IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-457

MICHAEL A. TANZI,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

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

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ARGUMENT

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

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.

As argued in the Initial Brief, despite briefly mentioning the "good cause" standard, the trial court failed to apply the pretrial standard to Michael Tanzi's motion, instead requiring him to prove either that he was incompetent or that he received ineffective assistance of counsel. Initial Brief, 45-47. This was, perhaps, inevitable. 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).

The Answer Brief handsomely reinforces this point. The State does not dispute that the trial court required competency in place of the "mental weakness" aspect of good cause under Rule 3.170(f). Instead, it argues that incompetence is the correct standard. The Answer Brief expressly maintains that, absent intoxication, only incompetence can ever be relevant to good cause under the

presentencing rule. Answer Brief, pp. 35-36, 46, 51.

The State's position is inconsistent with the nature and purpose of Rule 3.170(f). The rule is intended to impose a more lenient standard for presentencing motions to withdraw. *See 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); *see also Harrell v. State*, 894 So. 2d 935, 939 (Fla. 2005). By requiring "mental weakness" to mean the same thing as incompetency, the State would require a showing high enough to invalidate a plea after sentencing under Rule 3.170(l) or years later on postconviction. *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). This is plainly inconsistent with a more lenient, presentence good-cause standard, liberally construed in favor of the defendant and 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).[1]

With regard to the argument that the trial court required a showing of

[1] The State's position is also inconsistent with Florida Courts' adoption of "mental weakness" as part of the classic formulation for good cause to withdraw a plea before sentencing. *See Robinson v. State*, 761 So. 2d 269, 274 (Fla. 1999), *quoting Yesnes v. State*, 440 So. 2d 628, 634 (Fla. 1st DCA 1983). If the Courts of this State wished to limit relevant mental health issues to competency, they presumably would have said so.

ineffective assistance of counsel for relief under Rule 3.170(f), the State demurs, terming this an "obtuse reading" of the order. Answer Brief at 38. The State nevertheless joins the trial judge in equating good cause with the higher showing of ineffective assistance of counsel, as follows:

> The State would submit that the court's finding that the decision to enter the guilty plea and move to waive a penalty phase jury was a matter of trial strategy agreed upon by the Defendant and his Counsel" (R. 2305) is an express finding that there was no mistake, misapprehension, or mental weakness.

Answer Brief at 38.

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).[2]

As argued in the initial brief, the record amply shows that Michael and his

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[2] The State complains that the basis for the motion has somehow changed between the written motion, the hearing, and this appeal. Answer Brief at 40. This is untrue. The written motion alleged that Michael entered the plea based on a misunderstanding or misapprehension based on the mistaken advice of counsel that the court would accept the waiver. (R. 2152). The motion went on to specify that advice as being that his attorneys' were confident that the judge would accept the waiver. (R. 2153). At the evidentiary hearing, while he could not recall the exact word Kuypers used, Michael pointed to: "His body language, his expressions of confidence, his belief that Judge Payne would grant the jury waiver." This is hardly inconsistent.

The State further complains that claims presented by appointed counsel differ from the complaints Michael Tanzi focused on when forced to address the court pro se. Answer Brief at 42. As addressed at length in the Initial Brief, 16-17, 54-55, even Mr. Tanzi's pro se statements show that he wished to withdraw his plea if forced to have a penalty phase jury, that he was confused about his ability to waive the penalty phase jury, and he was dissatisfied with counsel's advice in this area.

two lawyers had three different understandings of the advice concerning the plea. Initial Brief 50-51. Michael believed he would receive a jury waiver in return for 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. (R. 2132). At the evidentiary hearing, Mr. Kuypers claimed the attorneys had made no estimate whatsoever of the likelihood of the court accepting the waiver, though he could have given reasons why the court would or would not have accepted the waiver. (R. 2400-02).

The State, however, argues both that "Kuypers testified specifically that he never expressed such confidence," and that Ms. Rossell's affidavit stating the attorneys expressed confidence the judge would probably accept the waiver "does not contradict Mr. Kuypers['] testimony on the central issue," because of the use of the word "probably." Answer Brief, pp. 40-41.[3] The Appellant submits that these

[3] In its Answer Brief, the State attempts to argue that it was error to admit the affidavit of Assistant Public Defender Nancy Rossell. Answer Brief, 41, 50. The State has waived this issue by its failure to cross-appeal. *See* Fla. R. App. P. 9.140(c)(1)(l); *Pope v. State*, 884 So. 2d 328 (Fla. 2d DCA 2004) (in defendant's successful appeal contending his 35 year sentence was unauthorized and must be reduced to not more than 30 years, State's argument the court had been required to impose life sentence – though preserved and correct – had been waived by failure

statements ineluctably demonstrate that the two defense attorneys themselves had different understandings of the advice they gave their client. It is not surprising that their non-lawyer client had a third interpretation.

The Initial Brief argues that, because defense counsel concealed their intention of waiving the penalty phase jury, the trial judge was in no position to conduct a meaningful plea colloquy on this issue. Initial Brief, 14, 53. Nevertheless, the State maintains that: "[T]he colloquy itself belies Defendant's allegations." Answer Brief, 41-42. It is true that the colloquy and other statements by the court referenced sentencing before a jury. But this did nothing to refute Michael Tanzi's understanding that he would be permitted to waive that jury. There was no occasion to address Michael's understanding of whether he would be permitted to give up his right to a sentencing jury. Moreover, Michael was directed by his lawyers not to mention the jury waiver during the plea colloquy. (R. 2345-46).

The State disputes the existence of defense counsel's scheme of secrecy:

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to file cross-appeal). The use of affidavits at a hearing on a motion to withdraw a plea is, moreover, entirely appropriate. This Court has relied on affidavits in reversing the denial of a motion to withdraw a plea. *See Thompson v. State*, 351 So. 2d 701 (Fla. 1977); *Costello v. State*, 260 So. 2d 198 (Fla. 1972) ("The attorney filed an affidavit with the trial court at the post-conviction hearing in which he admitted so advising the defendant … Without the attorney's affidavit, we would share that conviction."

> In fact, it was his attorney who spoke first to the issue of the court's discretion, which in and of itself belies Defendant's allegation of a secrecy campaign.

Answer Brief at 42. Appellee's doubt on this point is puzzling, since there is no dispute in the record. Ms. Rossell's affidavit states:

> 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.

(R. 2131). Kuypers confirmed this account: "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).

The State complains that Michael did not personally address the Court during the argument on the attempted jury waiver or when it was rejected. Answer Brief, 42-43. At that point Michael was relying on his attorneys to represent him, and they had told him to wait. (R. 2347, 2380-81).

The State then argues that statements made when Michael was improperly forced to represent himself do not show that he believed the jury would be waived. Answer Brief at 42. Without repeating the detailed discussion from the Initial Brief,[4] Michael (1) asked to withdraw his plea; (2) expressed confusion, which in context, clearly related to his ability to waive the jury; and (3) plainly told the judge that if he was to have a jury for the second phase, he wanted one for the first

[4] *See* Initial Brief 16-17, 54-55.

phase. (R. 2046). The court then changed the topic, asking Michael **why** he had failed to reveal his problems with counsel before ordering him to sit down. (R. 2047-48). Contrary to the State's suggestion, this was not a natural juncture for Michal to elaborate on his understanding of the consequences of his plea.

The State next argues that Michael had simply agreed to a strategy that did not work. Answer Brief, 43. The positions of the State and trial court notwithstanding, this motion is not to be decided under the standards that apply to ineffective assistance of counsel. *See* Argument B, *supra*. Nevertheless, it is worth examining the "strategy" upon which the State relies to dismiss Michael's claim that he misapprehended the connection between his guilty plea and the jury waiver. There were two parts to this "plan." Taken together, they promoted – indeed, ensured – the misunderstanding at the root of the plea.

The first part bound the guilty plea to the jury waiver in Michael's mind. Defense counsel were convinced, and they convinced Michael that his best and only chance at a life sentence was, in Kuypers' words, "plead no contest and get a jury waiver." (R. 2408; 2131-33). Kuypers' contemporaneous notes of the decision to plead reflect this connection: To plead guilty and waive the penalty phase jury.[5]

[5] On January 30, 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).

The second part of the attorneys' so-called strategy promoted the misunderstanding that doomed the plea: Their puzzling plan of secrecy. Defense counsel hoped to catch the prosecutors unprepared to argue when they announced the jury waiver. Whatever the merits of that hope, there can be no explanation for the solution. The attorneys decided to keep the jury waiver a secret until **after** the plea. There is, of course, no good reason why they could not have brought it up at the same time as the proposed guilty plea. The prosecution's level of preparedness would have been the same. But defense counsel 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 ensured only that their client would be surprised. The "strategy" minimized Michael's information, and maximized the likelihood that he would enter the plea under a misapprehension. The fact that Michael acceded to his attorneys' pointless "strategic" advice in this regard is hardly evidence that he understood what was going on.

Kuypers also generated a separate, handwritten note memorializing the decision. It reads: **"JAIL 1-30-03 ® <u>Guilty</u> – Alford – all counts except 2 sex bats; waive jury for penalty phase."** (R. 2276; 2425).

One of the most damaging pieces of evidence for the State is the affidivit prepared by Kuypers and signed by Michael Tanzi before the entry of his plea. (R. 2257-58). Under any fair reading, this document appears to indicate that the guilty plea and jury waiver are part of the same transaction, with no indication that waiver could be rejected while holding Michael to his guilty plea.

The State claims that the use of the word "wish" negates this argument. Answer Brief, pp. 44-45. This argument is difficult to maintain when the words are read in context:

> 3. [Michael Tanzi] **wishes** to change his plea from not guilty to guilty in his best interest to the following charges …
>
> 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 …
>
> 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). In context, the word "wish" is clearly an expression of what

Michael has chosen to do. More importantly, the choice to plead guilty and the choice to waive the sentencing jury are clearly linked, with no indication that they can be severed. The language, moreover, makes it clear that the jury is Michael's right to give up, with no mention of the court's veto authority. Finally, to the extent the State relies on the word "wish," it should be noted that in paragraph 7 Michael is **"choosing to be sentenced solely by the judge without a jury."**

The Initial Brief pointed out that the defense counsel's records supported the motion to withdraw. *See* Initial Brief 11-12, 49-50. The State responds that: "Defendant's assertion that a guilty plea and jury waiver were under consideration for at least two months only serves to further support the trial court's finding that this was a reasoned, well-informed, strategic decision." Answer Brief at 45. To the contrary: the record reflects that while the guilty plea and jury waiver were under consideration for about two months, **counsel did not research the law governing jury waivers until the eve of the guilty plea**. (R. 2269, 2422-23). Consistent with this, counsel's notes show that counsel discussed such consequences of the plea as the waiver of *Ring* and *Apprendi* issues and the potential effect on postconviction, but there is no mention of any discussion of the possibility the jury waiver could be rejected. (R 2264; 2420; 2269; 2425; 2276). It is difficult to see how the State's position is furthered by these two months of conceded ignorance.

The State is mistaken when it says that: "The lower court implicitly found Defendant's testimony at the evidentiary hearing to be untrue." Answer Brief at 45. In fact, the judge never made this determination because he mischaracterized Michael's testimony. The judge mistakenly believed that Michael had testified he agreed that his attorneys never told him the court was likely to accept the jury waiver. "The Defendant testified that he had arrived at this conclusion on his own based on Counsel's 'body language.'" (R. 2305). This was not the case: Michael testified that his attorneys expressed confidence and belief that the judge would grant the waiver. Ms. Rossell's affidavit (unaddressed in the court's order) supported this understanding.[6] The court's mischaracterization of the record served simply to avoid the issue.

Finally, the cases relied on by the State are not relevant to the situation before the Court. In *Collins v. State*, 858 So. 2d 1197 (Fla. 4th DCA 2003), the defendant alleged that his attorney had told him he should plead guilty, and that if he didn't like the sentence he got he could just withdraw his plea. 858 So. 2d 1198. The plea colloquy, however, had directly addressed such a potential misunderstanding: The trial court had informed him there would be no going back on the plea if he didn't like the sentence. *Id.* In this case, as discussed above, the

[6] The proffered testimony of Dr. Koziol would have explained how Michael might have misunderstood even more cautious advice as expressions of confidence.

colloquy never discussed what would happen in the event that Michael attempted to waive the sentencing jury. Similarly, *Wagner v. State*, 895 So. 2d 453 (Fla. 5th DCA 2005), involved a claim that the defendant received misinformation affecting his ability to obtain a downward departure, but the plea colloquy directly addressed his eligibility for the maximum sentence and the fact that his attorney could find no basis for a downward departure.

Lines v. State, 594 So. 2d 322 (Fla. 1st DCA 1992) rejected a defendant's motion to withdraw plea based on counsel's failure to advise him that his manic-depression could yield a possible insanity defense, because there was no evidence the defense would actually have applied. 594 So. 2d 323-24. *Davis v. State*, 783 So. 2d 288 (Fla. 5th DCA 2001), held that the defendant had failed to prove good cause based on his claim that he failed to appreciate the moral consequences of his plea. The State fails to explain the relevance of either of these decisions.

Inexplicably, the State argues that the motion to withdraw was properly rejected as supported by no more than a "naked allegation," citing *Brown v. State*, 428 So. 2d 369 (Fla. 5th DCA 1983). Even a casual reading of that decision shows that the requirement of more than a "naked allegation" refers to a defendant's burden to support the allegations in the motion to withdraw with **evidence**. In *Brown*, "appellant's counsel indicated that she had nothing to offer by way of tangible evidence or testimony, only that appellant thought he was pleading to

something less than a life felony." 428 So. 2d at 371. The statement: "Here, Defendant's testimony that he believed the judge would accept the jury waiver is such a naked allegation," Answer Brief at 48, is self-refuting.

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

The State maintains there is nothing untrue in the trial court's statement:

> 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."

Answer Brief at 50. In fact, Michael testified that he relied on his attorney's "expressions of confidence" and "belief that Judge Payne would grant the waiver," as well as "body language." (R. 2369). Michael simply "admitted" he could not remember the precise words his lawyer used. (R. 2368).[7,8]

E. The Trial Court Erred In Excluding The Relevant Expert Testimony Concerning Michael Tanzi's Mental Weakness.

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[7] The trial court's order misstates the testimony of William Kuypers, claiming he testified he told Michael Tanzi that any prediction he made concerning the waiver would be "pure speculation," when in fact, the attorney merely testified he refrained from offering an opinion. (R. 2402). The State claims that this is not a misstatement because Kuypers testified he gave correct legal advice and denied expressing confidence in a waiver. Answer Brief at 49. The difference is a clear one. The difference becomes all the more important in light of the proffered testimony of Dr. Koziol.

[8] The State's suggestion that Ms. Rossell's affidavit stating the attorneys expressed confidence the waiver would be accepted is consistent with Kuypers denial that he expressed such confidence requires no further comment.

The State's only argument on this issue is to assert because the standard for competency to enter a plea is the same as the standard for competency to stand trial, the trial court did not abuse its discretion in excluding Dr. Koziol's testimony as irrelevant.[9] Answer Brief at 51. This argument relies entirely on the State's equation of "mental weakness" under Rule 3.170(f), and incompetence. As argued above, this assumption is contrary to the meaning and purpose of the rule.

Moreover, expert testimony concerning a defendant's mental limitations is relevant to "mistake" or "misapprehension" under Rule 3.170(f). Michael Tanzi is seeking to show why his understanding of his attorneys' advice differs from that of his attorneys. The proffered testimony is relevant to that showing, just as evidence of mental retardation or mental illness might be relevant to show why an otherwise competent defendant did not understand particular advice given to him in a particular situation.

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

The State's exercise in distinguishing cases notwithstanding, this Court has

[9] While the State characterizes the trial court as having determined that Dr. Koziol's testimony was not relevant to competency, the court's order shows that it rejected the testimony in the belief that it **was** relevant to competency. The order states: "The Defendant proffered testimony by new experts that he was not competent to enter a plea." (R. 2303). Having refused to listen to the proffered testimony, the court was apparently completely unaware of what it had excluded, and it was in no position to exercise its discretion.

unmistakably held that it is error to introduce evidence of a defendant's lack of remorse in the guise of discussing a diagnosis of antisocial personality disorder. *Atwater v. State*, 626 So. 2d 1325, 1328 (Fla. 1993), *see also Smithers v. State*, 826 So. 2d 916, 930-31 (Fla. 2002). The Attorney General can offer no legal distinction between the errors in *Atwater* and *Smithers* and the one committed in Michael Tanzi's trial. The State's argument that it was entitled to argue lack of remorse to rebut evidence that Michael had any mental illness other than antisocial personality is simply a disagreement with *Atwater* and *Smithers*. This argument is, moreover, misleading because under the facts of this case there was no effort to use lack of remorse in this way.

Atwater stands for the proposition that a diagnosis of antisocial personality disorder does not put lack of remorse in issue. The Attorney General argues that *Atwater* is without force because in that case the prosecution sought to elicit lack of remorse during cross-examination of a **defense** expert, while here the state repeatedly introduced lack of remorse through its own rebuttal experts and argued it in closing. Answer Brief, 60-61. This strained effort to distinguish *Atwater* need not detain us long however, because in *Smithers* the prosecution introduced lack-of-remorse testimony through a **prosecution** psychiatrist's discussion of antisocial personality disorder. 826 So. 2d at 930. Smithers objected and moved for a mistrial. *Id.* The trial judge admonished the witness not to mention lack of remorse

and offered a curative instruction, but denied the motion. *Id.;* Answer Brief of Appellee, 57-58, *Smithers v. State*, SC96690 (Fla. June 1, 2001). On appeal, the State argued that there had been no error because testimony concerning lack of remorse as it relates to antisocial personality is not improper. Answer Brief of Appellee at 59, *Smithers v. State*, SC96690. Although the Court affirmed, it clearly found the testimony to be improper:

> In *Shellito v. State*, 701 So. 2d 837, 842 (Fla. 1997), this Court stated that lack of remorse is a nonstatutory aggravating circumstance and cannot be considered in a capital sentencing. However, the Court further stated that "the brief reference to lack of remorse was of minor consequence and constituted harmless error." *Id.*
>
> Similarly, in the instant case, Dr. Stein's brief reference to lack of remorse was of minor consequence, especially in light of the fact that the State did not mention lack of remorse in its closing argument. Hence, the trial court did not abuse its discretion in denying Smithers' motion for mistrial.

826 So. 2d 930-931.

The State's attempt to distinguish *Smithers* is incoherent. The Answer Brief says:

> *Smithers*, too, is distinguishable. In *Smithers*, this Court found that the trial court had not abused its discretion in denying a motion for mistrial based on a question[10] of the State's mental health expert that a person with antisocial personality disorder does not have remorse. *Smithers*, 826 So. 2d 916. This Court's analysis in finding no abuse

[10] In fact, prosecution in *Smithers* merely asked the psychiatrist for his diagnosis, and the witness included lack of remorse as part of his answer. 826 So. 2d at 930.

> of discretion and mention of the brevity of the comments and lack of argument of remorse, does not mandate a different result here.

The distinctions between *Smithers* and Michael Tanzi's case militate in favor of reversal. Smithers' judge immediately recognized the error of admitting lack of remorse testimony through the state's psychiatrist, and put an end to it. Michael Tanzi's judge endorsed the practice and permitted the evidence again and again. In *Smithers*, the lack-of-remorse testimony was brief, isolated, and never repeated in closing argument. In this case the testimony was extensive, recurrent, and featured in the prosecution's closing. Smithers bore the burden of establishing abuse of discretion. Here the State bears the burden of proving the error was harmless beyond a reasonable doubt. None of these distinctions suggests that the admission of lack-of-remorse testimony, here or in *Smithers*, was proper.

The State attempts to evade *Smithers* and *Atwater* by arguing that lack of remorse was admissible to establish antisocial personality disorder in order to rebut the defense experts' diagnoses. *See* Answer Brief, pp. 56-58, 62. The State overlooks that both defense experts agreed on a diagnosis of antisocial personality disorder, as one of several mental illnesses. (T. 1165; 1303). Moreover, **State experts never testified that either lack of remorse or antisocial personality was inconsistent with any of the defense experts' opinions regarding the other illnesses.** The State's argument is nothing more than a transparent vehicle for injecting lack of remorse into capital sentencing any time a defendant offers mental

health evidence in mitigation.

The State's reliance on section 90.705, Florida Statutes, and the authority to cross-examine witnesses is puzzling. *See* Answer Brief at 54, *citing* § 90.705, Fla. Stat. (1987); *Parker v. State*, 476 So. 2d 134, 139 (Fla. 1985) (no error in permitting state to cross-examine defense psychologist who testified defendant was not aggressive concerning his knowledge of defendant's prior record); *Valle v. State*, 581 So. 2d 40, 46 (Fla. 1991) (no error in permitting state to cross-examine defense expert who testified defendant would be a good prisoner concerning specific prison misconduct as well as likely behavior if eligible for parole). The prosecution introduced lack of remorse through the direct examination of its own experts. Indeed, as discussed above, the Attorney General's entire basis for distinguishing *Atwater* is to claim that *Atwater* only applies to bar lack-of-remorse testimony when elicited during the cross-examination of a defense expert. *See supra* 15; Answer brief, 60-61.

The pervasive and repeated nature of the error in this case rules out a finding of harmlessness. This Court has only found lack-of-remorse evidence to be harmless where the references are "brief" or "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 prosecution's repeated invocations of lack of remorse in Michael Tanzi's penalty phase were anything but "isolated."

The Court should not be misled by the State's attempt to minimize its exploitation of lack of remorse. The Answer Brief avers:

> The factual basis for this claim rests on **two questions posed by the prosecutor** during the State's direct examination of its mental health expert, Dr. Jane Ansley, presented during the State's rebuttal case, **two references to records used by Defendant's experts** in their evaluations, **and a comment on that testimony during closing argument**.

Answer Brief at 53 (e.s.). Even this redacted list is more extensive than any "brief reference" heretofore found harmless. But in fact, as set forth in the Initial Brief, the prosecution invoked lack of remorse no fewer than **nine times**, as follows (all emphasis is supplied):

- During the testimony of Dr. Ansley, the prosecutor stated: "This statement [Dr. Beroski] 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." (T. 1459). The prosecutor then asked the witness to explain how that "works into a conduct disorder." (T. 1459).

- After the defense objection to lack-of-remorse testimony was overruled, the prosecutor again referred 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).

- The prosecution had Dr. Ansley list lack of remorse as a criterion for antisocial personality disorder. (T. 1463).

- The prosecutor asked **whether "lack of remorse" was evident "at**

a very early stage," in Michael's development. The doctor answered "Yes." (T. 1464).

- When Dr. Ansley testified that personality disorders are necessarily dysfunctional, the prosecutor asked **whether the dysfunction included "no remorse."** (T. 1468).

- The prosecutor 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).

- A second state expert, **Dr. Sczechowicz, identified "lack of remorse" as characteristic of Michael's "behaviors."** (T. 1576).

- Despite a promise not to argue lack of remorse, the prosecutor mused that one early report finding Michael narcissistic contained, "Very, very prophetic words," before telling the jury that another report said 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. 1669; 1724-25).

- The prosecutor argued lack of remorse a second time. (T. 1733-34).

The State placed these extensive references to lack of remorse before the jury for their aggravating effect. It cannot now prove beyond a reasonable doubt that this error did not contribute to the penalty phase verdict.

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 Answer Brief broadly asserts that Dr. William Vicary's 1998 California Medical Board discipline, which arose out of a case involving entirely different parties and attorneys, was admissible as evidence of bias in this case. The State

ignores the requirement that the bias relate to the witnesses or parties in a particular case. The single decision cited by the State in support of its position is inapposite, and the Attorney General can point to no cases authorizing the impeachment that took place below.

"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.). Dr. Vicary's misconduct would be admissible evidence of bias in a proceeding where Eric Menendez was a party. It could be admissible in a proceeding where Menendez was not a party but the attorney who directed Dr. Vicary to rewrite his notes represented a party. It might conceivably even be admitted where both Menendez and the attorney were absent, but the State of California was a party. But nothing about this specific incident of misconduct demonstrates a bias relevant to Michael Tanzi, the State of Florida, or any witness or attorney involved in this cause.

The sole decision cited by the State does not authorize the impeachment of Dr. Vicary in this case. Citing *Henry v. State*, 574 So. 2d 66, 71 (Fla. 1991), the State maintains: "[I]nquiry into an expert's other work is relevant to show bias." Answer Brief at 64. *Henry* does not support this broad claim, and certainly does not authorize inquiry into details of misconduct in an expert's other work. In *Henry*, the Court wrote:

> [T]he prosecution was properly allowed to elicit from defense expert, Dr. Robert Berland, that ninety-eight percent of his clientele consisted of criminal defendants and that forty percent of his practice consisted of first-degree murder defendants represented by the Hillsborough County Public Defender's office.[11] These questions were relevant to show bias, prejudice, or interest.

This statement hardly implies that specific acts of misconduct involving an expert's other work are admissible as evidence of bias. Indeed, this Court has contrasted permissible evidence of the frequency with which an expert testifies for the defense with impermissible evidence of prejudicial details from other cases. *See Campbell v. State*, 679 So. 2d 720, 724 (Fla. 1996) (improper for prosecutor to question defense expert concerning his testimony for defendants accused of murdering police officers). In Michael Tanzi's trial, the State not only brought out the irrelevant details of Dr. Vicary's misconduct, it also emphasized the sensational nature of Lyle and Eric Menendez' crime. The prosecutor introduced the topic with the question: "Isn't it true that the Menendez case was a double homicide in California," and went on to refer to it as a "violent murder of [Lyle and Eric Menendez'] parents." (T. 1202, 1204).

The State's argument, if adopted, would effectively carve out an exception to the rule against impeachment by specific acts of misconduct for forensic experts. Experts would always be open to such impeachment because bias would not need

[11] Henry was apparently represented by the Public Defender at trial. *See Henry v. State*, 649 So. 2d 1361, 1364 (Fla. 1994).

to be relevant to the parties to the litigation. The result would be predictable: trials (both criminal and civil) would swiftly devolve into collateral litigation of the alleged misdeeds of experts in unrelated matters. Witnesses would be called to testify that the expert lied, fudged, or misled, in another case – for there is no logical reason the State's rule would be limited to experts who have admitted misconduct or been formally sanctioned. Other witnesses would be procured to rebut this testimony. As just a single example, Dr. DeGuglielmo, the expert witness found to be subject to impeachment concerning case-specific bias in *Murray v. State*, 838 So. 2d 1073 (Fla. 2002), *see* Initial Brief 78-79, would be impeachable for the same events in every case in which he testified.

There can be no credible contention that the error was harmless. The improper impeachment was devastating, completely undermining Dr. Vicary's credibility. The State claims the error was rendered harmless by the defense's attempt to "draw the sting" by confronting the disciplinary action during direct examination. The point of this was to avoid compounding the harm of the improper impeachment by appearing to hide it from the jury as well. The State avers without explanation that the defense presented "a most sympathetic version of the events." Answer Brief at 66. It does not explain how this sympathetic version prevented the improper impeachment from having the intended effect of discrediting a crucial defense witness. The error gave the jury and the trial court a

reason to disregard the only witness to diagnose Michael as bipolar, and to reject some of the most powerful evidence in favor of statutory mental mitigation. The State cannot show beyond a reasonable doubt that the error was harmless.

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.

Contrary to the State's assertion, the prosecution sought a ruling admitting the confession to sexual battery pursuant to section 92.565 in contemplation of the **penalty phase**. The State sought a ruling admitting the confession pursuant to section 92.565 **after** the guilty plea. (R. 1983). Although the corpus delicti rule has traditionally been phrased in terms of the fear that someone might be convicted out of derangement, mistake, or fabrication, there is nothing to suggest that it is more acceptable if someone is executed for the same reasons. Certainly, in light of *Ring v. Arizona*, 536 U.S. 584 (2002), the federal constitution requires that aggravating factors be proven like other elements of an offense.

The trial court applied the wrong standard under section 92.565 and, contrary to the State's assertions, the Court simply did not make findings of fact on the record for the basis of its ruling. The record shows that the Court, at the request of the State, specifically addressed this motion, and did not make the statutorily-required findings. (R. 2033-44). Finally, while the State points to a variety of facts that may corroborate other aspects of the confession, nothing in the

record corroborates the alleged oral sexual battery.

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

The State relies on **improper doubling** cases in an attempt to rebut the Initial Brief's argument that the trial court improperly **double-counted** the felony-murder aggravator. The Appellant's point stands unrebutted: There is no authority for the double-counting of a single aggravating factor, and that is unquestionably what the trial court did.

The Answer Brief responds to an argument the Appellant never made. The State claims, "[Michael Tanzi] argues that this constitutes improper doubling." Answer Brief at 74. The Attorney General then proceeds to knock down this straw man, arguing that there is no doubling where "independent facts support each aggravator." Answer Brief, 75-76, *citing Morton v. State*, 689 S. 2d 259, 265 (Fla. 1997), *overruled on other grounds Rodriguez v. State*, 753 So. 2d 29 (Fla. 2000). But the Initial Brief never argued that there was a doubling error or pointed to any of this Court's discussions of doubling. Instead, the Appellant presented a completely different argument: That section 921.141 does not authorize a court to count a single aggravating factor as though it were several different aggravators. *See* Inititial Brief, 84-87.

Contrary to the Attorney General's assertion, *see* Answer Brief at 75, Michael Tanzi does provide legal authority for his position: Section 921.141 itself,

and the rule of lenity as embodied in section 775.021(1), Florida Statutes. *See* Inititial Brief at 85. Nowhere does Florida's capital sentencing statute authorize the multiple-counting of the felony-murder aggravating factor. To the extent that there is any ambiguity on this point, that ambiguity must be resolved in Mr. Tanzi's favor.

And when the issue is not misconstrued as one of doubling across different aggravators, but of double-counting the same aggravator, the importance of the decision cited in the Initial Brief becomes perfectly clear: This Court has always interpreted the felony-murder aggravator as a single factor. *See Brown v. State*, 473 So. 2d 1260 (Fla. 1985). This Court's decision in *Brown* strongly indicates that it did not consider a second felony to be a basis for a second aggravator. Indeed, the Court's discussion in *Brown* only makes sense if felony-murder is considered a unitary aggravating factor that can only be counted once. If the sexual battery in *Brown* could have supported a separate aggravating factor, the Court would not have dismissed it as something that could be "regarded as harmless surplusage:"

> [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. The Court went on to observe that in fact a rape had been proven, and "The accomplice's commission of rape properly provides additional

support for the finding of this aggravating factor, if any additional support were needed." *Id.* The Court did not view the rape as evidence of an additional aggravating factor, but rather potential supplementary evidence of a single aggravator.

Every decision from this Court is consistent with the view that the felony-murder aggravator may be counted only once. *See* Initial Brief at 87 n.25 (citing cases). The Attorney General cannot point to a single decision approving the double-counting of this aggravator. Nor can the State explain this absence of authority as a by-product of the rule against doubling of separate aggravators. The State claims:

> In most instances where multiple felonies are committed, counting each as a separate aggravator would constitute improper doubling, not because of some automatic rule, but by virtue of the fact that in most circumstances, two or more felonies are established by the same conduct.

Answer Brief, 75-76.

The State provides no authority for this statement. Instead it cites *Morton* for the proposition that "[N]o improper doubling exists so long as independent facts support each aggravator." Answer Brief at 76, *citing Morton*, 689 So. 2d at 265. The cited statement undercuts the State's position rather than supporting it. **There is no doubling problem** where the underlying felonies reflect different aspects of the offense. Doubling, therefore, cannot explain why no Florida

decision has ever so much as hinted at the authority for double-counting the felony murder aggravator. In *Brown*, for example, the Court made it clear that the burglary was undertaken for a broad variety or purposes (theft, beating, strangling, sexual battery) not limited to the sexual battery, and in fact Brown's conviction was for burglary with intent to commit theft. *Brown*, 473 at 1267. It is clear that the rape and burglary in *Brown* were supported by independent facts or separate aspects of the offense. Similarly, in *Ruffin v. State*, 397 So. 2d 277, 282 (Fla. 1981), Ruffin planned to steal a car to use in a convenience-store robbery. 397 So. 2d at 278. Having stolen the car at gunpoint, however, he and his accomplice then abducted, sexually abused, and murdered the car's owner. *Id.* This Court treated as "an aggravating circumstance" the fact that the murder was committed in the course of a kidnapping and a robbery. 397 So. 2d at 282.

Even less persuasive is the State's argument that the trial judge did not *really* treat felony-murder as multiple aggravating factors. The State necessarily concedes that the sentencing order expressly states that it is finding two distinct aggravators. Answer Brief at 74. But the Attorney General asserts:

> Despite the court's express language, the resulting effect of the finding two distinct felonies were committed independent of each other, is that the court is giving great weight to this aggravator.

Answer Brief at 74. The State's argument, however, falls apart when the trial judge's plain intent is considered: He unequivocally states that he is already giving

great weight to the felony murder aggravating circumstance, **and that he is applying great weight both times he assesses the aggravator**:

> "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 aggravating circumstances 2 and 3."

(R. 1809) (e.s.).

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.

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 unmistakably stated that it found Michael Tanzi's substance abuse problems not to be a mitigating factor based solely on its conclusion that the substance abuse did not cause the crime. (R. 1824-25). The State nevertheless argues that the trial judge actually found this to be a mitigating factor and assigned it weight. Answer Brief, pp. 79-80. This is simply inconsistent with what the sentencing order says. The order discussed a number of proposed mitigators together. (R. 1817-1825). Some the court found mitigating and assigned weight. With regard to Michael's history of drug abuse and dependency, the court stated:

> The court finds that the Defendant has a history of drug abuse and dependence, but that this problem was in remission at the time. This is borne out by the fact that after he robbed the victim of the $53 that was in her purse, he used the money to purchase a soda and several

> packs of cigarettes. He did not buy alcohol or attempt to buy drugs in Florida City. As it was in remission, this problem did not contribute to the commission of this capital crime.

(R. 1824-25). The court did not assign weight to the proposed mitigation.

The Attorney General's attempt to analogize the present case to *Morris v. State*, 811 So. 2d 661 (Fla. 2002), is unconvincing, particularly in light of what the sentencing order in *Morris* actually said. There, under the heading, "The defendant began using alcohol and drugs at an early age, and developed a lifelong addiction problem," the trial court wrote:

> *Established* and uncontroverted. That the defendant used drugs in the past is *not mitigating*. Moreover, there is no evidence that he was using drugs in September, 1994 when he murdered Mrs. Livingston. This factor is entitled to *little weight*.

811 So. 2d at 667 (e.s. by the Court). It seems clear that, whatever else the judge was trying to say, he assigned Morris' drug use weight as a mitigating factor. At most this contradictory language is vague. This Court concluded that the trial court had in fact found and weighed the mitigation, and that "any inaccuracy in the trial court's statements is harmless beyond a reasonable doubt." *Id.*

In the present case, there is nothing vague about the sentencing order. The trial court is perfectly clear: Because the trial judge does not believe that Michael's substance abuse caused the offense, it is not mitigating. The Court

rejected such a causality requirement in *Morris*.[12] 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).

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 trial court rejected the proposed mitigating circumstance that "Society can be protected by a sentence of life imprisonment without parole." The court concluded this was could never be 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 categorical rejection of life without parole as mitigation was unquestionably error. In *Ford v. State*, 802 So. 2d 1121 (Fla. 2001), the Court stated:

> The court ruled that another proposed nonstatutory factor, i.e., the alternative punishment to death is life imprisonment without parole, is not mitigating in nature and gave it no weight. We disagree. Parole ineligibility is mitigating in nature because it relates to the circumstances of the offense and reasonably may serve as a basis for imposing a sentence less than death. While this factor is mitigating in

[12] "Thus, under the facts of this case we agree with Morris that his history of drug and alcohol abuse and addiction is a valid nonstatutory mitigator, and that the defendant does not have to be under the influence of the drugs or alcohol at the time of the murder for this mitigating circumstance to be weighed." 811 2d at 667.

> nature, it may or may not be mitigating under the facts in the case at hand (that is for the trial court to determine).

802 So. 2d at 1136 (footnotes omitted).

The Attorney General argues that the trial judge's statement that the legislature did not intend to create an automatic mitigator in every case is technically consistent with *Ford*, which recognizes that the availability of life imprisonment may not be mitigating in every case. Answer Brief, pp. 81-82. Taken in isolation, that much is true, but it has nothing to do with what the trial court did here. **The judge concluded that the alternative sentence of life imprisonment without parole was categorically unavailable as mitigation.** He did not make an individualized determination of whether this mitigating factor was in fact mitigating under the facts of the case. He simply rejected it out of hand. There is no way to claim this was consistent with *Ford*.[13]

C. The Trial Court Failed To Meaningfully Exercise Its Discretion In Rotely Applying the Same Weight To Each Mitigating Circumstance It Found.

[13] The State also notes that the Court "did not reach the issue" in *Ford*. Answer Brief at 82. While the Court did write that it need not "reach the issue" because the error was harmless in Ford's case, it is clear the Court actually decided the legal question before it. In any event, the Court's decision was dictated by precedent holding that alternative sentences are relevant to mitigation. *See Ford*, 802 So. 2d at 1136 n. 36. ("*See Jones v. State*, 569 So. 2d 1234, 1240 (Fla. 1990) ("The potential sentence is a relevant consideration of 'the circumstances of the offense' which the jury may not be prevented from considering."); *see also Walker v. State*, 707 So. 2d 300, 315 (Fla. 1997) ("We conclude that Walker was afforded what Florida and U.S. Supreme Court caselaw deem sufficient, i.e., the opportunity to argue to the jury potential parole ineligibility as a mitigating factor.").")

The trial court abused its discretion in failing to meaningfully weigh mitigating factors. To put it another way, **the trial court failed to exercise its discretion at all.** As noted in the initial brief, the sentencing order assigns each and every mitigating factor equal weight: "some weight." Initial Brief, at 92 n.27. The State offers no explanation of how the rote assignment of the same weight to each mitigator demonstrates an exercise of discretion entitled to discretion. The closest the Answer Brief comes to a response is to quote the Court stating, "discretion is abused only where no reasonable [person] would take the view adopted by the trial court." Answer Brief at 79, *quoting Reynolds v. State*, 31 Fla. L. Weekly S318 (Fla. May 18, 2006) (internal quotations omitted).

The Appellant wishes to be clear: He is alleging that no reasonable person could take the view that the mitigating factors in this case all just happen to be entitled to the same weight. No reasonable person would look at Michael's childhood as the victim of sexual abuse, or his adolescence spent in mental health institutions, and conclude that these should be given the same weight as the fact that Michael likes to read, or that he unsuccessfully attempted to join the military. The trial judge simply failed to exercise the discretion vouchsafed to him under the law, and instead applied a single, rote, weight. There can be no clearer case of a trial court abusing the broad discretion given it in this area.

VII. THE CUMULATIVE ERRORS IN THE PENALTY PHASE REQUIRE THAT THIS CASE BE REVERSED AND REMANDED.

The State maintains that each of the penalty phase errors raised above is harmless. The Appellant disagrees, and submits the State cannot meet its burden to prove harmless error as to each of these errors. But even if each error could be considered harmless when considered in isolation, their combined impact would still deprive Michael Tanzi of a reliable sentencing phase. The trial court permitted the State to make lack of remorse a feature of the penalty phase, permitted improper impeachment of a key defense expert with his misconduct in an unrelated matter, erroneously admitted the confession to sexual battery, double-counted a single aggravating circumstance, wrongly rejected Michael's history of drug abuse as mitigation, wrongly rejected the alternative sentence of life imprisonment as mitigation, and abused its discretion by mechanically applying the same weight to the various mitigators in this case. If not singly, then together these errors deprived Michael Tanzi of a reliable penalty phase and cannot be said to be harmless beyond a reasonable doubt. U.S. Const. Amends. VIII, XIV; Art. I § 17, Fla. Const.

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 Margarita Cimadevilla, Assistant Attorney General, Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, FL 33131, on August 2, 2006.

_____
ANDREW STANTON
Assistant Public Defender

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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ANDREW STANTON
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