); *Farinas*, 569 So. 2d at 429. The evidence was not admissible for any proper purpose. This ruling had the effect of destroying the credibility of one of Michael Tanzi's most important penalty phase witnesses. The court's ruling deprived Michael of due process and a fair and reliable sentencing proceeding, in violation of his rights to due process and to be free from cruel and unusual punishment under article I, sections 9 and 17 of the Florida Constitution and the eighth and fourteenth amendments to the United States Constitution.

Before Dr. Vicary took the stand, the defense moved in limine to exclude

evidence of a 1998 California Medical Board matter in which the doctor had been given a suspended license revocation and placed on probation. (R. 1290-91; 1293-1302); (T. 1121-36). The disciplinary action arose out of Dr. Vicary's involvement in the case of Eric Menendez as both a treating and forensic psychiatrist. (R. 1295). At the direction of Eric Menendez' attorney, he rewrote his clinical notes, deleting passages the attorney believed to be damaging. (R. 1295-96). After the first trial resulted in a mistrial, the defense attorney inadvertently disclosed a copy of the unredacted notes. (R. 1296). Dr. Vicary stipulated to his discipline, completed his probation, and had his certificate restored. (R. 1301); (T. 1151).

This evidence was inadmissible. It amounted to classic improper impeachment by a specific instance of misconduct:

> We have held that evidence of particular acts of ethical misconduct cannot be introduced to impeach the credibility of a witness. The only proper inquiry into a witness's character for impeachment purposes goes to the witness's reputation for truth and veracity.

*Fernandez*, 730 So. 2d at 282. Florida courts have repeatedly held similar impeachment to be inadmissible. *See Farinas*, 569 So. 2d 428-29 (improper to cross-examine expert concerning alleged firing by municipality for unethically referring clients to his private practice); *Tormey v. Trout*, 748 So. 2d 303, 304-05 (Fla. 4th DCA 1999) (where expert testified to his extensive expertise and experience in MRI interpretation, improper to impeach expert with discipline by department of medicine for missing an interpretation on an MRI); *King v. Byrd*,

716 So. 2d 831, 834-35 (Fla. 4th DCA 1998) (error to permit impeachment concerning medical grievance which resulted in probation).

That Dr. Vicary's discipline arose from misconduct in court proceedings does nothing to alter the general rule that specific acts of misconduct are inadmissible to impeach. Even the fact that a witness lied under oath in an unrelated matter is collateral and inadmissible as impeachment. *See Strasser v. Yalamanchi*, 783 So. 2d 1087 (Fla. 4th DCA 2001).

The state maintained that the disciplinary action and misconduct were evidence of bias, and the trial court agreed. (T. 1124; 1126-31; 1134). In this, the trial court abused its discretion.[22] "The underlying bias, prejudice, or interest, must be one that is **relevant to the witnesses or parties in the case being litigated**." Charles W. Ehrhardt, Florida Evidence § 608.5, at 516 (2005 ed.) (e.s.); *see O'Neil v. Gilbert*, 625 So. 2d 982, 983 (Fla. 3d DCA 1993) (error to admit "bias" testimony that witness was illegal alien on theory that she would alter her testimony for fear that defendant would report where there was no basis in record to support that claimed fear of defendant). The state has not demonstrated any bias with respect to the witnesses or parties in Mr. Tanzi's case.

*Flores v. Miami-Dade County*, 787 So. 2d 955 (Fla. 3d DCA 2001), and *Murray v. State*, 838 So. 2d 1073 (Fla. 2002), relied on by the state below, are

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[22] A trial court's admission of evidence as going to bias is reviewed for abuse of discretion. *See Morrison v. State*, 818 So. 2d 432, 447-48 (Fla. 2002).

inapposite. Each deals with a bias directly related to the case then before the court. In *Flores,* the very case in which the doctor testified and was impeached arose out of an apparent corrupt and illegal arrangement between the doctor and the attorney who brought the action to generate personal injury actions. The connection could not have been more direct. In *Murray*, prosecution expert DeGuglielmo called defense expert Warren, warned him that Murray's attorney would try to impeach DeGuglielmo and told Warren he needed to recall an earlier conversation about errors in the case. 838 So. 2d at 1083-84. This Court observed:

> This conversation would be relevant to a determination of whether DeGuglielmo was truly an unbiased expert merely reading the results of a test or was attempting to persuade Warren to testify in a manner which would support DeGuglielmo's prior testimony.

838 So. 2d at 1084. The bias evidence in *Murray* took place in the context of that case, and it was in that context that it was relevant and admissible.

Neither *Flores* or *Murray* authorizes the impeachment permitted here. Dr. Vicary's specific instance of misconduct took place with an unrelated client and an unrelated attorney, in a different state. There is nothing in the record to show that his California disciplinary matter shows any sort of bias toward Michael Tanzi. Nor was the error harmless. The improper impeachment demolished the credibility of one of only two doctors to testify in support of mitigation. It cannot be said that the jurors did not rely on the impeachment in rejecting the mitigation proffered by

the defense.[23]

## IV. THE TRIAL COURT ERRED IN ADMITTING THE CONFESSION TO SEXUAL BATTERY PURSUANT TO SECTION 92.565 WITHOUT COMPLYING WITH THE REQUIREMENTS OF THAT SECTION.

Pursuant to section 92.565, Florida Statutes, the prosecution sought an order permitting it to admit Michael Tanzi's confession to sexual battery, conceding it could not establish corpus delicti. (R. 1034-35). The trial court granted the motion. (R. 2043-44). This was error. Over defense objection, the trial court completely ignored the requirements of section 92.565. (R. 2043-44). It applied the wrong standard, failed to make the statutorily-required findings, and granted the motion in the absence of any evidence whatsoever to corroborate the reliability of the confession. The improper admission of this evidence contrary to statutory authority deprived Michael Tanzi of due process and a fair and reliable sentencing proceeding, in violation of his rights to due process and to be free from cruel and unusual punishment under article I, sections 9 and 17 of the Florida Constitution and the eighth and fourteenth amendments to the United States Constitution.

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[23] Dr. Vicary took the stand shortly after the court denied the motion in limine. (T. 1134; 1143). In an apparent attempt to "draw the sting," defense counsel attempted to address this damaging information in his direct examination. (T. 1147-52). Contrary to the state's position below, this did not waive the issue. (T. 1203). "[O]nce a trial court makes an unequivocal ruling admitting evidence over a movant's motion in limine, the movant's subsequent introduction of that evidence does not constitute a waiver of the error for appellate review." *Sheffield v. Superior Ins. Co.*, 800 So. 2d 197 (Fla. 2001).

The prosecution filed a motion seeking to admit Michael Tanzi's confession "concerning acts of sexual abuse to be introduced despite the lack of corpus delicti." (R. 1034-35). During the hearing on Michael Tanzi's motion to suppress his statements, the prosecution announced that the same testimony would serve as its presentation on the section 92.565 motion:

> And as Ms. Vogel was kind enough to remind me as well, this motion hearing was to establish also the corpus aspect for the corpus motion on the sexual battery situation, to establish that there was a trustworthiness of the confession to allow it to come in absent the corpus of sexual battery. That is relevant to one of the aggravators in the penalty phase, so it still remains a relevant issue.

(R. 1983). The only evidence before the court, then, was the testimony of Detective Frank Casanovas, (R. 1959-2011), and Sergeant Garfield Williams, (R. 2012-2019) concerning the apprehension and interrogation of Michael Tanzi, and the audio- and video-recorded statement admitted during the hearing. (R. 1981, 1986, 1990). Only the first two minutes of the videotape, and no part of the audiotapes, was published during the hearing. (R. 1991).

At the end of the hearing, the court ruled as follows:

> [Prosecutor]: Okay. Judge I had told the Court that Part of this hearing was to establish by a preponderance of the evidence the trustworthiness of the defendant's –
>
> THE COURT: It does establish a prima facie case for the confession to come into evidence. (R. 2033-44).

The defense objected that the statue required proof of corroboration by a

preponderance of the evidence, and that no corroboration had been proven. (R. 2033-44). The court replied, "Next motion." (R. 2033-44).

Section 92.565 abrogates the corpus delicti rule in cases of sexual battery and other forms of sexual abuse where the state establishes that it cannot show the existence of each element of the crime. § 92.565, Fla. Stat. (2002); *see Geiger v. State*, 907 So. 2d 668, 674 (Fla. 2d DCA 2005); *State v. Dionne*, 814 So. 2d 1087, 1091 (Fla. 5th DCA 2002). In this situation, the statute replaces the corpus delicti rule with the "trustworthiness doctrine." *Geiger*, 907 So. 2d at 674; *Dionne*, 814 So. 2d at 1091. Under the statute, the confession may be admitted in the absence of corpus delicti if, after a hearing, the judge determines the confession is trustworthy. § 92.565(2), Fla. Stat. (2002).

The statute, moreover, imposes specific requirements on the judge in making the determination of trustworthiness. It requires that the state "prove by a preponderance of evidence that there is sufficient corroborating evidence that tends to establish the trustworthiness of the statement by the defendant," and states: "The court shall make specific findings of fact, on the record, for the basis of its ruling." § 92.565(3),(4) Fla. Stat. (2002).

The trial court utterly failed to comply with section 92.565. Contrary to subsection (4), the court failed to make any findings of fact on the record to support its ruling. Contrary to subsection (3), the court employed the wrong

standard: Instead of requiring the state to establish the reliability of the confession by a preponderance of the evidence, it admitted the confessions because the prosecution had established "a prima facie case." This seems to be a reference to the requirement under the corpus delicti rule that the state independently establish prima facie evidence of each element of a crime before a confession may be admitted. *See, e.g., Chavez v. State*, 832 So. 2d 730, 762 (Fla. 2002). This burden has been interpreted as evidence "tending to show" the crime was committed. *See, e.g., State v. Kester*, 612 So. 2d 584 (Fla. 3d DCA 1992). This is a far cry from "proof by a preponderance of the evidence that there is sufficient corroborating evidence that tends to establish the trustworthiness of the statement by the defendant." Because the trial court failed to comply with the statute, the statements could not be admitted. *See B.P. v. State*, 815 So. 2d 728, 730 (Fla. 5th DCA 2002) ("However, the court failed to comply with the requirements of the statute and therefore the conviction must be reversed.").

Moreover, the state failed to establish through corroborating evidence that the statements were trustworthy. The state merely presented the statements, and brief testimony of two police officers concerning the circumstances surrounding them. While the statute permits the trial court to consider the statements in making its determination, the judge did not listen to or watch the taped statements, aside from the first two minutes of the videotape, before making his perfunctory ruling.

The statements in question involve a confession to forcing Ms. Acosta to perform oral sex. Absolutely no physical evidence was admitted to corroborate this statement, nor does any such evidence exist. The statements themselves are not even consistent.

The improperly admitted evidence was harmful in the extreme. The statement that Michael Tanzi sexually battered Ms. Acosta was a feature of the state's case. It formed the basis for the felony-murder aggravator. The state's evidence of a second sexual battery was equivocal, and could just as easily have been indicative of consensual sex prior to the abduction. The state relied on it in arguing the felony murder aggravator to the jury, and the court relied on it in finding the same aggravator. If nothing else, it significantly increased the weight attached to this aggravating circumstance. It can hardly be said beyond a reasonable doubt that the improperly admitted evidence did not contribute to the penalty phase verdict or that the court's sentencing decision would remain unchanged in the absence of a confession to sexual battery.

## V. THE TRIAL COURT ERRED IN IMPROPERLY ASSESSING THE FELONY MURDER AGGRAVATOR TWICE.

Section 921.141 makes it an aggravating circumstance that the capital felony was committed while the defendant was engaged in the commission of a specified felony. § 921.141(5)(d) (Fla. 1999). The trial court not only found this aggravator, it found it twice, treated it as two separate aggravating circumstances, and gave

both great weight. (R. 1807-09). There is no authority for this double-counting of a single aggravator, which violates Florida's capital sentencing scheme, Mr. Tanzi's rights to due process and to be free from cruel and unusual punishment under article I, sections 9 and 17 of the Florida Constitution and the eighth and fourteenth amendments to the United States Constitution.

The trial court's order is emphatic in treating the felony murder aggravator as two separate aggravators: a murder committed in the course of kidnapping and a murder in the course of sexual battery. The sentencing order states: "**The court emphasizes that the facts set out above constitute two separate aggravators**: kidnapping and sexual battery … **Both aggravating circumstances will be given great weight as a aggravating circumstances 2 and 3.**" (R. 1809) (e.s.).

There is no authority for the double-counting of a single aggravating factor under Florida's death penalty statute.[24] Section 921.141 provides an exclusive list of aggravating factors. § 921.141(5), Fla. Stat. (1999) ("Aggravating circumstances shall be limited to the following …"). The statute, including the limitation of aggravating circumstances, "is designed to limit the unbridled exercise of judicial discretion in cases where the ultimate penalty is possible." *Provence v. State*, 337 So. 2d 783, 786 (Fla. 1976). With regard to aggravating

[24] This Court reviews a trial courts finding of an aggravator to determine if the trial court applied the correct rule of law and, if so, whether competent substantial evidence supports the finding. *See Willacy v. State*, 696 So. 2d 693 (Fla. 1997).

circumstances, the trial court is charged with weighing the aggravating and mitigating circumstances and determining "that sufficient aggravating circumstances exist as enumerated in subsection (5)." § 921.141(3), Fla. Stat. (1999). Nothing in the statute authorizes the treating of a single aggravating circumstance as two separate aggravators. The rule of lenity would dictate that the statute be interpreted not to authorize this. *See* § 775.021(1), Fla. Stat. (1999).

Florida's courts have routinely treated the fact that murder was committed in the course of more than one felony as a single aggravating circumstance. Where this Court has discussed the aggravator in the presence of multiple felonies, it has treated felony murder as a unitary aggravator. *See Brown v. State*, 473 So. 2d 1260 (Fla. 1985). In *Brown*, the court found the defendant had committed the murder in the course of both a burglary and a rape. 473 So. 2d 1267. Brown contended this was improper, because he had not been found to have committed a rape. *Id.* This Court explained that this would not undermine the validity of the felony murder aggravator because:

> [T]he aggravating circumstance is adequately shown by the evidence that the murder was committed in the course of a burglary. The trial court's reference to the jury verdict and the rape may be regarded as harmless surplusage.

473 So. 2d at 1267. Plainly, the Court did not equate the existence of a second felony with a second aggravator. Instead, it treated it as additional evidence of a

single aggravating factor.[25]

The constitutionality of Florida's capital sentencing scheme depends on the fact that the statute imposes consistency in the application of the death penalty. *See Proffitt v. Florida*, 428 U.S. 242 (1976) (noting, among other things, that the trial judge must determine whether the crime was committed in the course of one of several enumerated felonies). The trial judge's double-counting of the felony murder aggravator threatens that consistency. It raises the specter that the identical crime would be more aggravated in one part of the state than another. Some judges would be free to follow the lead of the court below and multiply the felony murder aggravator, while others apply the law the way it has been applied since its

[25] *See also Stevens v. State*, 419 So. 2d 1058, 1063-64 (Fla. 1982) ("The trial judge found that the murder was committed in the commission of or flight after committing rape and kidnapping, **an aggravating circumstance** under section 921.145(5)(d), Florida Statutes (1977)") (e.s.); *Ruffin v. State*, 397 So.2d 277, 282 (Fla. 1981) (treating as "an aggravating circumstance" the fact that the murder was committed in the course of a kidnapping and a robbery); *accord Perez v. State*, 30 Fla. L. Weekly S729 (Fla. Oct. 27, 2005) (murder while engaged in robbery or burglary of dwelling treated as a single aggravating factor); *Geralds v. State*, 674 So. 2d 96 (Fla. 1996) (same); *Power v. State*, 605 So. 2d 856 (Fla. 1992) (homicide committed while the defendant was engaged in the commission of the crimes of sexual battery, burglary, and kidnapping treated as a single aggravating factor); *Robinson v. State*, 574 So. 2d 108 (Fla. 1991) (murder committed in course of sexual battery and kidnapping treated as single aggravating factor); *Amazon v. State*, 487 So. 2d 8, 12 (Fla. 1986) (murder committed during a rape, burglary, kidnapping treated as a single aggravating factor); *Justus v. State*, 438 So. 2d 358, 369 (Fla. 1983) (murder committed in connection with the crimes of robbery, rape, and kidnapping treated as a single aggravating factor); *Lightbourne v. State*, 438 So. 2d 380, 390 (Fla. 1983) (burglary and sexual battery treated as single aggravating factor).

adoption. Moreover, there is no reason the multiplication of a single aggravator would stop with felony murder. Courts might double- or triple-count section 921.141(5)(a), where a defendant is on parole for multiple felonies, for example. In any event, the arbitrary double-counting of a single aggravating factor renders Michael Tanzi's death sentence unreliable and violates his rights under article I, sections 9 and 17 of the Florida Constitution and the eighth and fourteenth amendments to the United States Constitution.

## VI. THE TRIAL COURT ERRED IN FAILING TO CONSIDER AND FIND AND WEIGH VALID MITIGATING EVIDENCE, AND ABUSED ITS DISCRETION IN ITS BOILERPLATE TREATMENT OF WEIGHTY MITIGATING CIRCUMSTANCES.

The trial court failed to find, consider and give appropriate weight to proposed mitigating circumstances. This Court has explained:

> [W]hen a court is confronted with a factor that is proposed as a mitigating circumstance, the court first must determine whether the factor is mitigating in nature. A factor is mitigating in nature if it falls within a statutory category or otherwise meets the definition of a mitigating circumstance. The court next must determine whether the factor is mitigating under the facts in the case at hand. If a proposed factor falls within a statutory category, it necessarily is mitigating in any case in which it is present. If a factor does not fall within a statutory category but nevertheless meets the definition of mitigating circumstance, it must be shown to be mitigating in each case, not merely present. If a proposed factor is mitigating under the facts in the case at hand, it must be accorded some weight; the amount of weight is within the trial court's discretion.

*Ford v. State*, 802 So. 2d 1121, 1134-35 (Fla. 2001) (footnotes omitted). Here, the trial court failed to consider and find valid mitigating circumstances, and failed to

accord weight to other mitigators. Perhaps most seriously, the court made no effort to accord each mitigating circumstance its unique weight. Instead, the court gave each mitigating factor – whether it be Michael Tanzi's tragic history of childhood sexual abuse, or the fact that he attempted to join the military – the same rote value of "some weight." These errors violated Michael Tanzi's constitutional rights under article I, sections 9 and 17 of the Florida Constitution and the eighth and fourteenth amendments to the United States Constitution

### A. The Trial Court Erred In Finding That Michael Tanzi's History Of Drug Abuse And Dependence Was Not A Mitigating Factor.

The trial court found that Michael Tanzi had a history of drug abuse and dependence. (R. 1824). The court did not find this to be a mitigating circumstance, however, based on its conclusion that Michael's drug abuse was in remission at the time of the offense and that it "did not contribute to this capital crime." (R. 1825). As a matter of law,[26] there is no requirement that a circumstance be shown to have a causal connection to a crime before it can be considered mitigating. A mitigating circumstance is "(A)ny aspect of a defendant's character or record and any of the circumstances of the offense that reasonably may serve as a basis for imposing a sentence less than death."

[26] "Whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by this Court." *Ford*, 802 So.2d at 1135, *quoting Blanco v. State*, 706 So. 2d 7, 10 (Fla. 1997).

*Campbell v. State*, 571 So. 2d 415, 419 (Fla. 1991), *receded from on other grounds, Trease v. State*, 786 So. 2d 1050 (Fla. 2000). The trial court's causal limitation on mitigation violates not only Florida law, but the eighth and fourteenth amendments to the United States Constitution. *See Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978).

The trial court's conclusion that Michael Tanzi's substance dependence was in remission is, moreover, contrary to the evidence. The court bases this conclusion on the fact that Michael did not buy drugs or alcohol when he stopped in Florida City with the recently-abducted Janet Acosta still in the car. The court can point to no authority that shows that any time a person with a lengthy history of drug abuse and dependence purchases something other than drugs, they are necessarily in remission. Indeed, both the state experts diagnosed Michael with polysubstance abuse. (T. 1509; 1572).

### B. The Trial Court Erred In Ruling That The Availability of Life Without The Possibility of Parole As An Alternative Sentence Is Not a Mitigating Factor.

The court rejected the defense-proposed mitigating circumstance that "Society can be protected by a sentence of life imprisonment without parole." The court concluded this was not a mitigating circumstance, stating:

> This court is of the opinion that the legislature did not intend to create an automatic mitigator when enacting the law providing for the sentence of life without the possibility of parole in capital cases.

(R. 1829). This Court has held to the contrary, however. In *Ford*, the Court held that the availability of life without parole is a mitigating factor because it relates to the circumstances of the offense and reasonably may serve as a basis for imposing a sentence less than death. 802 So. 2d at 1136.

### C. The Trial Court Erred In Ruling That The Availabilty of Life Without The Possibility of Parole As An Alternative Sentence Is Not a Mitigating Factor.

The trial court abused its discretion in failing to meaningfully weigh mitigating factors. Although the amount of weight assigned to a mitigator is a matter for the trial court's discretion, *Ford*, 802 So. 2d 1135, the failure to exercise that discretion by instead assigning the same arbitrary weight to each mitigating factor, is by definition an abuse of discretion because it is, "**arbitrary**, fanciful, or unreasonable." *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980) (e.s.), *quoting Delno v. Market Street Railway Company*, 124 F.2d 965, 967 (9th Cir. 1942). In *Canakaris*, this Court explained:

> The trial court's discretionary power is subject only to the test of reasonableness, but that test requires a determination of whether there is logic and justification for the result. The trial courts' discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner.

382 So. 2d at 1203.

There can be no logic or justification for the weights assigned to the mitigating factors in this case; they are purely arbitrary. For each mitigating factor,

the court assigned, "some weight."[27] The partial exception is Michael Tanzi's mental health problems, to which the court assigned some *small* weight. No reasonable exercise of discretion could look at the facts that (1) Michael Tanzi was sexually abused and raped from the ages of 8 to 13, and (2) Michael unsuccessfully attempted to join the military, and conclude that these factors weigh equally in mitigation. No non-arbitrary evaluation of the penalty-phase evidence could conclude that the four years of Michael's adolescence spent in residential mental health programs, and the fact that he enjoys reading, are equally mitigating. The trial court abused its discretion in doing so.

## VII. SECTION 921.141 IS UNCONSTITUTIONAL UNDER *RING* BECAUSE IT REQUIRES THE TRIAL JUDGE TO MAKE THE FINDINGS NECESSARY TO IMPOSE A DEATH SENTENCE.

In *Ring v. Arizona*, 536 U.S. 584 (2002), the Supreme Court held that Arizona's capital sentencing statute violated the Sixth Amendment because it allocated to the judge rather than the jury the responsibility of making the findings

[27] With regard to mitigating circumstances, the court found that Michael Tanzi suffered from mental illnesses or personality disorders (some small weight), he had been committed to mental health facilities as a child and adolescent (some weight), his behavior is positively affected by the administration of psychotropic drugs (some weight), he lost his father to cancer at the age of 8 (some weight), he was repeatedly sexually abused by older males as a child and adolescent (some weight); he attempted to join the military twice (some weight), he cooperated with the police, confessed, and led police to the body (some weight), he assisted illiterate inmates by writing letters for them (some weight), he is an avid reader and enjoys discussing what he learns from books (some weight), and he has a loving relationship with his mother, aunts, uncles, cousins, and grandparents (some weight). (R. 1824; 1823; 1826; 1827-28; 1829-30).

of fact necessary to impose a sentence of death. In so holding, the Court overruled *Walton v. Arizona*, 497 U.S. 639 (1990), "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring*, 536 U.S. at 609.

Florida's capital sentencing statute suffers from the identical flaw that led the Court in *Ring* to declare the Arizona statute unconstitutional. Florida law, makes imposition of the death penalty contingent on the **judge's** factual findings regarding the existence of aggravating circumstances. Section 775.082(1), Florida Statutes, states specifically that a defendant may be sentenced to death only if "the proceeding held to determine sentence … results in findings **by the court** that such person shall be punished by death, otherwise, such person shall be punished by life imprisonment." § 775.082(1), Fla. Stat. (1999) (e.s.). Section 921.141(3), Florida Statutes, provides in turn that to enter a sentence of death, **the judge** must make specific written **findings of fact** based upon aggravating and mitigating circumstances. Thus, in Florida, as in Arizona, although the maximum sentence authorized for first-degree murder is death, a defendant convicted of first-degree murder ***cannot*** be sentenced to death without additional findings of fact that must be made, by explicit requirement of Florida law, by a judge and not a jury. *See Bottoson,* 833 So. 2d 706-08 (Anstead, C.J., concurring); *id.* at 715-17 (Shaw, J., concurring); *id.* at 719-22 (Pariente, J., concurring). The Florida statute is

therefore unconstitutional under the Sixth and Fourteenth Amendments.

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

Florida's advisory sentencing verdict does not render the Florida capital scheme constitutional under *Ring*. As the Supreme Court explained in *Walton*:

> It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. **A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.**

*Walton v. Arizona*, 497 U.S. 639, 648 (1990) (e.s.). *See also, Espinosa v. Florida*, 505 U.S. 1079, 1080 (1992).

A Florida jury's advisory sentencing recommendation cannot be equated with a verdict for Sixth Amendment purposes. An advisory jury in Florida does not make findings of fact. *See, e.g., Hunter v. State*, 660 So.2d 244, 252 & n.13 (Fla. 1995) (citing *Hildwin v. State*, 531 So.2d 124, 128 (Fla.1988), *aff'd*, 490 U.S. 638 (1989)); *see also Combs v. State*, 525 So.2d 853, 859 (Fla. 1988); *accord Bottoson,* 833 So. 2d 705-09 (Anstead, J., concurring); *id.* at 720 (Pariente, J., concurring). Moreover, the jury's penalty phase "verdict" *is*, in fact, merely advisory. *See* § 921.141(2). Thus, the advisory jury in Florida does not bear "the same degree of responsibility as that borne by a 'true sentencing jury,'" *Pope v. Wainwright*, 496 So. 2d 798, 805 (Fla. 1986); *accord Combs*, 525 So.2d at 855-

858; *Burns v. State*, 699 So.2d 646, 654 (Fla. 1997), and cases cited therein. The jury factfinding requirement of *Apprendi*, *Ring*, and the Sixth and Fourteenth Amendments is based on recognition of the importance of interposing independent jurors between a criminal defendant and punishment at the hands of a "compliant, biased, or eccentric judge," *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968), and cannot be satisfied by a jury which is told that "the final decision as to what punishment shall be imposed rests solely with the judge," Fla. Std. Jury Instr. (Crim.), *supra.*

## IX. BECAUSE AGGRAVATING CIRCUMSTANCES ARE ELEMENTS OF THE OFFENSE OF CAPITAL MURDER UNDER *RING*, FLORIDA LAW ALSO REQUIRES THAT THEY BE CHARGED IN THE INDICTMENT AND FOUND UNANIMOUSLY BY THE JURY BEYOND A REASONABLE DOUBT.

*Ring* is premised in part on the principle that "[c]apital defendants, no less than non-capital defendants," are entitled to the due process and jury trial rights that apply to the "determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring*, 536 U.S. at 589; *accord id*. at 609. This reasoning applies with equal force to the state law protections, both constitutional and common law, that apply to the determination of essential elements of an offense. *See Bottoson,* 833 So. 2d at 709-10 (Anstead, C.J., concurring); *id.* at 711 (Shaw, J., concurring).

As in Arizona, Florida's "enumerated aggravating factors operate as 'the

functional equivalent of an element of a greater offense.'" *Ring*, 536 U.S at 609 (quoting *Apprendi*, 530 U.S. at 494 n. 19); *see also Bottoson,* 833 So. 2d at 705-08 (Anstead, C.J., concurring); *id.* at 715-16 (Shaw, J., concurring); *id.* at 719-722 (Pariente, J., concurring). In the noncapital context, Florida courts have consistently treated aggravating factors that cause an offense to be reclassified to a more serious level or that trigger the application of a minimum mandatory sentence as elements of an offense that must be charged in the indictment and specifically found by the jury, unanimously and beyond a reasonable doubt. *See Bottoson,* 833 So. 2d at 709 & n.21 (Anstead, C.J., concurring) (noting that Florida law requires jury fact findings for noncapital sentencing enhancements); *id.* at 724 (Pariente, J., concurring) (same); *see, e.g., State v. Rodriguez*, 575 So.2d 1262, 1264 (Fla.1991) (prior convictions for felony DUI), *receded from on other grounds Harbaugh v. State*, 754 So.2d 691 (Fla.2000); *State v. Overfelt*, 457 So. 2d 1385, 1387 (Fla. 1984) (possession of a firearm). In contrast, the current procedures for imposing a death sentence in Florida do not require notice of aggravating circumstances, jury unanimity on the existence of any aggravating circumstance or on the ultimate question whether there are "sufficient" aggravating circumstances to warrant imposition of the death penalty, or a finding of "sufficient" aggravating circumstances be made beyond a reasonable doubt, and are not subject to the rules of evidence. This violates Florida law, independent of federal constitutional law,

and impermissibly affords capital defendants ***fewer*** rights than defendants facing a three year minimum mandatory sentence for possessing a firearm during commission of a crime. *See Bottoson,* 833 So. 2d 709-10 (Anstead, C.J., concurring).

## Conclusion

For the foregoing reasons, the sentence of death and the plea of guilty must be vacated, and this cause must be remanded for trial.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I Andrew Stanton, counsel for the Appellant, HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to counsel for the Appellee Sandra Jaggard, Assistant Attorney General, Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, FL 33131, on February 14, 2006.

________________________________
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## CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

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