IN THE SUPREME COURT OF FLORIDA

MICHAEL A. TANZI,

Appellant,

v. **CASE NO. SC10-807**
L.T. No. 2000-CF-573-K

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

Citations to the record in this brief will be designated as follows: The direct appeal record will be cited as “R” and the direct appeal transcript will be cited as “T” followed by the appropriate page numbers. The original post-conviction record will be cited as “V” with the appropriate volume and page numbers. The supplemental post-conviction record will be cited as “Supp” with the appropriate volume and page numbers.

STATEMENT OF THE CASE AND FACTS

I. Direct Appeal

In affirming Tanzi's convictions and sentences on direct appeal, this Court recited the following facts:

> During her lunch hour on April 25, 2000, Janet Acosta was reading a book while seated inside her maroon van parked at the Japanese Gardens in Miami. At that time, Tanzi was stranded in Miami without a means of returning to Key West, where he had been residing for the previous months. Tanzi saw Acosta sitting in her vehicle with her window rolled down and approached her, asking for a cigarette and the time. When Acosta was distracted, Tanzi punched her in the face until he gained entry to the van. He then threatened her with a razor blade and drove away with Acosta in the van. Tanzi held Acosta by the wrist until he reached Homestead.
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> Upon reaching Homestead, Tanzi stopped at a gas station, where he bound Acosta with rope that was in her van and gagged her with a towel. Tanzi further threatened Acosta, telling her that if she kicked or made noise he would cut her from ear to ear. Tanzi took Acosta's fifty-three dollars in cash. He then bought some cigarettes and a soda and attempted to use Acosta's bank card, which he had obtained after rifling through her belongings. While still in Homestead, Tanzi also forced Acosta to perform oral sex, threatening to kill her with his razor if she injured him. However, he stopped her from continuing because Acosta's teeth were loose as a result of the earlier beating.
>
> Tanzi then continued to drive with Acosta bound and gagged in the rear of the van until he reached Tavernier in the Florida Keys, where he stopped at approximately 5:15 p.m. to withdraw money from Acosta's bank account. He again threatened Acosta with the razor in order to obtain Acosta's personal identification number. Tanzi thereafter stopped at a hardware store to purchase duct tape and razor blades.

Tanzi continued his journey until approximately 6:30 p.m. when he reached Sugarloaf Key. He decided that he needed to get rid of Acosta as she was getting in the way. He also knew he would get caught quickly if he released her alive. Tanzi proceeded to Blimp Road, an isolated area in Cudjoe Key. Tanzi told Acosta that he was going to kill her and then crosslaced a piece of rope and began to strangle her. He temporarily stopped to place duct tape over her mouth, nose, and eyes in an attempt to stifle the noise. Tanzi then continued to strangle Acosta until she died. Tanzi disposed of Acosta's body in a wooded, secluded area where he thought she would go unnoticed.

After the murder, Tanzi drove to Key West, where he shopped, ate, smoked marijuana, visited with friends, and used Acosta's ATM card. Tanzi had planned to access more of Acosta's money, sleep in a hotel, purchase drugs, and alter the van's appearance. However, on April 27, 2000, Tanzi's activities were interrupted when the police observed him returning to Acosta's van, which the police had located and placed under surveillance after Acosta's friends and coworkers reported her missing. When the police approached Tanzi, he had receipts in his pocket showing his ATM withdrawals and purchases. Tanzi stated that he "knew what this was about." He also spontaneously stated he wanted to talk about some bad things he had done.

After waiving his rights and while in a police car en route to the Key West Police Department, Tanzi confessed that he had assaulted, abducted, robbed, sexually battered, and killed Janet Acosta. Tanzi repeated his confession with greater detail several times on audio and video tape. Tanzi also showed the police where he had disposed of Janet Acosta's body and where he had discarded the duct tape and rope.

Tanzi was indicted for the first-degree murder of Janet Acosta. He was also charged by amended information with carjacking with a weapon, kidnapping to facilitate a felony with a weapon, armed robbery with a deadly weapon, and two counts of sexual battery with a deadly weapon. Initially, Tanzi pled not guilty; however, shortly before trial, Tanzi entered a

guilty plea to the first-degree murder, carjacking, kidnapping, and armed robbery counts. The two remaining sexual battery counts were severed.

After the plea colloquy and following a lunch recess, defense counsel moved to waive the penalty phase jury; however, the trial judge denied the motion. Hours later and arguing pro se, Tanzi stated that he had problems with one of his attorneys and vaguely mentioned that he should have a jury determine his guilt if he was forced to have a penalty phase jury. While the trial judge inquired into Tanzi's dissatisfaction with his attorneys, the judge did not rule on Tanzi's oral motion to withdraw his plea. The case proceeded to the penalty phase before a jury.

On February 19, 2003, the jury returned a unanimous recommendation of a death sentence. The court followed the jury's recommendation and sentenced Tanzi to death, finding that the aggravators greatly outweighed the mitigators. [FN1] The court also sentenced Tanzi to consecutive life sentences for carjacking with a deadly weapon, kidnapping to facilitate a felony with a deadly weapon, and armed robbery with a deadly weapon.

> FN1. Specifically, the trial court found the following aggravators: (1) that the murder was committed by a person previously convicted of a felony and under sentence of imprisonment or on felony probation; (2) that the murder was committed during the commission of a kidnapping; (3) that the murder was committed during the commission of two sexual batteries; (4) that the crime was committed for the purpose of avoiding arrest; (5) that the murder was committed for pecuniary gain; (6) that the murder was especially heinous, atrocious, or cruel (HAC); and (7) that the murder was committed in a cold, calculated, and premeditated (CCP) manner. The court gave each aggravator "great weight" except the HAC aggravator, which the court gave "utmost weight." The court found the following mitigators: (1) that Tanzi suffered from "axis two" personality disorders; (2) that he was institutionalized as a youth; (3) that his

> behavior benefited from psychotropic drugs; (4) that he lost his father at an early age; (5) that he was sexually abused as a child; (6) that he twice attempted to join the military; (7) that he cooperated with law enforcement; (8) that he assisted inmates by writing letters and that he enjoys reading; (9) that that his family has a loving relationship for him; and (10) that he had a history of substance abuse.
>
> On May 9, 2003, Tanzi filed a written motion to withdraw his plea, and an evidentiary hearing on the motion was held on November 15, 2004. The court entered a written order denying Tanzi's motion to withdraw his plea on January 6, 2005.

Tanzi v. State, 964 So. 2d 106, 110-12 (Fla. 2007). Tanzi filed a petition for writ of certiorari in the United States Supreme Court on November 26, 2007, which was denied February 19, 2008. Tanzi v. Florida, 552 U.S. 1195, 128 S. Ct. 1243 (2008).

II. Post-conviction Proceedings

(A) Course of Proceedings

A case management hearing was conducted on Tanzi's motion for post-conviction relief on June 12, 2009 before the Honorable Luis M. Garcia. The court denied Tanzi's subsequent attempt to amend his post-conviction motion with two new claims on August 14, 2009. The court issued an order on June 30, 2009, summarily denying several claims but setting the remaining claims for an evidentiary hearing. (V2, 308-13). The evidentiary hearing was conducted between January 21, 2010 and January 25, 2010. The court issued an order denying post-conviction relief on March

22, 2010. (V3, 511-20).

(B) Relevant Post-Conviction Hearing Testimony

(i) *Defense Attorney Bill Kuypers*

William Kuypers whose primary responsibility was the penalty phase, had extensive experience in criminal law, as a prosecutor, a defense attorney in private practice, and, as a senior litigator in the public defender's office.[1] (V4, 128-30). Kuypers had tried a number of homicide cases. He routinely attended life over death seminars addressing the latest developments and techniques for trying capital cases. (V4, 131-32). Kuypers was one of the most senior members in the public defender's office at the time this case was tried. (V4, 134-35).

Kuypers testified that extensive efforts to develop mitigation were made with an investigator making contact with Tanzi's family and institutions in Massachusetts and traveling to New York and Massachusetts. Kuypers testified that not only the investigator but he himself also traveled to Massachusetts in an effort to uncover Tanzi's background. (V4, 137-38). The defense called and qualified as an expert in forensic social work Linda Sanford, who had her Masters degree in Social Work. (V4, 147). He also recalled calling John Welch, a Masters level

[1]Kuypers tried the case with Nancy Rossell, who at the time this case was tried was the chief assistant public defender. (V1, 134).

counselor form New York who was willing to help Tanzi. (V4, 151). The doctors and lay witnesses called by the defense mentioned Tanzi's sexual abuse and family life or background. (V4, 152-53). Kuypers did not recall who molested Tanzi as a child but thought the fact that he was molested was not disputed below. (V4, 178). Kuypers admitted he sought out or obtained witnesses and evidence covering most of Taniz's life, from a very early age on. He sought out and obtained school records, medical records, and psychological records. (V4, 157).

Kuypers believed the letter referencing XYY was in the public defender's file and he had no idea what, if anything, Ms. Rossell might have done with it. (V4, 164). On the possibility of presenting XYY in mitigation, Kuypers believed he would first have to hear from an expert before he could determine whether to present it. (V4, 165). However, Kuypers was not sure what expert he would have retained to give him advice or input on XYY. (V4, 165-66).

Kuypers acknowledged that he had provided a large witness list in this case and that if they failed to call a witness on the list, "there was probably a reason for it." (V1, 137-38). For example, Dr. Maher, a psychiatrist, was not called because in evaluating and diagnosing Tanzi, he took into account Tanzi's Massachusetts murder. The defense made great efforts to

restrict the State from being able to reveal that homicide because the facts would be highly prejudicial to the defense. (V4, 138-39). Tanzi entered a laundromat where a black female was alone, hit her repeatedly over the head with a stick, attempted to strangle her with a sheet, and stabbed her in the neck with scissors, standing over her as she bled out.[2] Kuypers was worried about opening the door for the State to be able to elicit the prejudicial details of the Brockton murder. (V4, 140-141).

Kuypers filed a motion in limine to prohibit the State from cross-examining Dr. Vicary on his prior disciplinary problems and cited case law in support of that motion. (V4, 141-42). When the motion was not granted, Kruypers revealed the matter on direct examination in an effort to limit its impact on cross-examination by the State. (V4, 142). The record reflects that he sent the transcript of Tanzi's confession to Dr. Vicary and if any doctor had requested a copy of the actual videotaped confession, he would have sent it. (V4, 148).

In hiring Dr. Raphael, Kuypers retained the firm IAS, which included Doctors Mate, Raphael, and Golden. Thus, in addition to psychologist Dr. Raphael, he had the benefit of having Tanzi evaluated by a neuropsychologist, and a psychiatrist. (V4, 143-

[2]While not recalling a couple of those details, Kuypers did not dispute the facts recited by the prosecutor. (V4, 140).

44). They administered or had administered over 20 tests to Tanzi including a PET scan which revealed no abnormality in Tanzi's brain functioning. (V4, 144).

While Kuypers was generally aware that his experts had some inconsistent opinions, they were trying to minimize them. He recalled Dr. Raphael had "rule out" under schizoaffective disorder which meant he was not ruling it out as a possibility. (V4, 160-61). With regard to having his experts collaborate or discuss their opinions with one another, Kuypers thought that this was not a wise tactical move. He learned at a seminar that such collaboration among defense experts would open them up to a charge of collusion and potentially damage their credibility. (V4, 118, 150). Consequently, Kruypers thought the better practice was to compartmentalize his experts. Id.

(ii) *Lay Witnesses*

Shawn Martin, a neighbor and friend of Tanzi growing up in Massachusetts, was called by the defense. Martin was several years older than Tanzi. Martin testified that he began a sexual relationship with Tanzi when Martin was about 17. (V5, 269). It lasted about two years and ended when Martin went into the military at the age of 19. Martin testified that the total number of times they had sexual encounters was 4 or 5 and only two involved oral sex. The remaining contacts involved petting

and fondling. (V5, 269-70). He never forced Tanzi to view pornography but knew that Tanzi had some of his father's Playboys laying around the house. (V5, 271-72). He characterized their relationship as just two kids messing around. (V5, 271). If someone were to describe the relationship as dominating, manipulative sexual exploitation, Martin would call that a false characterization of the relationship. (V5, 271).

Martin claimed he observed several altercations between Tanzi and his father, that he was "pretty abusive." (V5, 256). Tanzi would get in a lot of fights and did not get along well with kids in the neighborhood. (V5, 259). When Tanzi's mother was at work or with one of her boyfriends, Martin testified that no one would watch him. (V5, 262). Martin admitted that he lied during the phone deposition when he denied having ever had sexual contact with Tanzi. He thought they had contact maybe four of five times and characterized it as "just kids fooling around kind of thing." (V5, 263). There was never any anal intercourse, just oral. (V5, 263). He never observed any third or fourth parties engaged in sexual activities with Tanzi. (V5, 264). He was with Tanzi when they happened upon his mother having sex a "couple" of times. (V5, 264).

Martin admitted that Tanzi's own conduct or behavior

brought about some of the neighborhood fights. (V5, 273). For example, Tanzi called the neighbors a negative racial term and was rude to people in the neighborhood. (V5, 274). Martin also observed Tanzi's mother get physical with Tanzi in response to verbal abuse, such as calling her a "bitch" and "cunt." (V5, 275). In response, Tanzi's mother would either slap Tanzi or push him abruptly into the vehicle. (V5, 275). Tanzi's home was maintained in good condition and Tanzi lived in a middle class neighborhood. (V5, 276-77).

Martin admitted that he lied in a recent interview with the assistant state attorney in this case, denying that he had ever had any sexual contact with Tanzi and denied knowing or hearing about anyone sexually abusing him. (V5, 266-68). Martin lied to the prosecutor despite knowing that this was a capital case and that this was a very serious matter. (V5, 265). While Martin did not believe he was under oath during the phone deposition, Martin testified during the hearing that he would not have been completely truthful with Mr. Madruga. (V5, 280). Martin agreed that counsel for CCRC allowed him to misrepresent the sexual nature of the relationship to counsel for the State of Florida during the interview.[3] (V5, 267-68).

[3]Martin testified that he was truthful right off the bat with Chris Taylor [and investigator with CCRC] over the phone regarding the sexual encounters. (V5, 266). However, he told

Hampton Perkins testified that he lived in Brockton Massachusetts and that the Tanzi family lived across the street from him. (V53, 283-84). He could recall Tanzi as a child but did not remember seeing him crying and Tanzi was not, to his knowledge, an emotional kid. Perkins thought that Tanzi got along well with the other kids in the neighborhood. Perkins worked a lot and did not recall or could hardly recall Tanzi ever fighting other kids. (V5, 285). Perkins thought that Tanzi was about 5 or 6 when his father passed away. (V5, 286). Perkins did not know if Tanzi struggled or had trouble coping with his father's death. (V5, 286-87). One time, when Tanzi got a good report card, Perkins testified that he took him out for breakfast. (V5, 287). He thought Tanzi was a good well-adjusted kid. (V5, 290). The neighborhood where he lives was a good neighborhood with no crime.[4] (V5, 291).

Julia Perkins testified that she lived across the street from Tanzi in Brockton and was a few years older than Tanzi. Julia babysat Tanzi when she was about 12 and Tanzi was maybe 6 or 7, after his father passed away. (V5, 302). Other kids in

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Taylor that he would not discuss it with him in person. (V3, 279).

[4]Tanzi, according to Perkins, got along well with his father. "Him and his father were together a lot. They did things together." Tanzi also got along well with his mother and as far as he could tell there was no trouble in the Tanzi household. (V5, 290).

the neighborhood would tease Tanzi. (V5, 293-95). Tanzi would get in fights but she admitted that sometimes he would act out or start some of them. (V5, 311). Julia thought Tanzi's father was a bit stern but thought that they got along. She recalled one incident where Tanzi's father grabbed him by the back and kicked his bottom into the house. (V5, 301).

Julia stopped babysitting Tanzi when he no longer listened to her. (V5, 304). Julia thought that Tanzi's mother spoiled him. From what Julia observed, she was a good mother to Tanzi. Of all the years she lived across the street, Julia only observed one incident of violence, the father kicking Tanzi into the house. (V5, 307-08). Julia also never observed Tanzi neglected or abandoned in the home. Tanzi's mother had a boyfriend in the neighborhood, Ray, who Julia knew to be a nice, friendly man. (V5, 310).

Anthony Delmonte testified that he had a bachelor's degree in international studies and came to meet Tanzi as a counselor at a day camp in Massachusetts. (V5, 320). Delmonte supervised recreational activities at the camp that had about 400 children. Delmonte personally supervised a group of ten to twelve children. (V5, 321). While he thought Tanzi was shy and sad he did not see any major differences between him and the other kids. (V5, 322).

Delmonte later had contact with Tanzi when he was fifteen or sixteen as a social worker with the Department of Social Services in Brockton. (V5, 322). He was not sure why Tanzi was referred to him but thought it was as a "child in need of services petition." Delmonte referred to such a petition as usually reflecting a parent seeking help for an uncontrollable or runaway child. (V5, 323). He thought Tanzi fell into the stubborn child category. (V5, 324). Delmonte's overall assessment of Tanzi was that he needed "a restrictive setting because of his behaviors and because of the things he had been involved in." Delmonte thought that Tanzi was violent and assaultive. (V5, 327).

Delmonte was not a psychologist and did not have a Masters Degree in social work. If anyone wanted to understand the nature of Delmonte's assessment of Tanzi they only needed to review his report. Delmonte did not believe he could add anything compelling which was not detailed in his reports on Tanzi. (V5, 330).

The records reflect that Mrs. Tanzi was the one who sought out treatment for Michael, she felt overwhelmed, and stated that she could not control him. Tanzi's home was evaluated and it was found that neither income nor the home environment were a problem. (V5, 334). The records revealed Mrs. Tanzi was very

involved in Michael's treatment and that she was very interested in getting him the help he needed. (V5, 335). Delmonte's reports indicated that Michael was acting out, that he had punched his mother, stolen a credit card, exposed himself to a young woman. (V5, 337). Mrs. Tanzi did not feel safe having Michael at home and did not feel she could provide the supervision he required. The report also indicated that Tanzi would need therapy to address issues of grief and possible sexual victimization. (V5, 339-40).

Phyllis Whalen, Tanzi's mother, testified that Tanzi's father was verbally abusive to Tanzi and physically abusive one time. (V5, 341-43). On that one occasion, Tanzi's father took him over his knee and spanked him. As a child, Tanzi was emotional and had a temper. (V5, 343). He did not get along well with other children and was always angry or fighting them over something. (V5, 346). Her relationship with Michael was close. She did everything for him and got him everything he needed. They sought out counseling for Tanzi. (V5, 348).

When Tanzi was first admitted to a hospital after threatening her with lawn shears, the counselors said that he was sexually abused. However, neither Tanzi nor the counselors told her who had abused him. (V5, 349). Mrs. Whalen testified that Tanzi went through a number of treatment options, from

outpatient to resident, but, that he was usually argumentative and uncooperative. She ultimately signed him out of a residential facility as her father-in-law said that nothing was wrong with Tanzi. The counselors advised against it, but she signed him out anyway. (V5, 354-55).

When Tanzi came to live with her, he made her nervous, he was edgy and started to get into trouble again. Tanzi made obscene phone calls to his sister-in-laws and even to Mrs. Whalen's 80-year-old aunt. The calls were very violent, very suggestive. Tanzi was arrested and ultimately was sent to a program where he was going to high school and graduated highest in his class. (V5, 356). Tanzi came home after graduation for only a few weeks when he was 17 or close to 18. Tanzi was arrested for stealing from his employer and for carjacking. "He was in a parking lot in Wareham, and he got in the car with a woman. And he tried to get her to take him some place, and she screamed. And the police were called, and they caught him." (V5, 357).

Whalen admitted talking to Stephanie Fleming from the public defender's office who came up to Brockton years ago. Fleming spent time with her and got a lot of information from her regarding Tanzi's background.. Whalen testified that there was nothing at all she could add today that was not originally

provided to the defense attorneys or the State at the time of trial that could be presented to the jury. She gave them all the information she had at that time about Tanzi. (V5, 362). However, Whalen admitted she did not want to come down to Florida to testify on behalf of her son at the time of trial. Ultimately, the defense attorneys convinced her of the necessity of coming down to participate. (V5, 363).

The one instance of corporal punishment she witnessed did not result in any significant injury to Tanzi. (V5, 363). Mrs. Whalen agreed that Tanzi started a lot of fights as a child. She tried to punish him by taking away privileges, like his Nintendo, but, Tanzi simply did not care. (V5, 367). Mrs. Whalen only took Tanzi out of treatment on one occasion and that was only for a few weeks. She did not abandon or neglect Tanzi in anyway. (V5, 368).

(iii) *Medical and Mental Health Experts*

Dr. Karl Muench testified that he was a professor of medicine at the University of Miami and was board certified in genetic medicine. (V4, 12). Dr. Muench did not examine Tanzi or review any psychological reports on him. (V4, 17). Dr. Muench reviewed a Cytogenics Laboratory Report which indicates that Tanzi has an XYY karyotype. (V4, 19). The genotype XYY “is subtle and consists of a syndrome of observable points, any one

of which by itself would not be totally outside of the normal range. For example, the height of an individual population–wise, statistically the height of XYY individuals is greater than the height of XY individuals. But the height of any one individual with XYY ordinarily would be in the normal range." (V4, 24). Other areas that are seen above the mean are larger teeth and more acne. (V4, 26-27). Dr. Muench testified that behaviorally, initial studies suggested that antisocial behavior was associated with XYY, but, those studies were later largely discredited. (V4, 29-30). However, lower intelligence has been noted in XYY males, a ten to fifteen percent decrease measured by standard tests. (V4, 31). Dr. Muench testified that there is no direct or causal link between XYY and criminal behavior. (V4, 32). However, he thought that there were some developmental issues such as decreased social skills, learning disabilities and impulsive behaviors that would lead to placement in special school situations. XYY "does not necessarily cause" any of those developmental problems, but it would be fair to say there would be a statistically higher likelihood of XYY children having such developmental issues. (V4, 33-34).

Dr. Muench had very limited personal experience with the XYY karyotype. Dr. Muench had not been involved in any studies regarding XYY, had not testified in court on XYY, and, if he

addresses XYY at all in his practice, it is usually by accident. (V4, 40). It would only come up when a parent was advised the child they were carrying had an XYY karyotype. (V4, 40). Dr. Muench has only counseled such parents five times in his 45-year career. On those occasions, Dr. Meunch advised the parents that more likely than not, their child will be normal. (V4, 43). Dr. Muench them that most likely they would never even know that their child had such a condition. He agreed with studies which showed that most XYY children develop quite normally during childhood. (V4, 44).

While Dr. Muench considered XYY a syndrome, he could not point to any publication which found to any degree of medical certainty that it is a "syndrome." (V4, 45). And, Dr. Muench agreed with a study on the issue which concluded that there is no prominent component or link between XYY and antisocial behavior. (V4, 49). Dr. Muench also agreed that environmental factors have clouded attempts to link behavior to XYY. (V4, 51). Dr. Muench agreed that he could not testify that XYY was "causative" of behavior. (V4, 53). In fact, it is generally accepted in the scientific community that there is no "established causation between XYY disorder and criminal or antisocial behavior." (V4, 61-62).

Dr. Richard Dudley testified that he resided in New York

and was licensed to practice medicine there with a specialty in psychiatry. (V5, 372). Dr. Dudley's sole training in genetics consisted of one class in genetics in medical school dating back to 1972. The class he took did not focus on XYY, but, covered a whole range of chromosome abnormalities. Since medical school he had not taken any courses or continuing education courses in genetics. Nor, had he participated in any studies relating to genetics. (V5, 375). Dr. Dudley did not consider himself a specialist in the area of genetics. (V5, 380).

Dr. Dudley is called to testify overwhelmingly by the defense in criminal cases. When the death penalty is at issue, Dr. Dudley has only been called to testify by the defense. (V5, 401). Dr. Dudley charges $350 an hour for his professional services. While Dr. Dudley did not know exactly how many hours he had billed, he admitted it could be more than 40 or even 50 in this case. (V5, 402-03).

Dr. Dudley agreed that the mental health experts at the time of trial had a large number of documents and records relating to Tanzi. Dr. Dudley did not talk to any witnesses or family members of Tanzi. (V5, 404).

Dr. Dudley testified that Tanzi's XYY genotype constituted a "risk factor" for the development of childhood "difficulties." (V5, 381. Dr. Dudley diagnosed Tanzi with post-traumatic stress

disorder, borderline personality disorder, and depressive disorder, with polysubstance abuse, and, a "sexual disorder not otherwise specified." (V5, 381-82). The borderline personality was based upon instability in his life and personal relationships. "That kind of mood instability that was there as a child continued into his adult life, having difficulty sustaining that mood. And then, again, when he couldn't find those attachments or felt those rejections that he would just fall apart." (V5, 390). Since he did not find evidence of, or periods of hypomania, Dr. Dudley did not diagnose Tanzi with bipolar disorder. (V5, 395).

Dr. Dudley found the statutory mental mitigator that Tanzi was under an "extreme mental or emotional disturbance" at the time of the crime, based upon the disorders he mentioned. Dr. Dudley also found Tanzi's capacity to appreciate the criminality of his conduct and conform his conduct to the requirements of the law was substantially impaired: "In my opinion." (V5, 397-98).

Dr. Dudley admitted that while he diagnosed Tanzi with borderline personality disorder, a number of doctors had diagnosed Tanzi with antisocial personality disorder. These included Dr. Raphael, Dr. Vicary, Dr. Ansley, and Dr. Sczechwicz. Dr. Dudley admitted, therefore, that at the time of

the penalty phase there was a consensus among the experts who testified. (V5, 405).

Dr. Dudley was cross-examined regarding the criteria for antisocial personality disorder, specifically the criteria relating to the pervasive pattern of violating the rights of others and failure to conform to societal norms. Dr. Dudley agreed that Tanzi's history satisfied this criteria, relating to repeatedly committing property crimes and theft. His history also revealed crimes against individuals such as acting out sexually and inappropriately, from the time he was a juvenile to the time he was arrested, and, included among other things, assaulting a teacher in class [frottage]. They also included soliciting sex from a minor child, obscene phone calls, being arrested for rape in New York. (V5, 407).

Dr. Dudley was also familiar with the facts of the murder of Caroline Holder, which preceded the murder of Janet Acosta. He believed he was provided arrest records relating to that murder but mostly recalled the facts from Tanzi's confession. In this confession, Dr. Dudley admitted Tanzi stated how he came upon the isolated victim in the laundromat, ensuring that no one else was around, then hit her in the head with a stick. Once she was helpless, he demanded money and robbed her of $200. (V5, 407-08). She pleaded with Tanzi to just take her money.

However, after taking her money, Tanzi incapacitated her, and tied a sheet around her neck. After pulling on the sheet, attempting to strangle her, Tanzi stated she was not dying from strangulation. Tanzi then obtained a pair of surgical scissors and stabs the victim twice in the neck. Dr. Dudley acknowledged that Tanzi sat over the victim until she bled out. In Tanzi's statement, Dr. Dudley acknowledged he committed the murder to obtain money to leave town, to go to New York. (V5, 409-10). Dr. Dudley admitted that the murder of Mrs. Holder and Janet Acosta are "significant antisocial acts." (V5, 410).

Dr. Dudley explained that he did not at all disagree that Tanzi's "behavior has been antisocial.". However, Dr. Dudley thought that Tanzi thought the "origin" of it was "so much more disturbed than that." (V5, 410). Ultimately, Dr. Dudley admitted that Tanzi met the criteria for antisocial personality disorder. "I'm agreeing that he meets the criteria for antisocial personality disorder." But, in thinking which disorder is primary, Dr. Dudley opined, that as instructed in the DSM you consider "whether this behavior is the result of something more severe." (V5, 411-12). Dr. Dudley thought borderline personality disorder was more "severe" but acknowledged that it, like antisocial personality disorder, is an Axis II diagnosis. (V5, 412).

Dr. Dudley agreed that he had the benefit of Tanzi's detailed confession in this case. (V5, 415-16). In it, Tanzi mentioned his motivation was to get from Miami to Key West. He admitted that each of his acts from the time he made that decision appeared to be logical and goal directed. Tanzi selected the female victim because she was in an isolated area he was familiar with. He overpowered her and obtained the method of transportation which was his goal to obtain. (V5, 416). Tanzi took control of her, obtained money from her, bound her, threatened to slice her from ear to ear if she did not give him the PIN number. (V5, 417). Tanzi successfully withdrew money from her ATM account. To more effectively bind her, he stopped at a store and obtained duct tape. The victim was incapacitated on his drive to Key West. (V5, 418). Tanzi admitted in the confession that he could not let her live and made the decision that he would get caught "really quick" if he let her go. Dr. Dudley acknowledged during the drive that Janet Acosta had been pleading for her life. (V5, 418-19). Further, Tanzi took some time in selecting the location where Janet could be murdered. And, he used a rope to strangle her, taking some twenty minutes to accomplish the task. Tanzi disposed of her body in a bag in a secluded location to prevent its discovery . Tanzi continued on to Key West and used her ATM card

successfully a couple more times. (V5, 420-21). In Tanzi's confessions to the two murders, he did not claim he mixed up either Janet Acosta or Caroline Holder with his mother. (V5, 421).

Dr. Dudley agreed that the experts who testified during the penalty phase discussed the sexual abuse Tanzi endured. (V5, 425-26). Dr. Dudley admitted that assuming Shawn Martin testified that only two instances of oral sex and some fondling occurred, this would contradict the nature of the abuse presented during the penalty phase; that it was repeated and included more violent episodes. (V5, 427).

Dr. Alan Raphael was called by the State and testified that his firm was retained to perform neuropsychological and psychiatric evaluations of Tanzi at the time of trial. Dr. Raphael evaluated Tanzi in conjunction with Dr. Mate, his director of psychiatry, and Dr. Golden, director of neuropsychology. (V4, 192). Dr. Raphael's firm administered or caused to be administered some 24 tests to Tanzi. (V4, 205). Dr. Raphael possessed some 2000 pages of material relating to Tanzi, of which approximately 1500 pages consisted of background materials relating to various institutions, "psychiatrists, psychologists, social workers, etc." (V4, 193).

Dr. Rapheal testified that he has conducted thousands of

evaluations but that he does not know their "chromosomal make-up." Since someone had mentioned a possible chromosomal defect, Dr. Raphael testified that he had "subsequently done considerable research on the topic." He did not recall trial counsel mentioning any sort of genetic disorder nor did he see any such reference in the hundreds of pages of records from various MD's and "don't believe that it should have been mentioned." (V4, 197). Dr. Raphael testified that as a psychologist he comments upon the overlap between genetics and behavior. (V4, 216-17). Dr. Raphael testified that assuming that Tanzi has an extra Y chromosome, that fact does not change any of his opinions in this case. (V4, 223).

Dr. Raphael testified that none of the doctors in his firm diagnosed bipolar disorder, but he testified that "we included it as a possibility." (V4, 200). When asked about schizoaffective disorder bipolar type, Dr. Raphael explained he did not make that diagnosis, that "rule out" meant "that we're considering it, but we do not have sufficient evidence to make it a diagnostic impression." (V4, 201). Dr. Raphael agreed that he testified that Tanzi's response to one particular test suggested bipolar disorder and it would be fair to say some "bipolar" elements in Tanzi's makeup. (V4, 225). Dr. Raphael noted that it is not unusual for reasonable mental health

professionals to arrive at a different diagnosis after examining an individual. In fact, “in a forensic or medical, legal or psycho-legal world it’s fairly common.” (V4, 226). Dr. Raphael provided “very extensive” testimony during the penalty phase in this case. (V4, 227).

Any additional facts necessary for disposition of the assigned errors will be discussed in the argument, infra.

SUMMARY OF THE ARGUMENT

ISSUE I—-This Court is not precluded from meaningful appellate review based upon an allegedly inadequate post-conviction order. The lower court's order sufficiently sets forth the facts and rationale for denying Tanzi's motion for post-conviction relief.

ISSUE II--Tanzi failed to establish either deficient performance or resulting prejudice based upon trial defense counsel's performance during the penalty phase. The experienced trial defense attorneys conducted an extensive mitigation investigation and presented a thorough and competent penalty phase case on behalf of Tanzi. Collateral counsel has failed to uncover any significant mitigation which calls into question the outcome of Tanzi's penalty phase.

ISSUE III—-The post-conviction court properly denied several post-conviction claims without a hearing as they were either facially insufficient, refuted by the record, or procedurally barred.

ISSUE IV--The post-conviction court did not abuse its discretion in refusing to allow Tanzi to amend his motion to add two claims where Tanzi failed to show good cause for the amendment.

ISSUE V—-Tanzi's public records claims are patently without merit. The information was either turned over to Tanzi or plainly irrelevant to any plausible post-conviction claim.

ARGUMENT

ISSUE I

WHETHER MR. TANZI IS BEING DENIED A MEANINGFUL AND APPROPRIATE APPELLATE REVIEW BECAUSE THE LOWER COURT FAILED TO MAKE DETAILED FINDINGS OF FACT AND CONCLUSIONS OF LAW?

Tanzi first asserts that the trial court did not make sufficient findings of fact or law in denying his motion for post-conviction relief. The State disagrees. This claim is both unpreserved for appeal and without merit.

Tanzi failed to object to either the form or substance of the trial court's order below, file a motion for rehearing, or, in any way, alert the trial court to the error he alleges on appeal. Consequently, Tanzi's claim has been waived on appeal. "It is a longstanding principle of our jurisprudence that for a claim to be addressed by this Court, it must be raised by the party before the trial court, or it has been waived." Baptiste v. State, 995 So. 2d 285, 301-302 (Fla. 2008) (string cites omitted). The trial judge and parties must be made aware that error may have been committed and the lower court must be given an "opportunity to correct it at an early stage of the proceedings." Castor v. State, 365 So. 2d 701, 703 (Fla. 1978). "Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually." Id.

The fact that the alleged error first appeared when the trial court issued its order does not obviate the need for an objection to preserve the issue on appeal. Tanzi had the opportunity to file a motion for rehearing to inform the post-conviction court of the perceived inadequacy of its order.[5] For example, in Holland v. Cheney Bros., Inc., 22 So. 3d 648, 649-650 (Fla. 1st DCA 2009), the court held that any error in the adequacy of the lower court's order was waived because it was not raised in a motion for rehearing. The court explained:

> "In workers' compensation cases, as in other cases, we will not consider arguments which were not presented in a meaningful way to the lower tribunal." *Id.* at 366. When "the issue ... arises for the first time in the final order" or "[i]f the error is one that first appears in the final order," an objection must be preserved by filing a motion for rehearing on the issue. *Hamilton v. R.L. Best Int'l*, 996 So.2d 233, 234 (Fla. 1st DCA 2008).
>
> The very purpose of a motion for rehearing is to allow the JCC, the sole finder of fact and arbiter of law, the opportunity to consider, correct, and clarify any perceived errors, whether factual or legal, before an order becomes final. See *Fla. Admin. Code R. 60Q-*

[5]Since Tanzi's convictions and death sentence are supported by overwhelming evidence of both guilt and aggravation, delay may be Tanzi's only achievable legal strategy in this case. See Thompson v. Wainwright, 714 F.2d 1495, 1506 (11th Cir. 1983) (observing that "[e]ach delay, for its span, is a commutation of a death sentence to one of imprisonment"). However, it is a strategy that should not be facilitated by inappropriate legal maneuvers designed to achieve that goal. See Calderon v. Thompson, 523 U.S. 538, 555-556 (1998) ("Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out.") (citing Payne v. Tennessee, 501 U.S. 808, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991)).

> *6.122(1)-(5)*. **Because reversal by this court on the basis of insufficient findings of facts will result only in a remand for the JCC to do precisely that which was available by way of rehearing-i.e., make additional findings of fact FN*-preservation is necessary. A contrary result would discourage parties from bringing such matters to the JCC's attention, a process which would waste judicial resources and unnecessarily delay the ultimate disposition of cases.**

(emphasis added). See also Verkruysse v. Florida Carpenters Regional Council, 27 So. 3d 157, 159 (Fla. 1st DCA 2010) (where the alleged error first appears in the court's order, a motion for rehearing must be filed to preserve the issue for appeal); Hamilton v. R.L. Best Intern., 996 So. 2d 233, 234-235 (Fla. 1st DCA 2008) ("If the error is one that first appears in the final order, the aggrieved party must bring it to the judge's attention by filing a motion for rehearing.")

Aside from failing to preserve this claim for review, the trial court's order, while perhaps not as comprehensive as other post-conviction orders this Court routinely encounters in capital cases, is sufficient for meaningful appellate review. See Ragsdale v. State, 798 So. 2d 713, 720 (Fla. 2001) (stressing the need for judges to enter "detailed orders in postconviction capital cases."). The post-conviction court in this case presided over an evidentiary hearing lasting several days and issued an order finding neither deficient performance or resulting prejudice under the appropriate ineffective

assistance of counsel standard. The Court made some 49 separate findings of fact and 9 conclusions of law in a 10-page order. (V3, 513-520). While the order does not specifically make individual credibility findings for each witness, it is clear that the court credited trial counsel's evidentiary hearing testimony in finding that counsel did not render deficient performance.[6] See Brown v. State, 755 So. 2d 616, 628 (Fla. 2000) (Order sufficient where "[t]he record reflects that the circuit judge held a full evidentiary hearing, addressed the relevant points raised by Brown, and adequately explained the rationale for her decision denying relief."). While Tanzi faults the post-conviction court for failing to mention the mental health experts by name in his order, the court did make findings relating to Tanzi's claims. Moreover, once the court found counsel's investigation and presentation of mental health evidence was not deficient, there was no need to address Dr. Dudley or his testimony in any detail. This Court has long recognized, see Argument II, infra, p. 42, that counsel's reasonable investigation into a defendant's mental health is not

[6]Tanzi's reliance upon Mendoza v. State, 964 So. 2d 121, 127 (Fla. 2007) is misplaced. In Mendoza, the lower court denied the postconviction relief in a "very brief, two-page order, which simply set out the standards from case law for ineffective assistance of counsel claims" and ultimately concluded that he failed to meet the ineffective assistance standard. Here, the trial court made some 49 factual findings and did not, like the judge in Mendoza, simply recite the legal standards.

rendered deficient simply because collateral counsel is able to secure the testimony of a more favorable expert.

Based upon this record, there is simply no material conflict in the evidence or testimony presented which could conceivably alter the outcome of this post-conviction proceeding. Put simply, this is not a close case and remand would result in little more than an unjustifiable delay with minimal, if any, benefit to this Court.

ISSUE II

WHETHER MR. TANZI WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT PENALTY PHASE?

Tanzi next contends that his trial defense attorneys were deficient for failing to present or prepare penalty phase mitigation. After having been granted an evidentiary hearing on this issue, Tanzi failed to establish any deficiency on the part of his experienced trial counsel, much less the type of serious deficiency required to meet either prong of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). Accordingly, this claim must be denied.

A. THE INEFFECTIVE ASSISTANCE STANDARD AND STANDARD OF REVIEW

Of course, pursuant to Strickland, 466 U.S. at 690, a defendant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional

standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and the reliability of the proceeding that confidence in the outcome is undermined. In any ineffectiveness case, judicial scrutiny of an attorney's performance must be highly deferential and there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 694. A fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight. Id. at 696.

With regard to the penalty phase, this Court has stated that a defendant "must demonstrate that there is a reasonable probability that, absent trial counsel's error, 'the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" Cherry v. State, 781 So. 2d 1040, 1048 (Fla. 2000), cert. denied, 534 U.S. 878, 122 S. Ct. 179 (2001) (quoting Strickland, 466 U.S. at 695)). The defendant bears the full responsibility of affirmatively proving prejudice because "[t]he government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." Strickland, 466 U.S. at 693.

When reviewing a trial court's ruling on an ineffectiveness

claim, this Court must defer to the trial court's findings on factual issues, but reviews the trial court's ultimate conclusions on the deficiency and prejudice prongs *de novo*.[7] Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001); Sochor v. State, 883 So. 2d 766, 771-72 (Fla. 2004).

With these considerations in mind, the State will attempt to analyze Tanzi's various claims, many of which are summarily made, without reference to the trial record or trial counsel's testimony during the post-conviction hearing. The evidentiary hearing did not reveal any significant credible mitigating evidence or avenue of mitigation not presented by trial counsel below.

B. CLAIMS RELATING TO INVESTIGATION OR PRESENTATION OF MENTAL HEALTH EVIDENCE

Tanzi's burden of establishing ineffective assistance in this case is an especially difficult one as he was represented by two very experienced defense attorneys. See Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir. 2000) (*en banc),* ("When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger.").

William Kuypers, whose primary responsibility was the

[7]This standard of review applies to all issues of ineffectiveness addressed in this brief.

penalty phase, had extensive experience in criminal law, as a prosecutor, a defense attorney in private practice, and, as a senior litigator with the public defender's office.[8] (V4, 128-30). Kuypers had tried a number of homicide cases. He routinely attended life over death seminars addressing the latest developments and techniques for trying capital cases. (V4, 131-32). Kuypers was one of the most senior members in the public defender's office at the time this case was tried and attorneys in the office often sought him out for advice. (V4, 134-35). This is a rare case where although the post-conviction court ordered a hearing this claim, the trial record alone is sufficient to refute the ineffectiveness claim.

The trial record reflects that counsel sought the appointment of seven mental health experts to assist with the defense.[9] (R. 3, 91-94, 142-43, 274-75, 794-95). The trial court granted all of those requests. (R. 4, 9, 122, 189, 191, 197, 292-93, 796, 827). The first expert was sought the day after Defendant's arrest. (R. 3). Defense counsel also sought and was permitted to have a PET scan conducted. (R. 464-65, 555, 558, 588).

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[8]Kuypers tried the case with Nancy Rossell, who at the time this case was tried was the Chief Assistant Public Defender. (V1, 134).

[9]The trial court also appointed two more experts to evaluate Defendant's competency to proceed on two separate occasions. (R. 10, 825-26).

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

At the conclusion of the evidentiary hearing, the post-conviction court did not find any deficiency in counsel's preparation for or presentation of expert testimony below. (V3, 513, 516-20). The post-conviction court's order is well supported by the evidence.

(i) Counsel's Presentation of Allegedly Inconsistent Mental Health Theories

Tanzi asserts that his trial attorneys were ineffective for presenting two mental health experts who had inconsistent theories regarding his mental condition. (Appellant's Brief at 29-30). Specifically, Tanzi faults counsel for presenting Dr. Vicary who diagnosed Tanzi with bipolar disorder and Dr.

Raphael, who did not. While these two mental health experts did not have the same exact diagnosis, they were not truly inconsistent and both provided favorable mental health mitigation testimony in the penalty phase.

With regard to the claim that Kuypers was ineffective for failing to ensure that his experts were aware of each others' conclusions and that counsel was deficient in presenting two opinions "diametrically opposed" to one another, this claim is refuted by the trial record. Dr. Vicary testified that he reviewed the reports of Defendant's other experts. (T. 1154). Moreover, he diagnosed Defendant with bipolar disorder, substance abuse, paraphilia and antisocial personality disorder. (T. 1159). Dr. Raphael also diagnosed, *inter alia*, a substance abuse disorder, sexual disorders and antisocial personality disorder. (T. 1300-04). He further stated that he suspected Defendant of having bipolar disorder. (T. 1302). The record shows that although the experts did not arrive at exactly the same diagnosis, they did not truly contradict each other.[10] And, the testimony of Dr. Raphael during the evidentiary hearing below does not establish any deficiency on the part of trial counsel.

[10]Dr. Raphael noted that it is not unusual for reasonable mental health professionals to arrive at a different diagnosis after examining an individual. In fact, "in a forensic or medical, legal or psycho-legal world it's fairly common." (V4, 226).

Dr. Raphael testified that none of the doctors in his firm diagnosed bipolar disorder, but he testified that "we included it as a possibility." (V4, 200). When asked about schizoaffective disorder bipolar type rule out, Dr. Raphael explained that "rule out" meant "we're considering it, but we do not have sufficient evidence to make it a diagnostic impression." (V4, 201). Dr. Raphael agreed that he testified during the penalty phase that Tanzi's response to one particular test suggested bipolar disorder and it would be fair to say there are some "bipolar" elements in Tanzi's makeup.[11] (V4, 225).

While Kuypers was generally aware that his experts had some inconsistent opinions, they were trying to minimize them. He recalled Dr. Raphael had "rule out" under schizoaffective disorder [bipolar] which meant he was not ruling it out as a possibility. (V4, 160-61).

With regard to having his experts collaborate or discuss their opinions with one another prior to testifying, Kuypers thought that this was not a wise tactical move. He learned at a seminar that such collaboration among defense experts would open them up to a charge of collusion and potentially damage their

[11]The trial record confirms Dr. Raphael's recollection. Dr. Raphael testified that he suspected Tanzi also suffered psychotic disorders including bipolar disorder but could not determine if Defendant met all the criteria. (T. 1302) He testified that antisocial personality disorder is a form of mental illness. (T. 1304).

credibility. (V4, 118, 150). Consequently, he thought the better practice was to compartmentalize his experts. Id. As counsel offered a valid tactical reason for failing to have his experts meet and consult with one another, counsel cannot be considered ineffective. Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000) ("Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions."). The trial court properly credited the testimony of the experienced trial attorney in rejecting this claim below. (V3, 516).

As for any assertion that trial counsel was ineffective in failing to prepare Dr. Vicary to testify by failing to provide him with a videotape of Tanzi's confession [rather than the written transcript] (Appellant's Brief at 32), this claim need not long detain the Court. Tanzi failed to prove either deficient performance or prejudice during the evidentiary hearing. Kuypers testified that he sent the transcript of Tanzi's confession to Dr. Vicary and if any doctor had requested a copy of the actual videotaped confession, he would have sent it. (V4, 148). Tanzi's assertion that "Dr. Vicary's opinion" would be "supported" (Appellant's Brief at 33) by the videotaped statement is simply not supported by any evidence or testimony presented during the evidentiary hearing. Tanzi failed to call

Dr. Vicary to testify during the evidentiary hearing and therefore has not shown his testimony would have been changed or altered had he simply viewed the videotaped confession. See e.g. Carroll v. State, 815 So. 2d 601, 611 (Fla. 2002) (Even "assuming trial counsel was deficient for failing to provide the additional background information" defendant failed to demonstrate prejudice under Strickland where the experts would not have changed their opinions with the benefit of such material).

It is unclear why Tanzi called Dr. Richard Dudley, a psychiatrist licensed to practice in New York State, to testify during the evidentiary hearing. If it was an attempt to prove prejudice on the issue of counsel's effectiveness in calling Dr. Vicary and presentation of an allegedly inconsistent mental health diagnosis, then collateral counsel is guilty of the same deficiency alleged of trial counsel. While collateral counsel faults trial counsel for presenting two mental health experts who had arguably inconsistent diagnoses, incredibly, Dr. Dudley's testimony was inconsistent with every other expert who has testified in this case. Dr. Dudley was the only expert, of the four who testified in this case, who did not diagnose Tanzi

with Antisocial Personality Disorder.[12] Moreover, Dr. Dudley did not diagnose Tanzi with a major mental disorder. Dr. Dudley's primary diagnosis was that Tanzi had a maladaptive personality, Borderline Personality Disorder, an Axis II diagnosis. Thus, aside from failing to establish deficient performance in this case, Tanzi has fallen far short of establishing prejudice.

Assuming for a moment, that Dr. Dudley's testimony was somehow more beneficial to Tanzi than the experts who testified on his behalf during the penalty phase, this fact is of no consequence Tanzi has simply shown that with apparently unlimited resources, he could find an expert willing to provide favorable mitigation testimony.[13] However, it is well established that trial counsel's reasonable investigation into a defendant's mental health or presentation of mental health testimony is not rendered deficient simply because post-conviction counsel is able to secure the testimony of a more favorable mental health expert. Counsel extensively explored Tanzi's mental condition and retained several qualified experts.

[12]Dr. Dudley admitted that while he diagnosed Tanzi with Borderline Personality Disorder, a number of doctors, including Dr. Raphael, Dr. Vicary, Dr. Ansley, and Dr. Sczechowicz diagnosed Tanzi with Antisocial Personality Disorder. (V4, 405).

[13]Dr. Dudley is called to testify overwhelmingly by the defense in criminal cases. In fact, when the death penalty is at issue, he has only been called to testify by the defense. (V4, 401).

See Darling v. State, 966 So. 2d 366, 377 (Fla. 2007) ("[D]efense counsel is entitled to rely on the evaluations conducted by qualified mental health experts, even if, in retrospect, those evaluations may not have been as complete as others may desire."); Accord Stewart v. State, 37 So. 3d 243, 252-253 (Fla. 2010); Dufour v. State, 905 So. 2d 42, 58 (Fla. 2005) ("Simply presenting the testimony of experts during the evidentiary hearing that are inconsistent with the mental health opinion of an expert retained by trial counsel does not rise to the level of prejudice necessary to warrant relief.)

Further, Dr. Dudley's testimony was somewhat less than credible. Tanzi had a history of conduct which falls squarely within the antisocial realm, from being irresponsible with no work history to speak of, acting out in school, setting fires, sexually acting out and sexual offenses against others, repeatedly stealing and lying, carjacking, kidnapping, and two murders. While not including Antisocial Personality Disorder in his diagnosis, Dr. Dudley was ultimately forced to admit on cross-examination that Tanzi met the DSM-IV-TR diagnosis for the disorder.[14] "I'm agreeing that he meets the criteria for antisocial personality disorder." But, in thinking which

[14]The Diagnostic and Statistical Manual of Mental Disorders, Text Revision, [DSM-IV-TR], promulgated by the American Psychiatric Association.

disorder is primary, Dr. Dudley opined, that as instructed by the DSM-IV, you consider "whether this behavior is the result of something more severe." Dr. Dudley thought borderline personality disorder was more "severe" but acknowledged that it, like Antisocial Personality Disorder, is an Axis II diagnosis. (V5, 411-12).

Dr. Dudley was then questioned about the DSM which provides an exception on when not to diagnose Antisocial Personality Disorder, even though an individual met the diagnostic criteria. "The occurrence of antisocial behavior is not exclusively during the course of schizophrenia or a manic episode." Dr. Dudley admitted he had not diagnosed Tanzi with either schizophrenia or bipolar disorder [manic episode]. (V4, 414-15). Consequently, his failure to diagnose Antisocial Personality Disorder in this case was not supported by the DSM-IV-TR.

Finally, assuming that trial counsel can be faulted for not scouring the country to find a $350 an hour psychiatrist from New York, in some respects Dr. Dudley was far less helpful to the Defendant than the experts trial counsel called during the penalty phase. Dr. Dudley did not find that Tanzi suffered from a major mental illness or thought disorder. According to Dr. Dudley, Tanzi had a Borderline Personality Disorder, an Axis II, disorder, and he did not in any way explain how this personality

dysfunction affected Tanzi at the time of the offense. Indeed, Dr. Dudley's assertion that the two statutory mental mitigators applied in this case was simply not credible. Dr. Dudley did not relate the personality disorder to any of Tanzi's conduct on the day of the murder and the cross-examination focused upon the deliberate and goal directed behavior described by Tanzi in his detailed confession.[15] See Rose v. State, 617 So. 2d 291, 293 (Fla. 1993) (stating that a postconviction judge "has broad discretion in determining the applicability of mitigating circumstances and may accept or reject the testimony of an expert witness."); Davis v. State, 604 So. 2d 794, 798 (Fla. 1992) (statutory mitigating circumstances properly rejected, despite testimony of two defense experts, where defendant's methodical behavior was inconsistent with alleged mental incapacity).

Aside from questions of credibility, Dr. Dudley's testimony opened the door to the highly damaging revelation that Tanzi committed another murder and invited comparisons between the two murders to test Dr. Dudley's opinions. The prior murder was

[15]As noted by the trial court, the two experts called by the State during the penalty phase, Drs. Ansley and Sczechowicz, as well as other mental health professionals in the past, diagnosed Tanzi with Axis II, personality disorders [antisocial, narcissistic] which the court found did not substantially impair his ability to conform his conduct to the requirements of the law. (R. 1818-1821).

clearly relevant to test Dr. Dudley's opinion regarding the statutory mental mitigating factors and his failure to diagnose Tanzi with Antisocial Personality Disorder. Notably, collateral counsel lodged no objection to inquiry on the Massachusetts murder, conceding its relevance.[16] No competent defense attorney would present the testimony of Dr. Dudley in the penalty phase at the risk of revealing Tanzi committed another murder in Massachusetts before murdering Janet Acosta.

Dr. Dudley admitted Tanzi's confession reflected how he came upon the isolated victim in the laundromat and ensured that no one else was around, before attacking her with a stick. Once she was helpless, Tanzi demanded money and robbed her of $200. (V4, 408). The victim begged Tanzi to just take her money. However, after taking the money, Tanzi incapacitated her, and proceeded to strangle her. Frustrated that the victim was not dying, Tanzi obtained a pair of surgical scissors and stabbed the victim twice in the neck. Dr. Dudley acknowledged that Tanzi sat over the victim until she bled out. Dr. Dudley acknowledged that Tanzi claimed he attacked the victim in order

[16]In any case, any such objection would be without merit. See Muehleman v. State, 503 So. 2d 310, 315-16 (Fla. 1987); Belmontes, supra. The fact trial counsel successfully kept the jury from learning of this information is itself a testament to counsel's effectiveness in this case.

to obtain the money he needed to go to New York.[17] (V4, 409-10). Dr. Dudley admitted that the murders of Mrs. Holder and Janet Acosta are "significant antisocial acts." (V4, 410).

In each case, Tanzi selected an isolated female victim, who after the initial attack, complied with his desires. And, in each case, he slowly murdered a helpless and compliant female victim who had begged for her life, for his own gain. Notwithstanding Dr. Dudley's refusal to draw conclusions from the facts surrounding the Massachusetts murder, the cross-examination itself and the information revealed would be absolutely devastating to Tanzi's case in mitigation.

As recognized by the Supreme Court, addressing counsel's failure to introduce evidence in mitigation, revelation that the defendant had committed another murder constitutes probably the most severe aggravation imaginable:

> It is hard to imagine expert testimony and *additional* facts about Belmontes' difficult childhood outweighing the facts of McConnell's murder. It becomes even harder to envision such a result when the evidence that Belmontes had committed another murder-"the most powerful imaginable aggravating evidence," as Judge Levi put it, Belmontes, S-89-0736, App. to Pet. for Cert. 183a-is added to the mix.

[17]Dr. Dudley's refusal to speculate that Tanzi's motive on the first murder appeared to be financial in the face of Tanzi's confession that he attacked the victim in order to obtain money and leave the city, is interesting and not terribly credible. (V5, 423-24).

Wong v. Belmontes, 130 S. Ct. 383, 391 (2009). A competent attorney would not have called Dr. Dudley to testify at the risk of revealing Tanzi committed another murder.

In sum, trial counsel cannot be considered ineffective simply because collateral counsel has found another expert to provide favorable [though, in the State's view, less than credible] mitigation testimony. Further, revelation that Tanzi had committed another murder and the horrifying facts of that murder overwhelmed the mitigation Tanzi attempted to establish through Dr. Dudley. Accordingly, Tanzi has not carried his burden of demonstrating either deficient performance or prejudice through his presentation of Dr. Dudley's evidentiary hearing testimony.

(ii) Defense Counsel's Decision To Call Dr. Vicary

Tanzi faults counsel for calling Dr. Vicary to testify knowing of the potential impeachment he faced by virtue of his misconduct on another case. (Appellant's Brief at 31-32). Although Dr. Vicary's acknowledged misconduct in an unrelated case carried the possibility of impeachment on cross-examination, defense counsel reasonably attempted to exclude such information by filing a motion in limine. When that motion was denied, Kuypers called Dr. Vicary to the stand and attempted to minimize its negative impact by addressing this issue on

direct examination. (V4, 141-42). As found by the trial court below, trial counsel made a reasonable tactical decision to present Dr. Vicary's testimony. (V3, 519)("Employing Dr. William Vicary as an expert witness was a sound trial strategy.").

As a strategic decision, counsel's conduct is virtually immune from post-conviction attack. See Johnson v. State, 769 So. 2d 990, 1001 (Fla. 2001) ("Counsel's strategic decisions will not be second guessed on collateral attack."); Maharaj v. State, 778 So. 2d 944, 959 (Fla. 2000) (the court "recognized that counsel cannot be ineffective for strategic decisions made during a trial.") (citing Medina v. State, 573 So. 2d 293, 297 (Fla. 1990)). On this record, Tanzi has not carried his burden of establishing counsel's performance was deficient or that he suffered prejudice.

Trial counsel did not establish that Kuypers had any readily available alternative who could provide testimony as favorable as Dr. Vicary did during the penalty phase. Collateral counsel attempted to establish that another psychiatrist, Dr. Maher, had examined Tanzi and was available to testify. While Kuypers considered calling Dr. Maher, he could not, given Dr. Maher's view that Tanzi's Massachusetts murder was relevant to his evaluation and opinion in this case. Kuypers acknowledged the defense made great efforts to restrict

the State from being able to reveal that homicide because the facts would be highly prejudicial to the defense. (V4, 138-39).

While Tanzi now asserts that an expert from Dr. Raphael's firm should have been called, no mention of another expert was made during the hearing below except for Dr. Maher. And, since no such readily available expert was called to testify during the evidentiary hearing, such a bare allegation is insufficient to establish either deficient performance or prejudice. See Spencer v. State, 842 So. 2d 52, 63 (Fla. 2003) (rejecting an ineffectiveness claim for failure to impeach a witness with an available report where defense counsel failed to call the witness during the evidentiary hearing, noting that that reversible error cannot be predicated on "conjecture.") (citing Sullivan v. State, 303 So. 2d 632, 635 (Fla. 1974)). In any case, counsel's explanation for not calling Dr. Maher was clearly reasonable and professionally competent.[18] The revelation that Tanzi had committed another murder and opening up the horrible details of that crime to discussion would have been devastating to the defense. See Chandler v. United States, 218 F.3d 1305, 1314 (11th Cir. 2000) (a reviewing "court must not second-guess counsel's strategy.").

[18]Further, collateral counsel failed to call Dr. Maher to testify during the evidentiary hearing and therefore completely failed to carry his burden of establishing any prejudice as a result of the failure to call him, rather than Dr. Vicary, to testify.

(iii) Failure to Discover or Utilize XYY In Mitigation

Tanzi's claim that trial counsel was ineffective for failing to present evidence of his XYY genotype does not satisfy either prong of Strickland. The post-conviction trial court found that Tanzi suffered no prejudice from the failure of counsel to use or argue Tanzi's XYY chromosomal makeup, finding no causal connection to any of Tanzi's criminal conduct. (V3, 517-19).

Kuypers believed the letter referencing XYY was in the public defender's file and he had no idea what, if anything, Ms. Rossell might have done with this information. (V4, 164). However, he thought that she would have shared this information with him had she received it. Kuypers testified that if he had learned this information prior to the penalty phase, he would have had to investigate it and listen to what an expert told him about XYY. (V4, 165-66). Based upon this record, Tanzi has not established counsel rendered deficient performance for failing to discover or utilize this information.

Regardless of the existence of XYY and what happened to the letter which imparted this information to the public defender's office, it is clear that trial counsel conducted a reasonable investigation into Tanzi's mental health. Counsel sought out and obtained voluminous mental health records relating to the

prior treatment of Tanzi and retained a number of experts, ultimately calling three experts [a psychologist, psychiatrist, and a forensic social worker] to provide favorable evidence in mitigation. Trial counsel cannot be considered ineffective for failing to suspect or discover that Tanzi had the rare XYY genotype where he thoroughly investigated Tanzi's medical and psychological history and reasonably relied upon qualified experts, none of whom, apparently, even suspected that Tanzi had this genotype. Moreover, given the fact XYY has never been successfully argued or even presented in mitigation in Florida and, given the tenuous link between behavior and the genotype, failure to develop or present evidence on this genotype cannot be considered a serious deficiency on the part of counsel.

Significantly, Tanzi has not carried his burden of showing that the fact Tanzi has the XYY karyotype would have changed or altered the opinions of the qualified mental health professionals Kuypers relied upon at trial. Dr. Raphael testified that he has conducted thousands of evaluations but that he does not know their "chromosomal make-up." Since someone had mentioned a possible chromosomal defect, Dr. Raphael testified that he had "subsequently done considerable research on the topic." He did not recall any reference to XYY in the hundreds of pages of records from various MD's in Tanzi's case

and did not "believe that it should have been mentioned." (V4, 197). Dr. Raphael testified that as a psychologist he comments upon the overlap between genetics and behavior. (V4, 216-17). Dr. Raphael testified that assuming that Tanzi has an extra Y chromosome, that fact does not change any of his opinions in this case.[19] (V2, 223). See Brown v. State, 755 So. 2d 616, 636 (Fla. 2000) (trial counsel's performance was not deficient for failing to provide mental health expert additional background information because the expert testified at the evidentiary hearing that the collateral data would not have changed his testimony); Engle v. Dugger, 576 So. 2d 696, 701 (Fla. 1991) ("Counsel had Engle examined by three mental health experts, and their reports were submitted into evidence. There is no indication that counsel failed to furnish them with any vital information concerning Engle which would have affected their opinions."). Since Tanzi failed to establish that any experts trial counsel utilized or relied upon at the time of trial would change or alter their opinions with this information, this claim

[19]Dr. Alan Raphael testified that his firm was retained to perform neuropsychological and psychiatric evaluations of Tanzi. Dr. Raphael evaluated Tanzi in conjunction with Dr. Mate, his director of psychiatry, and Dr. Golden, director of neuropsychology. (V4, 192). Dr. Raphael's firm administered or caused to be administered some 24 tests to Tanzi. (V4, 205). He had some 2000 pages of material relating to Tanzi, of which approximately 1500 pages consisted of background materials relating to various institutions, "psychiatrists, psychologists, social workers, etc." (V4, 193).

must be rejected. Nonetheless, if this Court were to move on to evaluate the prejudice prong of Strickland, Tanzi's evidentiary hearing presentation falls far short of establishing prejudice.[20]

Tanzi did not carry his burden of demonstrating the materiality and weight of the XYY diagnosis during the hearing. The testimony of Dr. Muench, did not establish any generally accepted characteristics that could ameliorate or mitigate Tanzi's crimes in this case.

Dr. Muench agreed with studies which showed that most XYY children develop quite normally. (V4, 44). While Dr. Muench considered XYY a syndrome, he could not point to any publication which found to any degree of medical certainty that it is in fact a "syndrome."[21] (V4, 45). Dr. Muench agreed that environmental factors have clouded attempts to link behavior to XYY. (V4, 51). Dr. Muench agreed that he could not testify that XYY was "causative" of behavior. (V4, 53). It is generally accepted in the scientific community that there is no "established causation between XYY disorder and criminal or

[20]Tanzi did not show that the evaluations performed by Dr. Raphael or Dr. Vicary were insufficient or that they should have uncovered the rare XYY genotype. See Gorby v. State, 819 So. 2d 664, 681 (Fla. 2002) ("Dr. Goff's examination itself was competent because it certainly was not so 'grossly insufficient [as to] ignore clear indications of either mental retardation or organic brain damage.'" (citing State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987)).

[21]XYY is not recognized in the DSM-IV-TR as a syndrome affecting psychological conditions or behavior.

antisocial behavior." (V4, 61-62).

As the lower court noted in making its findings under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), the only showing made by the defense in this case is that XYY is not "causative" of any characteristic or condition, but, that it is associated with an increase in incidence of an individual being taller, having more acne, bigger teeth, and perhaps, some childhood development issues.[22] (V4, 72). Notably, Dr. Muench did not examine Tanzi and did not link any conduct in Tanzi's background to the XYY genotype.[23]

Dr. Dudley had even less to say about XYY than Dr. Muench. Dr. Dudley did not have any particular experience or training in XYY, but, presumably, took a single general course in genetics in medical school more than thirty years ago. (V4, 375, 380). Dr. Dudley's single reference to XYY was as a "risk factor," presumably, although not articulated, as a risk factor for childhood difficulties. (V5, 381). Dr. Dudley's testimony on

[22]The State filed a motion in limine prior to the evidentiary hearing to exclude any reference to XYY and any potential link to behavior in this case on the basis that such a link has not been generally accepted by the medical or psychological community. (V2, 416-17).

[23]Dr. Muench acknowledged he could not make the causal link between XYY and criminal behavior. (V1, 32). While Dr. Muench indicated that statistically you would see "diminished socialization" for children with XYY he could not say it necessarily causes a "diminuation in that aspect." (V1, 33-34). But, statistically you would find an "increased risk" of developmental problems. (V1, 34).

this matter was so brief and inconsequential that it does not in any way support finding counsel's performance deficient or that Tanzi suffered prejudice as a result.

The trial court's conclusions of fact reflect that early studies linking XYY as a causative link to "violent and/or antisocial behavior have been completely discredited" (V3, 518) and that Tanzi has not established that XYY is a "syndrome" or causative of violent behavior. As Tanzi's early childhood difficulties and antisocial behavior, "however caused", were extensively presented to the jury, the court did not find any prejudice from counsel's failure to pursue or present Tanzi's choromosomal makeup in mitigation. (V3, 519).

Finally, to the extent XYY can be linked to an increased risk of early childhood learning disability, defense counsel in this case presented evidence of childhood development issues, hyperactivity, and, a learning disorder. Suggesting XYY may, or may not, have been associated with these background facts [there is no science to support a direct or causative link] does not make such information even marginally more mitigating. Trial defense counsel presented expert testimony on the possible genetic link to Tanzi's difficulties. (T. 1279-80, 1283). In closing argument Kuypers stated that Tanzi had lost the "genetic lottery" and noted the number of Tanzi's relatives who had

psychological difficulties, i.e., "genetic predisposition." (T. 1781-1782, 1797). See also (T. 1753, 1781) ("genetic disadvantage" and "genetic aspects").

For the foregoing reasons, Tanzi has not carried his burden of establishing either deficient performance or prejudice based upon defense counsel's failure to present evidence of Tanzi's XYY genotype.

III. COUNSEL'S ALLEGEDLY DEFECTIVE BACKGROUND INVESTIGATION

The post-conviction court found that "counsel extensively investigated and presented mitigating factors." (V3, 519). The court stated: "Though the defense called witnesses attesting to the Defendant's troubled past, and attempted to humanize him, the defense did not call all possible witnesses who could testify in that regard; the defense is not charged with calling or contacting every source available. To require the defense to find and call all potential witnesses would render virtually all defense efforts vulnerable to collateral attack." (V3, 514). Ultimately, the post-conviction court concluded that trial counsel presented evidence of the "defendant's troubled childhood" and that failing to call "all possible witnesses" did not warrant "vacatur." (V3, 519). The court's ruling is well supported by the record.

Kuypers testified during the evidentiary hearing that

extensive efforts were made with an investigator making contact with family and institutions in Massachusetts and traveling to New York and Massachusetts. Kuypers testified that not only the investigator but that he also traveled to Massachusetts in an effort to uncover Tanzi's background and obtain evidence in mitigation. (V4, 137-38). They even called and qualified as an expert social worker Linda Sanford, who had her Masters in Social Work and whom they tendered as an expert in forensic social work. (V4, 147). He also recalled calling John Welch, a Masters level counselor from New York who was willing to help Tanzi. (V4, 151). Both the doctors and lay witnesses mentioned Tanzi's sexual abuse and family life or background. (V4, 152-53). Kuypers admitted he sought out or obtained witnesses and evidence covering most of Tanzi's life, from a very early age on. (V4, 157). They obtained a large amount of records in this case relating to Tanzi's background, including prior institutionalization records and previous treating doctors. (V4, 145).

Kuypers' evidentiary hearing testimony, supported by the trial record, establishes that the defense conducted an extensive investigation into the Defendant's background. Further, the trial record demonstrates that counsel presented extensive mitigating evidence covering Tanzi's history of abuse,

his problems in school, his placements at a variety of facilities, the diagnoses made at these facilities, his chaotic family life, his family's resistance to treatment and his estrangement from his family. Aside from failing to establish any deficiency in the background investigation conducted, the evidentiary hearing testimony also falls far short of establishing any prejudice. The lay witnesses called by Tanzi during the evidentiary hearing, Shawn Martin, Hampton Perkins, Julia Perkins, and Anthony Delmonte, presented little, if anything of value, to Tanzi's case in mitigation.

Tanzi's claim that "presentation of Mr. Martin at Mr. Tanzi's penalty phase would have given the jury a much greater appreciation for the depravity of the molester and the resulting trauma of the abuse" (Appellant's Brief at 35), is simply not supported by the record. Martin's evidentiary hearing testimony reflected less severe sexual abuse than that offered in mitigation by trial counsel at the time of trial.

Shawn Martin testified that he had lied in a recent phone deposition taken by the assistant state attorney in this case, denying that he had ever had any sexual contact with Tanzi. Indeed, in the deposition, Martin denied knowing or hearing about anyone sexually abusing Tanzi. Martin lied to the prosecutor despite knowing that this was a capital case and that

this was a very serious matter. (V3, 264-65). Ultimately, Martin testified that the total number of times he and Tanzi had sexual encounters was 4 or 5 and only two involved oral sex. The remaining contacts involved petting and fondling. (V5, 269-70). If someone were to describe the relationship he had with Tanzi as dominating, manipulative, and sexually exploitative, Martin would call that a false characterization. (V5, 271).

Trial defense counsel presented evidence of Tanzi's sexual abuse and the trial court found and gave the sexual abuse some weight in mitigation. (R. 1826). Trial counsel cannot be found ineffective for failing to present cumulative evidence. Atwater v. State, 788 So. 2d 223, 233 (Fla. 2001) (rejecting an ineffectiveness claim for failing to present mitigation because Atwater's personal and family history were, in fact, presented during the penalty phase); Downs v. State, 740 So. 2d 506, 515-16 (Fla. 1999) (rejecting ineffective assistance claim for failing to present mitigating evidence where most, if not all, of the evidence was, in fact, presented.). Moreover, trial counsel cannot be faulted for failing to find and present the testimony of Martin where it was not shown that Martin was reasonably available to testify at the time of trial. Indeed, Martin told the post-conviction defense investigator that he was not willing to tell him about the relationship in person and

lied about the sexual contact in a phone deposition immediately preceding the post-conviction evidentiary hearing.[24] Thus, the defense failed to establish that Martin was even available to testify at the time of Tanzi's trial.

The remaining testimony provided by Martin, if he could be believed at all, did not establish any significant mitigation. Indeed, much of the information could even be considered detrimental to Tanzi. To the extent Martin testified that he and Tanzi walked in on his mom having sex, or, that Tanzi's father had been mean or abusive, this testimony was cumulative to evidence presented during the penalty phase.[25]

Hampton Perkins testified [by phone] that he lived in Brockton, Massachusetts across the street from the Tanzi family. (V3, 284). Perkins did not know if Tanzi struggled or had trouble coping with his father's death. (V5, 286-87). Tanzi,

[24]The State is concerned that counsel for CCRC did not reveal to the assistant state attorney the contents of Martin's earlier admission to a CCRC investigator and called Martin to testify during the evidentiary hearing without first advising the State of the alteration in his statement. Martin agreed that counsel for CCRC allowed him to misrepresent to counsel for the State of Florida his sexual relationship with the accused in his phone deposition. (V5, 267-68).

[25]Dr. Vicary testified that Tanzi's family exposed him to pornography, that his mother engaged in sexual activities with a number of men after Defendant's father died and that Defendant witnessed his mother's sexual activities. (T. 1163-64). He also testified that Tanzi had been abused by an older boy in the neighborhood. (T. 1164).

according to Perkins, got along well with his father. "Him and his father were together a lot. They did things together." Tanzi also got along well with his mother and as far as he could tell there was no trouble in the Tanzi household. He thought Tanzi was a good, well adjusted kid. (V5, 290).

Hampton Perkins' testimony was so inconsequential that hardly a fact in mitigation can be discerned from it. Obviously, neither deficient performance nor prejudice has been shown by the failure to call Mr. Perkins.

Julia Perkins testified that she lived across the street from Tanzi in Brockton and was a few years older than Tanzi. She thought Tanzi was an emotional kid. (V5, 296). Julia thought Tanzi's father was a bit stern but that they got along. She recalled one incident where Tanzi's father grabbed Tanzi by the back and kicked his bottom into the house. (V5, 301).

Julia babysat Tanzi when she was about 12 and Tanzi was maybe 6 or 7 after his father passed away. (V5, 302). She stopped babysitting Tanzi when he no longer listened to her. (V5, 304). Julia thought that Tanzi's mother spoiled him. From what Julia observed, she was a good mother to Tanzi. Of all the years she lived across the street, she only observed one incident of violence, the father kicking Tanzi into the house. (V5, 307-08). Julia never observed Tanzi neglected or abandoned

in the home. (V5, 310).

Once again, very little in mitigation can be gleaned from Ms. Perkins' testimony. Certainly, nothing significant was developed during the hearing to suggest, much less establish, the type of serious deficiency required to find counsel ineffective for failing to call her under Strickland. Indeed, Ms. Perkins' testimony tends to undercut the notion that Tanzi was simply left to fend for himself, or was abandoned by his mother. Rather, Ms. Perkins' testimony established that Mrs. Tanzi obtained a babysitter and was a caring mother.

Anthony Delmonte testified that he had a bachelor's degree in international studies and came to meet Tanzi as a counselor at a day camp in Massachusetts.[26] (V5, 320). Delmonte later had contact with Tanzi when he was fifteen or sixteen when Delmonte was a social worker with the Department of Social Services in Brockton. (V5, 322). If anyone wanted to understand the nature of his assessment of Tanzi they could have reviewed his report. (V5, 329-30).

Delmonte's testimony differed little in character or quantity from the background evidence presented by trial counsel during the penalty phase. In fact, social worker Linda Sanford

[26]During his time as a YMCA counselor, Delmonte agreed that Tanzi did not stand out from other kids and he had no behavioral problems. (V4, 331).

provided much more extensive testimony during the penalty phase. She extensively explored Tanzi's history of intervention and treatments for his childhood misconduct. (T. 1076-94). Delmonte candidly admitted that his report would be the best reflection of his contact with Tanzi. Tanzi has not established either deficiency or prejudice from trial counsel's failure to call Delmonte to testify in the penalty phase.

Finally, Phyllis Whalen, Tanzi's mother, was called to testify during the evidentiary hearing. The State is unsure why collateral counsel called Ms. Whalen to testify during the evidentiary hearing. Ms. Whalen acknowledged she cooperated with the defense and testified during the penalty phase. (V5, 362). Since trial counsel investigated the possibility of calling Ms. Whalen, and, in fact, actually called her to testify during the penalty phase; Tanzi has not shown any deficiency on the part of trial counsel. Obviously, her testimony during the evidentiary hearing was largely, if not entirely, cumulative.

In conclusion, the record clearly refutes any assertion that counsel's performance was deficient for failing to investigate or present Tanzi's background in mitigation.[27]

[27]Given the strength of the State's case, Rossell and Kuypers agreed as a strategic decision that Tanzi should plead guilty and focus their efforts on the case in mitigation. (V1, 135). At the time that decision was made, most of the discovery had

Indeed, after the evidentiary hearing, there remains no reason to question counsel's effectiveness. Collateral counsel failed to develop any new, significant background mitigation during the evidentiary hearing. In some respects the lay witness testimony casts doubt upon the nature and extent of the sexual abuse trial counsel presented during the penalty phase, and painted a better view of Tanzi's home life. The evidence presented by collateral counsel was either cumulative, insignificant, or, not mitigating. See Gorby v. State, 819 So. 2d 664, 676 (Fla. 2002) (finding counsel was not ineffective where each allegation "is either wholly unsupported by evidence, was actually presented as mitigation evidence, or is related to nonstatutory mitigation found to exist by the trial judge."). Consequently, on this record, Tanzi has not come close to meeting his heavy burden of establishing either deficient performance or resulting prejudice under Strickland.

D. TANZI HAS NOT CARRIED HIS BURDEN OF ESTABLISHING PREJUICE UNDER STRICKLAND

Assuming, *arguendo*, Tanzi has carried his burden of establishing some deficiency in counsel's performance, he has completely failed to carry his burden of establishing prejudice. See Gaskin v. State, 737 So. 2d 509, 516 n.14 (Fla. 1999)

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been completed and a thorough investigation had been made. (V1, 136).

("Prejudice, in the context of penalty phase errors, is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or the deficiencies substantially impair confidence in the outcome of the proceedings"). This was simply not a close case as evidenced by the jury's unanimous death recommendation. Tanzi battered, kidnapped, and sexually assaulted Janet Acosta before ultimately murdering her. This was a protracted, shockingly cold, cruel and calculated murder of a helpless and compliant victim. Tanzi inflicted a horrible death upon Ms. Acosta, after she had repeatedly begged him to spare her life. The heinous, atrocious and cruel manner of Ms. Acosta's murder alone overwhelmed anything he presented in mitigation. The State presented an absolutely overwhelming case in aggravation, with six valid aggravating factors, including two of the most weighty under Florida's capital sentencing scheme, CCP and HAC. Larkins v. State, 739 So. 2d 90, 92-95 (Fla. 1999) (The heinous, atrocious or cruel and the cold, calculated, and premeditated aggravating factors are considered two of the weightiest factors in the capital balancing equation.); Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986) (counsel's failure to present psychiatric evidence that the defendant had a personality disorder, was a drug abuser, was

of low intelligence with poor motor skills, did not affect the outcome of the sentencing hearing in light of the overwhelming evidence of aggravating circumstances, in particular the **heinous, atrocious and cruel nature of the murder**)(emphasis added)).

The mitigation case collateral counsel presented during the post-conviction hearing, which was largely cumulative, must be balanced against the revelation of, and the horrifying facts of Tanzi's murder of another woman prior to killing Janet Acosta. See Belmontes, 130 S. Ct. at 387-90 (finding no prejudice where proposed mitigation evidence was either cumulative to evidence already presented at penalty phase, or would have opened door to damaging testimony); Breedlove v. State, 692 So. 2d 874 (Fla. 1997) (finding no prejudice under Strickland where the benefit of presenting additional witnesses during the penalty phase was largely offset by the damaging revelation of serious criminal misconduct). Since the additional evidence was hardly compelling, the balance of beneficial and harmful evidence developed during the evidentiary hearing tilts decidedly against Tanzi.

This case presents a better factual situation for the State than Hodges v. State, 885 So. 2d 338 (Fla. 2003), where the defendant failed to establish prejudice under Strickland. This

Court distinguished Hodges from Wiggins, stating:

> In assessing the prejudice prong of the Strickland standard, the Wiggins Court reweighed the evidence in aggravation against the totality of the mitigating evidence, and determined the evidence of severe privation, physical and sexual abuse and rape, periods of homelessness and diminished mental capacities, comprised the "kind of troubled history we have declared relevant to assessing a defendant's moral culpability." Wiggins, 539 U.S. at 535. Noting that in Maryland, the death recommendation must be unanimous, the High Court determined, "Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that one juror would have struck a different balance." Id. at 537.
>
> A similar analysis in the instant matter fails to yield a similar result. Certainly, the absence of generalized evidence pertaining to the asserted social dysfunction of Hodges' entire hometown, and his exposure to environmental toxins in the general area, even when coupled with more specific evidence regarding his abusive and impoverished upbringing, would not have rendered the sentencing proceeding unreliable. The jury recommended a death sentence by a ten-to-two majority, and the trial court found that the State had established two serious aggravators: commission of murder to disrupt or hinder law enforcement and that the act was committed in a cold, calculated, and premeditated manner. See Hodges I, 595 So. 2d at 934. Even with the postconviction allegations regarding Hodges' upbringing, it is highly unlikely that the admission of that evidence would have led four additional jurors to cast a vote recommending life in prison. See Asay, 769 So. 2d at 988 (determining that there was no reasonable probability that evidence of the defendant's abusive childhood and history of substance abuse would have led to a recommendation of life where the State had established three aggravating factors, including CCP); see also Breedlove v. State, 692 So. 2d 874, 878 (Fla. 1997).

Hodges, 885 So. 2d 338, 350-351.

This case is much more aggravated than Hodges, with an extremely brutal homicide - supported by multiple aggravators - and a unanimous jury recommendation after the jury was fully exposed to much of the same evidence post-conviction counsel presented with regard to Tanzi's background. Further, unlike Hodges, the additional mitigation presented by collateral counsel [Dr. Dudley] carried with it a significant price, revelation of another homicide committed by Tanzi. Thus, Tanzi has fallen far short of establishing a reasonable probability of a different result had counsel presented additional evidence of Tanzi's background or mental condition.

ISSUE III

WHETHER THE CIRCUIT COURT ERRED IN SUMMARILY DENYING SEVERAL OF MR. TANZI'S POSTCONVICTION CLAIMS?

Tanzi next asserts that the trial post-conviction court erred in summarily denying several of his claims. To support the summary denial of post-conviction relief, the trial court must either state its rationale in the order denying relief or attach portions of the record that would refute the claims. See Nixon v. State, 932 So. 2d 1009, 1018 (Fla. 2006), citing Anderson v. State, 627 So. 2d 1170, 1171 (Fla. 1993). This Court reviews *de novo* summary denial of a motion for post-conviction relief on the pleadings and record. Wainwright v. State, 2 So. 3d 948, 950 (Fla. 2008).

The claims raised here are either refuted by the record, procedurally barred, or, without merit as a matter of law. See Arbelaez v. State, 775 So.2d 909, 915 (Fla.2000) ("Where a motion lacks sufficient factual allegations, or where alleged facts do not render the judgment vulnerable to collateral attack, the motion may be summarily denied."). Accordingly, summary denial of these claims should be affirmed on appeal.

A. Juror Misconduct

Tanzi claims that the trial court erred in summarily rejecting his attempt to interview jurors based upon an allegation of juror misconduct. The trial court properly denied this claim, and, its related challenge to the constitutionality of rules restricting the ability of defense counsel to question jurors. (V2, 309) (finding claims without merit and procedurally barred). Tanzi's attempt to interview jurors and then challenge the constitutionality of rules prohibiting defense counsel from contacting or interviewing jurors were without merit as a matter of established law.

Inquiry of the jury is clearly improper in the absence of external influence or exposure to extra record communication. No such allegation has been made here. Consequently, it cannot be said the trial court abused its discretion in declining to allow juror interviews in this case. See Anderson v. State, 18

So. 3d 501, 519 (Fla. 2009) (court's decision on a motion to interview jurors is reviewed for an "abuse of discretion").

The innocuous and brief statement, allegedly quoted from a juror, does not implicate any juror misconduct. The comment, if accurately reflected in the newspaper article, implicates the juror's understanding of, or, application of the trial court's instructions and gives a very general sense of the deliberative process.[28] Since no **external** information or influence was alleged, much less established, any inquiry of the jurors would clearly be improper as a matter of established state and federal law. See Devoney v. State, 717 So. 2d 501, 503-504 (Fla. 1998) ("Those cases which have permitted an attack upon a jury verdict have required allegations of an influence upon the jurors' deliberations arising from external sources.") (string cites omitted); Federal Rule of Evidence 606(b) (limiting inquiry of jurors to allegations of prejudicial extraneous information or external influence); Crowe v. Hall, 490 F.3d 840, 848 (11th Cir. 2007) ("federal law frowns upon this kind of inquiry into the internal communications of a jury.").

Any claim that the rules prohibiting juror interviews are unconstitutional is procedurally barred as a matter which should

[28]According to a newspaper report, a single juror stated: "He didn't care. He had no regrets, no remorse. We spent 2 1/2 hours trying to find a way not to give him the death penalty." (Appellant's Brief at 54).

have been raised, if at all, on direct appeal. See Ragsdale v. State, 720 So. 2d 203, 205 n.1 & 2 (Fla. 1998); Gaskin v. State, 737 So. 2d at 530 n.6 ; Brown v. State, 755 So. 2d 616, 620-21, n.1, 4, 5, 7 (Fla. 2000); Mann v. State, 770 So. 2d 1158, 1161, n.2 (Fla. 2000). In any case, this Court has repeatedly rejected the claim that the rule prohibiting his counsel from interviewing jurors, Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar, is unconstitutional because it violates his constitutional rights of equal protection and due process. See Kormondy v. State, 983 So. 2d 418, 440 (Fla. 2007); Power v. State, 886 So. 2d 952, 957 (Fla. 2004); Johnson v. State, 804 So. 2d 1218 (Fla. 2001). Such a fishing expedition is properly prohibited as a matter of state law and offends no constitutional principles.[29] See Barnhill v. State, 971 So. 2d 106, 116-17 (Fla. 2007) ("We deny relief on this issue consistent with our prior decisions which have found that rule 4-3.5(d)(4) and rule 3.575, which collectively restrict an

[29]Florida's rules are consistent with those employed by federal courts and offend no constitutional principle. See Federal Rule of Evidence 606(b) (limiting inquiry of jurors to allegations of prejudicial extraneous information or external influence); United States v. Powell, 469 U.S. 57, 67, 105 S. Ct. 471, 478 (1984) ("Courts have always resisted inquiring into a jury's thought processes, see McDonald v. Pless, 238 U.S. 264, 35 S. Ct. 783, 59 L.Ed. 1300 (1915); Fed. Rule Evid. 606(b) (stating that jurors are generally incompetent to testify concerning jury deliberations); through this deference the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality.").

attorney's ability to interview jurors after trial, do not violate the defendant's constitutional rights.")(string cites omitted).

Because Tanzi's claim is procedurally barred and without merit, this Court should affirm the post-conviction court's summary denial.

B. *The State Violated Brady v. Maryland*[30]

Tanzi next asserts that the State withheld favorable information from the defense based upon untimely disclosure that Tanzi possesses the XYY karyotype. The trial court rejected this claim because the "[d]efendant acknowledged that the State did disclose this possibility before trial" and consequently, there was "no Brady violation." (V2, 311).

It is undisputed that the letter referencing the possibility that Tanzi had an "XYY genotype" was sent by prosecutor Manny Madruga to the defense on February 7, 2003. (Supp-V3, 281). During the case management hearing, collateral counsel admitted that this information "was disclosed just prior to trial." (Supp-V3, 203). Once information is turned over to the defense, it is incumbent upon the defense to act upon it. If the defense needed more time to investigate or prepare for the penalty phase based upon this information, it was incumbent

[30]Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963).

upon Tanzi's counsel to request a continuance.[31] See White v. State, 816 A.2d 776, 778 (Del. 2003) (finding no Brady violation where materials were disclosed a week prior to the trial, and "[d]efense counsel ... neither asked for a continuance nor objected at trial."). "As long as ultimate disclosure is made before it is too late for the defendant to make use of any benefits of the evidence, Due Process is satisfied." United States v. Ziperstein, 601 F.2d 281, 291 (7th Cir. 1979), cert. denied, 444 U.S. 1031, 100 S. Ct. 701 (1980); Accord United States v. Allain, 671 F.2d 248, 255 (7th Cir. 1982). The prosecutor's disclosure in this case was made three days prior to the penalty phase trial, and, the same day the DNA analyst informed the prosecutor of this information.

In any case, it cannot be considered "material" in that after being provided an evidentiary hearing on the ineffective assistance of counsel claim, Tanzi failed to establish that a single expert would have changed his or her opinion in this case based upon Tanzi's XYY karyotype.[32] To the contrary, Dr.

[31]The penalty phase began on February 10, 2003. It is unclear who on the defense team reviewed the disclosure. Mr. Kuypers did not recall seeing the memo. (V4, 114). Unfortunately, Mrs. Rossell is deceased and we have no idea, what if anything, she may have done in response to the memo.

[32]As this Court explained in Smith v. State, 931 So. 2d 790, 796 (Fla. 2006):

> To establish prejudice, the defendant must demonstrate that the suppressed evidence is material. The test for

Raphael, the only expert retained by defense counsel at the time of trial who testified during the evidentiary hearing below, stated that this revelation would have no impact upon his opinions in this case. (V4, 223). Thus, Tanzi's assertion that his experts "would have had a basis on which to explain Mr. Tanzi's increased aggressiveness, impulsivity and behavioral problems" is simply inaccurate. (Appellant's Brief at 60). Nor, aside from cryptically asserting Tanzi was prohibited from exploring a possible defense based upon this information, does Tanzi explain what "defense" could have been pursued.

Assuming for a moment, that XYY karyotype can be linked to specific behavior, a fact not established during the evidentiary hearing below, Florida does not recognize a diminished capacity defense short of insanity. See State v. Bias, 653 So. 2d 380, 382 (Fla. 1995) ("[w]e continue to adhere to the rule that expert evidence of diminished capacity is inadmissible on the issue of mens rea."). Accordingly, the XYY karyotype

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materiality is whether there exists a reasonable probability that the jury verdict would have been different had the suppressed information been used at trial. Id. at 289, 296, 119 S. Ct. 1936. In other words, the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. at 290, 119 S. Ct. 1936 (quoting Kyles v. Whitley, 514 U.S. 419, 435, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995)).

information would not support any valid defense in this case.[33] And, as argued above under the ineffective assistance of counsel claim, Tanzi's XYY was not the least bit significant in terms of its impact on the penalty phase. Thus, assuming, *arguendo*, any discovery violation occurred, it could not be considered material pursuant to Brady. Summary denial of this claim should be affirmed.

C. Ineffective Assistance of Counsel At The Spencer Hearing

The trial court denied this claim as insufficiently pled. The court stated, in relevant part: "Defendant does not identify the additional evidence or witnesses that could have been presented. As such, this Court finds that this subclaim is insufficiently pled." (V2, 311). Since Tanzi failed to allege prima facie allegations to establish either deficient performance or resulting prejudice, summary denial was clearly appropriate. See Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989) ("A defendant may not simply file a motion for postconviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing."); Jones v. State, 998 So. 2d 573, 587

[33]Dr. Muench, the genetics expert called by Tanzi, agreed that he could not testify that XYY was "causative" of behavior. (V4, 53). In fact, it is generally accepted in the scientific community that there is no "established causation between XYY disorder and criminal or antisocial behavior." (V4, 61-62).

(Fla. 2008) ("This Court has consistently held that to be entitled to an evidentiary hearing on a motion claiming ineffective assistance of counsel, the defendant must allege specific facts establishing both deficient performance of counsel and prejudice to the defendant.").

Contrary to Tanzi's argument on appeal, the allegations in Tanzi's motion for post-conviction relief were very general, and did not specify the substance of the additional evidence which could have been presented to the trial court but for counsel's deficient performance. While true, the motion did mention additional mental health testimony could have been presented, the only experts cited in the motion were Doctors Mate and Golden, who were associated with Dr. Raphael and his firm. (V4, 44). The motion did not mention what these experts might have testified to, or, could have added to the trial court's understanding of Tanzi's mitigation evidence. See Doorbal v. State, 983 So. 2d 464, 484 (Fla. 2008) ("Counsel for Doorbal appears to operate under the incorrect assumption that conclusory, nonspecific allegations are sufficient to obtain an evidentiary hearing on claims of ineffective assistance of counsel, and specific facts and arguments need not be disclosed or presented until the evidentiary hearing."). Moreover, since Dr. Raphael testified at the penalty phase, and, his report was

introduced into evidence, it is clear the trial court already had the benefit of their input and opinions through Dr. Raphael. It was incumbent upon collateral counsel to specify how their testimony would differ from that already presented in the penalty phase.

In any case, the record conclusively refutes any notion that trial counsel was ineffective during the Spencer hearing. Counsel presented a thorough penalty phase presentation before the jury, thoroughly exploring Tanzi's background and mental condition. Given the jury's 12-0 death recommendation, supported by multiple and weighty aggravation, Tanzi could not meet his nearly insurmountable burden of demonstrating prejudice under Strickland for the failure to present some unspecified additional evidence to the judge during the Spencer hearing. And, since Tanzi was granted a full and fair hearing on his penalty phase allegations of ineffective assistance of counsel, any failure to grant a hearing on the Spencer hearing claim was harmless under the facts of this case.[34] See generally Gore v.

[34]Those few cases discussing defense counsel's performance during the Spencer hearing as a separate ineffectiveness issue generally address a life recommendation and the standards for a jury override, wherein the trial judge's role is especially critical. See e.g. Williams v. State, 987 So. 2d 1, 12 (Fla. 2008); Stevens v. State, 552 So. 2d 1082, 1086 (Fla. 1989). An override case is far removed from the situation presented here, with a 12-0 jury recommendation for death, supported by multiple, weighty aggravators.

State, 24 So. 3d 1, 14 (Fla. 2009) ("Similar to our previous discussion of Gore's ineffective assistance of counsel at the penalty phase, Gore has not been able to point to any other available witness that counsel should have presented at the *Spencer* hearing that would undermine our confidence in the outcome of his penalty phase.").

D. The Conflict of Interest Claim

As an initial matter, the State notes that this claim is procedurally barred from review. Although the trial court properly denied the claim as facially insufficient to allege a conflict of interest (V2, 311-12), the fact the trial court did not reach or mention a procedural bar does not preclude this Court from finding the claim barred. See Robertson v. State, 829 So. 2d 901, 906 (Fla. 2002) (noting that an appellate court may affirm a trial court where the court reaches the right result, even where the wrong reason is expressed by the lower court, where the correct result is apparent and supported by the record); Ransone v. State, 20 So. 3d 445, 446 (Fla. 4th DCA 2009) (affirming summary denial "for reasons other than those given by the State and relied on by the trial court in denying the motion.") (citing Robertson, 829 So. 2d at 446). The facts relating to this claim were developed in the record and could have been raised on direct appeal.

This Court summarized Tanzi's complaints regarding his attorneys on the motion to withdraw his plea after a Nelson inquiry.[35] On direct appeal, this Court observed the following:

> Arguing pro se, Tanzi confusingly alleged the following, among other items: (a) that he had a sexual relationship with his lead counsel; (b) that his counsel was incompetent and lied; (c) that he should not need two attorneys; (d) that he should have a guilt phase if he was forced to have a penalty jury; (e) that there is no difference between the slow death of a life sentence and the fast death of the death penalty; and (f) that a plea would be a waste of the Court's time. Further, during the inquiry held pursuant to *Nelson v. State*, 274 So.2d 256 (Fla. 4th DCA 1973), that followed, Tanzi unsuccessfully attempted numerous arguments to disqualify his lead counsel, including (a) accusations of sexual contact (i.e., sexual touching and his masturbating in her presence); (b) statements that he would threaten to harm or kill his attorneys and statements that such threats had worked previously in other states to disqualify his attorneys; (c) accusations that his attorney lied to the court; and (d) a claim that his counsel had provided incorrect advice when counsel accurately informed him that he could waive the guilt jury but not the penalty jury.

Tanzi v. State, 964 So. 2d 106, 113, f.n. 3 (Fla. 2007). This Court affirmed the trial court's denial of Tanzi's motion to withdraw the plea on direct appeal.[36]

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

[36]This Court credited the trial court's factual findings and counsel's testimony:

> At the evidentiary hearing, Tanzi's counsel, Mr. Kuypers, testified that Tanzi agreed to a strategy of pleading guilty and then requesting a jury waiver. Mr. Kuypers also testified that he had explained to Tanzi that it was uncertain whether the trial court would agree to the jury waiver and that Tanzi appeared to

This Court has held that where the facts giving rise to the conflict of interest claim appear in the trial record, the claim must be raised on direct appeal. See Derrick v. State, 983 So. 2d 443, 454 (Fla. 2008) (since facts relating to the conflict appear in the record of trial, "this claim should have been raised on direct appeal and is therefore procedurally barred."); Hannon v. State, 941 So. 2d 1109, 1141 (Fla. 2006) (finding the claim procedurally barred where "the facts that formed the basis for this alleged conflict of interest were known to Hannon at the time of his trial and, therefore, could have been and should have been presented on direct appeal"). Accordingly, Tanzi's conflict claim is procedurally barred. In any case, Tanzi's motion was properly denied as his motion was legally insufficient to raise a conflict of interest.

At no point did counsel or Tanzi allege that Ms. Rossell possessed a conflicting interest such as prior representation of a client who is, or might become, a witness in this case. (Appellant's Brief at 62-65). As this Court explained in Hunter v. State, 817 So. 2d 786 (Fla. 2002):

> Initially, we acknowledge that the right to

> understand. Further, during the Nelson inquiry, Tanzi stated that his counsel accurately advised him that he "would be able to waive the jury part of the guilt phase, but [he] wouldn't be able to waive the jury part of the trial of the penalty phase."

Tanzi, 964 So. 2d at 114.

> effective assistance of counsel encompasses the right to representation free from actual conflict. *See Strickland*, 466 U.S. at 688, 104 S.Ct. 2052; *Cuyler v. Sullivan*, 446 U.S. 335, 349, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). However, in order to establish an ineffectiveness claim premised on an alleged conflict of interest the defendant must "establish that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler*, 446 U.S. at 350, 100 S.Ct. 1708; see also Quince v. State, 732 So.2d 1059, 1065 (Fla. 1999). A lawyer suffers from an actual conflict of interest when he or she "actively represent[s] conflicting interests." *Cuyler*, 446 U.S. at 350. To demonstrate an actual conflict, the defendant must identify specific evidence in the record that suggests that his or her interests were compromised. *See Herring v. State*, 730 So.2d 1264, 1267 (Fla. 1998). A possible, speculative or merely hypothetical conflict is "insufficient to impugn a criminal conviction." *Cuyler*, 446 U.S. at 350, 100 S.Ct. 1708. "[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." *Id.* If a defendant successfully demonstrates the existence of an actual conflict, the defendant must also show that this conflict had an adverse effect upon his lawyer's representation. *See Strickland*, 466 U.S. at 692, 104 S.Ct. 2052; *Cuyler*, 446 U.S. at 350, 100 S.Ct. 1708.

Hunter v. State, 817 So. 2d 786, 791-92 (Fla. 2002).

Tanzi's sexual misconduct and allegations against his counsel may certainly have made Ms. Rossell uncomfortable, but, she indicated she could continue to effectively represent Tanzi upon inquiry by the trial court. (T. 2072-73). See Morris v. Slappy, 461 U.S. 1, 13-14, 103 S. Ct. 1610, 1617 (1983) ("…[W]e reject the claim that the Sixth Amendment guarantees a 'meaningful relationship' between an accused and his counsel.).

Tanzi did not even allege a breakdown of communication, simply that communication had to occur through a food door. See Hutchinson v. State, 17 So. 3d 696, 703-704 (Fla. 2009) (affirming summary denial of post-conviction claim that trial attorney's personal dislike of defendant and filing of a bar complaint constituted a conflict of interest, noting that the Supreme Court has rejected the notion that the Sixth Amendment guarantees a "meaningful relationship" between the accused and counsel.) (citing Morris v. Slappy, 461 U.S. at 13-14).

Tanzi's motion was facially insufficient in that it did not allege any conflicting interest on the part of Ms. Rossell. Accordingly, summary denial of this claim was appropriate. Further, to the extent Tanzi claims the conflict may have compromised counsel's performance, the record refutes any such suggestion.[37]

E. Tanzi's Challenge to Florida's Lethal Injection Procedures

The lower court summarily denied this claim, recognizing that it was without merit as a matter of established Florida law. (V2, 312). See Tompkins v. State, 994 So. 2d 1072, 1081 (Fla. 2008) ("This Court has repeatedly rejected appeals from

[37]Further, as Tanzi was provided a full and fair hearing on his penalty phase allegations of ineffective assistance, failure to hold a hearing on the conflict claim would be harmless under the facts of this case. Tanzi established neither deficient performance nor resulting prejudice during the hearing below.

summary denials of Eighth Amendment challenges to Florida's August 2007 lethal injection protocol since the issuance of Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007).")(string cites omitted). The trial court correctly recognized that this Court has repeatedly rejected the lethal injection challenges he makes in this case. For example, in Everett v. State, 54 So. 3d 464 (Fla. 2010) this Court stated the following in denying a similar post-conviction challenge:

> Everett claims that the use of lethal injection as a method of carrying out the death penalty is cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution. Everett bases this claim on the botched execution of Angel Diaz and the 2007 Report of the Governor's Commission on the Administration of Lethal Injection in Florida, both of which arose several years after Everett's convictions. The postconviction court did not err in denying Everett's claim without an evidentiary hearing, as this Court has repeatedly rejected similar lethal injection arguments. *See*, e.g., *Tompkins v. State*, 994 So.2d 1072, 1081 (Fla.2008), *cert. denied*, ––– U.S. ––––, 129 S.Ct. 1305, ––– L.Ed.2d –––– (2009); *Power v. State*, 992 So.2d 218, 220–21 (Fla.2008); *Sexton v. State*, 997 So.2d 1073, 1089 (Fla.2008). Additionally, this Court has held the procedures constitutional under the requirements of *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008). *See Ventura v. State*, 2 So.3d 194, 200 (Fla.) ("Florida's current lethal-injection protocol passes muster under any of the risk-based standards considered by the *Baze* Court (and would also easily satisfy the intent-based standard advocated by Justices Thomas and Scalia).") *cert. denied*, ––– U.S. ––––, 129 S.Ct. 2839, 174 L.Ed.2d 562 (2009); *Henyard v. State*, 992 So.2d 120, 130 (Fla.), *cert. denied*, ––– U.S. ––––, 129 S.Ct. 28, 171 L.Ed.2d 930 (2008).

Everett v. State, 54 So. 3d 464, 486 (Fla. 2010).

Tanzi has offered this Court no compelling reasons to depart from this well established precedent. Accordingly, summary denial of this claim should be affirmed.

ISSUE IV

WHETHER THE LOWER COURT ERRED IN DENYING MR. TANZI'S MOTION TO AMEND HIS RULE 3.851 MOTION WITH ADDITIONAL CLAIMS?

Tanzi filed his motion for post-conviction relief on February 12, 2009. A case management hearing was held and the court scheduled an evidentiary hearing for the week of August 24th, 2009. The motion for leave to amend was filed on July 24, 2009. The trial court did not err in declining to allow the amendment in this case.

This Court reviews the trial court's denial of a motion to amend a motion for post-conviction relief for an abuse of discretion. Taylor v. State, 2011 WL 446216, 36 Fla. L. Weekly S72 (February 10, 2011); Lugo v. State, 2 So. 3d 1, 19 (Fla. 2008). "Discretion is abused only when 'the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court.'" Lugo, 2 So. 3d at 19 (quoting State v. Coney, 845 So. 2d 120, 137 (Fla. 2003)). No abuse of discretion has been shown in this case where the claims Tanzi sought to add were based upon information

readily available to collateral counsel so that they could have been included in the original motion. Moreover, the claims sought to be added were vague, non-specific, and failed to allege any facts which suggested relief may be warranted in this case. See Doorbal, 983 So. 2d at 485 (no abuse of discretion in failing to allow amendment, in part, where "facts asserted in the amended motion are vague and nonspecific.").

A. Newly Discovered Evidence Based Upon A National Research Council Report

Tanzi's assertion that the National Research Council Report on *Strengthening Forensic Science in the United States: A Path Forward* (2009), (NAS Report) constitutes newly discovered evidence is without merit. This Court has already rejected the notion that the NAS Report constitutes newly discovered evidence. In Johnston v. State, 27 So. 3d 11 (Fla. 2010), this Court observed:

> First, we note that the report cites to existing publications, some of which were published even before Mary Hammond's murder. The majority of the remaining publications were published during the years when Johnston was pursuing postconviction relief. Therefore, we decline to conclude that the report is newly discovered evidence. Moreover, even if the report were newly discovered evidence, we conclude that the report lacks the specificity that would justify a conclusion that it provides a basis to find the forensic evidence admitted at trial to be infirm or faulty. The following statement in the report's executive summary is particularly telling: "The committee decided early in its work that it would not be feasible to develop a detailed evaluation of each

discipline in terms of its scientific underpinning, level of development, and ability to provide evidence to address the major types of questions raised in criminal prosecutions and civil litigation." As a result, we agree with the following observation of the postconviction court:

> The report does not establish that any particular test, test result, or specific testimony presented at Mr. Johnston's trial was faulty or otherwise subject to challenge. Furthermore, it is merely a new or updated discussion of issues regarding developments in forensic testing. It does not constitute evidence that was not known at trial and could not have been ascertained through due diligence.

Nothing in the report renders the forensic techniques used in this case unreliable, and we note that Johnston has not identified how the article would demonstrate, in any specific way, that the testing methods or opinions in his case were deficient.[38]

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[38]This Court's treatment of the report is consistent with other courts. For example, in State v. McGuire, 2011 WL 890748 (N.J.Super.A.D. 2011), the court stated:

> Since the NAS report was issued, at least two courts have refused to exclude forensic evidence based on criticism contained in that report. *See United States v. Rose*, 672 F.Supp.2d 723, 725 (D.Md.2009) (fingerprint analysis); *Johnston v. State*, 27 So.3d 11, 20-23 (Fla.) (fingerprint and footwear analysis), *cert. denied*, --- U.S. 459, 131 S.Ct. 459, 178 L.Ed.2d 292 (2010). As noted in those cases, the purpose of the NAS report is to highlight deficiencies in a forensic field and to propose improvements to existing protocols, not to recommend against admission of evidence. *See Rose, supra*, 672 F.Supp.2d at 725 (quoting Hon. Harry T. Edwards [co-chair of committee], Statement Before U.S. Senate Judiciary Committee (March 18, 2009) ("nothing in the [NAS] Report was intended to answer the 'question whether forensic evidence in a particular case is admissible under applicable law' ")).

State v. McGuire, at 18.

The NAS report upon which Tanzi relies, does not specifically address any item of the State's evidence in this case.[39] Such general "guideline" reports, as noted by the Court in Johnston, do not constitute newly discovered evidence. See e.g. Raleigh v. State, 36 So. 3d 84 (Fla. 2010) (noting that the American Bar Association, "*Florida Death Penalty Assessment Report*" "does not constitute newly discovered evidence" and that the Court has "repeatedly rejected claims premised upon this report.").

Tanzi's claim references the testimony of FDLE DNA Analyst Robin Ragsdale which is contained entirely in the trial record. He also briefly mentions the medical examiner's testimony regarding fresh injuries to the victim's vagina, consistent with forcible sexual battery. Since all of this testimony appears in the trial record, there was no excuse for counsel's failure to investigate and present this claim in his initial motion. Accordingly, the post-conviction court did not abuse its discretion in declining to allow Tanzi to amend his motion. See

[39]This Court's opinion in Trepal v. State, 846 So. 2d 405 (Fla. 2003) provides no support for Tanzi's position that reports like the NAS constitute newly discovered evidence. In Trepal the Office of the Inspector General issued a report that was highly "critical of the work performed by the FBI Crime Laboratory in Washington, D.C., in certain cases, including the present case." 846 So.2d at 409. That report was not a general criticism or guideline assessment of standards, but an apparently specific criticism of the methodology employed in the Trepal case.

Lugo v. State, 2 So. 3d at 20 (Fla. 2008) (finding no abuse of discretion in denying amendment where the claims sought to be added by post-conviction counsel were based upon information known or easily available to post-conviction counsel.). In any case, it is clear that Tanzi's motion to amend was facially insufficient to suggest, much less establish, a legitimate post-conviction challenge to Tanzi's death sentence.

Tanzi's assertion that the State DNA expert's opinion is somehow subject to attack based upon the report is a vague, non-specific challenge which is hard to decipher. Tanzi's blood was found on the inside lining of the victim's jeans. Ms. Ragsdale simply pointed out the location, i.e., that the blood was found on the inside pocket of the jeans. This did not require any special or particular training or knowledge. Further, Ms. Ragsdale was certainly qualified to testify that Tanzi's blood [matched at all 13 loci by DNA testing (T. 805-06)] on the inside pocket of the jeans (T. 806).[40] From this evidence, the

[40]Tanzi's attack upon Ms. Ragsdale's testimony on the minor contributor is so nebulous, that it cannot constitute a legitimate appellate challenge. Ms. Ragsdale testified without objection below: "The minor component there was such a small amount that I was only able to determine the profile at one out of those 13 STR loci, and that matched or was consistent with the profile of Janet Acosta. And that particular frequency for that one loci in the following populations is approximately one in nine Caucasions, one in six African Americans, and one in six Southeastern Hispanics." (T. 808). Such non-controversial DNA testimony such as that presented below is not subject legitimate

trial court in the sentencing order made the logical conclusion that the jeans were taken off of the victim at some point. (R. 1808-09).

The NAS report is irrelevant on this matter and casts no legitimate challenge to the finding that the victim was sexually assaulted in this case. Notably, the substantive claim Tanzi attempted to add did not allege he possessed a single expert or item of evidence to present [aside from the general report] which would contradict or question any of the State's forensic evidence. (V2, 330-348).

The autopsy revealed the victim had sustained a laceration to the labia and vaginal bruising, recently and before death.[41] (T. 879-82). This is not a controversial finding and is certainly within the scope of a medical examiner's competence.[42]

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challenge, particularly, on the basis of a general report such as the one relied upon Tanzi in this case.

[41]The fact the medical examiner did not personally perform the autopsy did not render the opinion inadmissible, particularly in light of the fact the defense did not challenge the medical examiner's qualifications. See Geralds v. State, 674 So. 2d 96 (Fla. 1996) and Schoenwetter v. State, 931 So. 2d 857, 871 (Fla. 2006). Trial counsel did, however, present their own expert, Dr. Feegel, to rebut that the injuries on Ms. Acosta could be considered consistent with a sexual battery. (T. 1233).

[42]In any case, ample evidence supported the fact Tanzi sexually battered the victim in this case. Tanzi confessed to forcing the victim to perform oral sex on him. Evidence was presented that the victim's teeth had been knocked loose by Tanzi. Tanzi confessed that Ms. Acosta's teeth had been the reason he had stopped the sexual battery. Tanzi also stated he threatened the victim with a razor not to bite him and razors were recovered

Nothing offered by Tanzi suggests otherwise. Since the record affirmatively refutes the claim Tanzi sought to add, no abuse of discretion has been shown.[43]

Ultimately, Tanzi's challenge to the forensic evidence in this case focuses on one-half of a single aggravator, commission during a sexual battery. Of course, Tanzi's own confession to forcing the victim to perform oral sex on him was enough to satisfy this aggravator. The fact the trial court also credited evidence showing a second sexual battery, even if in error, [which the State does not admit here], could not possibly alter the outcome in this heavily aggravated case. See Brown v. State, 473 So. 2d 1260 (Fla. 1985) (where multiple felonies are stated as supporting the "during the course" aggravator, and one felony is invalidated, the validity of the aggravator is not undermined where there are other felonies to support it).

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from the victim's van. Finally, Tanzi's post-conviction challenge to the sexual battery aggravator is of no consequence in this case. In light of the overwhelming evidence establishing the aggravators of under sentence of imprisonment, pecuniary gain, HAC, avoid arrest, and CCP, any error would not change the outcome.

[43]Yet another reason to affirm the lower court's ruling is that the claim Tanzi sought to add would be procedurally barred from his motion for post-conviction relief. Since the testimony of the forensic experts Tanzi sought to challenge appears in the record, any question of admissibility should have been raised, if at all, at trial and on direct appeal. "[A] Rule 3.850 motion based upon grounds which wither were or could have been raised as issues on appeal may be summarily denied." McCrae v. State, 437 So. 2d 1388, 1390 (Fla. 1983) (string citations omitted).

Accordingly, Tanzi was not prejudiced by the failure to allow an amendment to his motion for post-conviction relief.

B. The Penalty Phase Hearsay/Confrontation Claim

Tanzi next asserts the trial court erred in refusing to allow him to amend his motion to include a confrontation clause hearsay claim based upon Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2542 (2009). The trial court did not abuse its discretion in refusing to allow an amendment on a meritless and procedurally barred claim.

First, Tanzi sought to add a hearsay claim based upon testimony which appears in the penalty phase record. No good cause has been shown for failing to raise this claim in his initial motion, where the testimony sought to be challenged has always been available to collateral counsel. Although the trial court decided any claim would be without merit based upon the non-retroactivity of Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004) and by extension, Melendez-Diaz, it is also clear Tanzi failed to show good cause for the amendment.

Crawford was decided after Tanzi's penalty phase hearing, but, before his case was final on direct appeal. Consequently, any Crawford claim was not barred by non-retroactivity.[44]

[44]The post-conviction court recognized that the Supreme Court's decision in Melendez-Diaz v. Mass., 129 S. Ct. 2527 (2009), which applied Crawford v. Washington, 541 U.S. 36, 124 S. Ct.

Nonetheless, the post-conviction court properly found that Tanzi was not entitled to the benefit of Melendez-Diaz on collateral review. As noted, the claim is based upon an allegation of evidentiary error [hearsay] which appears in the trial record. As the Supreme Court itself recognized, "[t]his case involves little more than the application of our holding in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177[]" and that the "Sixth Amendment does not permit the prosecution to prove its case via ex parte out-of-court affidavits[.]." Melendez-Diaz, 129 S. Ct. at 2542 (2009). This was clearly an issue which could have, and should have been raised, if at all, at trial and on direct appeal.[45] See Schoenwetter v. State, 46 So. 3d 535, 561 (Fla. 2010) ("[I]issues that could have been raised on direct appeal, but were not, are not cognizable through collateral attack.") (citing Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1323 (Fla. 1994) (citation omitted)). Consequently, Tanzi was procedurally barred from pursuing this claim in a collateral attack upon his conviction or sentence. See also Knight v. State, 746 So. 2d 423, 430 (Fla. 1998) (lack

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1354 (2004), is not retroactive. See Chandler v. Crosby, 916 So. 2d 728 (Fla. 2005) (Crawford is not retroactive).

[45]However, this Court has held that a specific objection is necessary to preserve a Crawford challenge. See Schoenwetter v. State, 931 So. 2d 857, 871 (Fla.), cert. denied, 549 U.S. 1035, 127 S. Ct. 587 (2006); Williams v. State, 967 So. 2d 735, 748 (Fla. 2007).

of specific hearsay objection at trial waives the issue on appeal); Bowles v. State, 979 So. 2d 182, 193 (Fla. 2008); Mungin v. State, 932 So. 2d 986, 1003 (Fla. 2006) (same). A trial court does not abuse its discretion in refusing to allow amendment of a post-conviction motion to include a procedurally barred, meritless claim.

To the extent Tanzi claimed trial counsel was ineffective in failing to raise this hearsay challenge, this claim is also without merit. See Peede v. State, 955 So. 2d 480, 502-03 (Fla. 2007) (rejecting ineffective counsel claim, noting that Crawford was decided after the penalty phase and that "[c]ounsel cannot be deemed ineffective for failing to anticipate changes in the law.").

Ultimately, it is clear that Tanzi's motion did not state a prima facie case for relief in this case. Tanzi's post-conviction claim challenged only the hearsay allegedly used to support a single aggravator, during the course of a sexual battery, and, evidence indicating a vaginal sexual battery upon the victim. However, since this aggravator was supported by unchallenged evidence of Tanzi's oral sexual battery upon the victim, remand for consideration of this claim would amount to nothing more than legal churning. In rejecting a corpus delecti challenge to Tanzi's confession to oral sexual battery, this

Court held:

> Tanzi confessed to forcing Acosta to perform oral sex under a threat to cut her throat with a razor and that he ordered her to stop when her loose teeth had lessened his pleasure. A medical examiner determined that Acosta's teeth were in fact loose. A towel containing Tanzi's semen was found in Acosta's van, the location Tanzi indicated the oral sexual battery took place. Further, razors were discovered in Acosta's van. Based on these facts, the trial court did not abuse its discretion in finding the corpus delicti and admitting Tanzi's confession to sexual battery.

Tanzi, 964 at 116.

Consequently, assuming for a moment Tanzi's challenge had merit, the balance of aggravating and mitigating factors remain unchanged. The in the course of a felony aggravator remains supported by kidnapping and oral sexual battery. See Sentencing Order: "The Defendant committed two sexual batteries on the victim during the course of her four-hour ordeal which the court is counting as one aggravator even though the two sexual batteries could have been separated in time and place." Since the record in this case indicates Tanzi would not obtain post-conviction relief based upon the allegations contained in his motion, remand for consideration of this claim on the merits would amount to nothing more than legal churning. See generally State v. Rucker, 613 So. 2d 460, 462 (Fla. 1993) (declining to order remand for more specific findings by the trial court where it is clear defendant's prior convictions were not set aside or

pardoned and the "result would be mere legal churning.").

ISSUE V

WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN REJECTING TANZI'S ADDITIONAL PUBLIC RECORDS DEMANDS?

Tanzi finally complains that the post-conviction court erred in denying his request for public records from the Monroe County Sheriff's Department. The State disagrees. No abuse of the post-conviction court's broad discretion has been shown in denying these requests. Walton v. State, 3 So. 3d 1000, 1010 (Fla. 2009) ("This Court reviews the trial court's denial of a public records request for abuse of discretion.") (citing Diaz v. State, 945 So. 2d 1136, 1149 (Fla. 2006)).

On his first allegation, Tanzi argues that he was entitled to the Monroe County Sheriff's Office Miranda card in use during the period of Tanzi's arrest. However, Tanzi admits that this card was not used in this case as Monroe County Sheriff's detectives did not Mirandize Tanzi. (Appellant's Brief at 95). The prosecutor noted that the arrest and questioning of Tanzi was by the City of Key West Police Department along with a city of Miami detective. This fact was made clear below at the hearing on the motion, wherein the Sheriff's Office spokesman was present, noting that since the sheriff's Office did not administer Miranda warnings, "he might as well be asking it from any agency in the country. (V6, 46-47). Tanzi simply failed to

show any plausible relevance for a Miranda card and procedures from the Monroe County Sheriff's Office, which were not used in this case. See Moore v. State, 820 So. 2d 199, 204 (Fla. 2002) (A trial court has discretion to reject public records requests that are "overly broad, of questionable relevance, and unlikely to lead to discoverable evidence").

Tanzi's next assertion of error regarding the personnel file of Monroe County Sheriff's Officer James Norman is truly puzzling. The court granted Tanzi's request for Detective Norman's internal affairs file and training file. (V6, 50). A written order following the hearing on March 31, 2009, states: "…The Sheriff is further directed to produce the complete internal affairs file and training records for Detective James Norman. Said records shall be produced within ten (10) days of this order." (V2, 264). At the hearing below, Tanzi's counsel, Mr. Kalil, argued that "all I'm asking for is an internal affairs file." (V6, 49). Since the post-conviction court granted collateral counsel's request for records relating to Detective Norman, this assignment of error is patently without merit.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court AFFIRM the denial of Tanzi's motion for post-conviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Paul Kalil, Assistant CCRC, Capital Collateral Regional Counsel, Southern Region, 101 N.E. 3rd Ave., Suite 400, Fort Lauderdale, Florida 33301-1100, on this 18th day of April, 2011.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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