IN THE SUPREME COURT OF FLORIDA

Case No. SC10-807
Lower Court Case No. 2000-CF-573-K

MICHAEL ANTHONY TANZI,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

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

REPLY BRIEF OF APPELLANT

PAUL KALIL
Assistant CCRC-South
Florida Bar No. 0150177

SCOTT GAVIN
Staff Attorney
Florida Bar No. 0058651

OFFICE OF THE CAPITAL COLLATERAL REGIONAL COUNSEL - SOUTH
101 N.E. 3rd Avenue, Suite 400
Fort Lauderdale, Florida 33301
Tel. (954) 713-1284

COUNSEL FOR APPELLANT

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ARGUMENT IN REPLY

Mr. Tanzi submits this Reply to the State's Answer Brief. Mr. Tanzi will not reply to every argument raised by the State. However, Mr. Tanzi neither abandons nor concedes any issues and/or claims not specifically addressed in this Reply Brief. Mr. Tanzi expressly relies on the arguments made in his Initial Brief for any claims and/or issues that are only partially addressed or not addressed at all in this Reply Brief.

REPLY TO ARGUMENT I

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

The State asserts that Mr. Tanzi has waived any right to appeal the sufficiency of the trial court's order because he "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." (Answer Brief, p. 28). This argument is without merit.

It is not incumbent on the defendant to tell the circuit court how to fashion an order denying him relief. This Court has already done so. Florida Rule of Criminal Procedure 3.851(f)(5)(D) very clearly sets forth the responsibilities of the circuit court to render an order "ruling on each claim considered at the evidentiary

hearing and all other claims raised in the motion." Despite these requirements, the lower court's order being appealed here is limited to issues on which an evidentiary hearing was held and contains no independent findings of fact with regard to the claims for which a hearing was denied.

Rule 3.851 also requires that the court issue an order "making detailed findings of fact and conclusions of law with respect to each claim, and attaching or referencing such portions of the record as are necessary to allow for meaningful appellate review." The State cites to the lower court's "49 separate finding of fact and 9 conclusions of law." (Answer Brief, p. 31). However, the State fails to mention that each of the "findings of fact" is merely a one- or two-sentence conclusory statement, without citations to the trial record or the record of the evidentiary hearing. The nine one- or two-sentence "conclusions of law" provide no insight into the court's rationale or legal analysis. And despite the State's attempt to divine credibility findings from the lower court's order, the order is woefully devoid of any credibility findings, much less the detailed findings that this Court requires to conduct a meaningful review.

Unlike *Holland v. Cheney Bros., Inc.*, 22 So. 3d 648 (Fla. 1st DCA 2009), on which the State relies, this is not an appeal of an administrative denial of a worker's compensation claim; it is the review of a postconviction proceeding challenging a sentence of death. This Court should remand the case to the circuit

court for entry of an order which would enable this Court to conduct meaningful and appropriate appellate review. *Mendoza v. State*, 964 So. 2d 121 (Fla. 2007).

REPLY TO ARGUMENT II

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

The State argues that "after having been granted an evidentiary hearing on this issue, Mr. Tanzi failed to establish any deficiency on the part of his experienced 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)."

Mr. Tanzi does not dispute that trial counsel made efforts to retain experts, obtain records and present witnesses at the penalty phase. However, one can hardly imagine a better example of deficient performance than counsel failing to investigate evidence -- disclosed by the State to the defense before a capital penalty phase -- that the defendant might suffer from a chromosomal disorder which potentially affected his behavior and development. Nor can it be ignored that trial counsel chose to rely on contradictory theories of mental health mitigation evidence presented by incredible witnesses who were not adequately prepared for their testimony.

The State contends that "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" (Answer Brief, p. 51). This contention is incorrect in several respects.

Trial counsel did not merely "fail to discover" that Mr. Tanzi has 47,XYY Syndrome. Rather, the record reflects that trial counsel failed to act on information indicating that Mr. Tanzi suffered from this disorder after it was presented to the defense by the prosecution. Having been informed of the likelihood that Mr. Tanzi suffers from a chromosomal abnormality, it was incumbent on trial counsel to seek out the necessary experts to explore this avenue of mitigation further.

Moreover, none of the purportedly "qualified experts" to which the State refers (Answer Brief, p. 51) were, in fact, "qualified" to opine as to the diagnosis or significance of Mr. Tanzi's chromosomal disorder. The State insists that "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 must be rejected." (Answer Brief, p. 52-3). This is not the case. At the penalty phase, trial counsel presented a social worker, a psychiatrist, and a psychologist to explain Mr. Tanzi's mental health to the jury. None of these experts had the necessary knowledge, skill, experience, training or education to render an opinion regarding genetics. As such, it would have been inappropriate to ask those experts

their opinions about Mr. Tanzi's genetic disorder, and those opinions would not have been admissible. Thus, the issue is not whether the unpresented 47,XYY Syndrome evidence affected the penalty phase witnesses' opinions; rather, the issue is what effect the opinions of a trained and experienced geneticist and medical doctor would have had on Mr. Tanzi's jury.

Dr. Karl Muench is such a qualified expert. As a medical geneticist, Dr. Muench testified that Mr. Tanzi suffers from 47,XYY Syndrome. (PCR-T. 20). Notwithstanding the State's insistence that 47,XYY Syndrome is not a "syndrome" (Answer Brief, p. 53), Dr. Muench explained that 47,XYY Syndrome is, in fact, a "syndrome" within the plain meaning of the word and in the medical context. Dr. Muench explained that a "syndrome" represents the coming together of signs and symptoms related to a disease. (PCR-T. 20). Despite the circuit court's finding that 47,XYY is not a "syndrome as generally understood by *psychiatrists* and *psychologists*," the fact remains that 47,XYY Syndrome is recognized as a syndrome amongst *geneticists*, as Dr. Muench explained.[1] Similarly, the State's insistence that 47,XYY Syndrome "is not recognized in the DSM-IV-TR as a syndrome affecting psychological conditions or behavior" (Answer Brief, p. 53,

[1] This is not Dr. Muench's opinion alone. The term "47,XYY Syndrome" is used almost universally amongst medical authorities, including the National Institutes of Health. *See, e.g., http://ghr.nlm.nih.gov/condition/47xyy-syndrome*. The disorder is less commonly referred to as "Jacobs Syndrome," "XYY Syndrome" and "YY Syndrome." *Id.*

FN 21) is somewhat misleading because 47,XYY Syndrome is a genetic disorder, not a mental disorder.

Despite the State's attempts to minimize the significance of 47,XYY Syndrome, the fact remains that there is a well-documented statistical link between the disorder and behavioral issues related to development. (PCR-T. 32). Dr. Muench explained that there are numerous published studies on the developmental aspects of 47,XYY in which these children experience impaired socialization, increased problems with inner social skills, learning disabilities, impulsive behaviors, and other identifiable traits which would lead to placement in special school situations or which would lead to recommendation for psychological or psychiatric evaluation. (PCR-T. 33-34). Moreover, individuals with 47,XYY Syndrome are statistically likely to have lower intelligence than the general population or their own siblings as demonstrated by 15 percent decrease in performance on IQ tests. (PCR-T. 31). In a follow up study of thirty-eight XYY boys, approximately 50 percent had documented psychological problems, indicating "considerably increased risks" for delayed language and motor development and psychiatric disorders such as autism. (PCR-T. 60-61). While it is true that the initial studies conducted in the 1960's which suggested XYY was "the criminal gene" were later discredited, the fact remains that a significant body of reliable research has established that 47,XYY males are more likely to exhibit

these significant developmental and behavioral problems.

The testimony of the lay witnesses at the evidentiary hearing established that Mr. Tanzi suffered from these developmental disorders, consistent with 47,XYY Syndrome. For example, Julie Perkins explained that the young Mr. Tanzi cried often and would instigate problems with the other kids (PCR-T. 300) but rarely defend himself or fight back. (PCR-T. 298-9). Ms. Perkins also testified that she could no longer babysit for Mr. Tanzi because he became defiant and would not listen to her anymore. (PCR-T. 303-4). Sean Martin[2] corroborated these descriptions of Mr. Tanzi's behaviors. Mr. Tanzi was rude to other people in the neighborhood, and often brought the fights upon himself. (PCR-T. 259).

Mr. Tanzi's mother, Phyllis Whalen, also described many of the other developmental problems associated with 47,XYY Syndrome that Mr. Tanzi exhibited. From early childhood, Mr. Tanzi acted out and was temperamental. (PCR-T. 342). When Mr. Tanzi wasn't doing well in school, teachers thought he

[2] The State claims to be "concerned" that CCRC counsel "allowed" Mr. Martin to contradict previous statements made to a CCRC investigator when interviewed by by telephone by the assistant state attorney prior to the evidentiary hearing. (Answer Brief, p. 60, FN24). This criticism is improper here and unfounded. CCRC counsel is without any authority to allow Mr. Martin to contradict himself. Moreover, Mr. Martin's evidentiary hearing testimony established that, in addition to being a child molester, he is a chronic liar. CCRC counsel was in no better position than the State to assume that Mr. Martin's statements to the prosecutor in an unsworn telephone interview were any more or less truthful than his statements to the CCRC investigator. The State should be more concerned that they failed to properly depose Mr. Martin.

had "ADHD." He had a very short attention span and was disruptive in class. (PCR-T. 346). Mr. Tanzi had almost no friends. (PCR-T. 346). These exact behavior patterns and developmental problems are described in medical literature on 47,XYY Syndrome. Moreover, Mr. Tanzi exhibits many of the physical characteristics common to XYY males, including abnormal height and adult acne.

Mr. Tanzi's suffering from 47,XYY Syndrome is clearly an aspect of his background that should have been presented to his sentencing jury. Trial counsel argued that Mr. Tanzi's mental health was the result of genetic disposition, however, Mr. Tanzi's genetic condition had a much better explanation than simply losing the "genetic lottery." (Answer Brief, p. 55). Having been notified by the State that Mr. Tanzi potentially suffers from a recognized chromosomal disorder, trial counsel was deficient for not presenting this vital mitigation evidence to Mr. Tanzi's jury. When this additional evidence is considered cumulatively with that presented at the penalty phase, assessing the impact that the evidence uncovered during collateral proceedings could have had on the jurors, it is apparent that Mr. Tanzi was prejudiced. *Sears v. Upton*, 130 S.Ct. 3259 (2010), *Porter v. McCollum*, 130 S.Ct. 447, 454 (2009).

Regarding trial counsel's presentation of inconsistent mitigation theories, the State first argues that the diagnoses of Dr. Vicary and Dr. Raphael are "not truly inconsistent." (Answer Brief, p. 37). This is simply not true. The State argues that

Dr. Raphael "suspected Defendant of having bipolar disorder. (T. 1302)." However, this reference to the record is wholly inaccurate. Dr. Raphael in fact testified that he considered as rule-out diagnoses schizophrenia, schizoaffective disorder and psychotic disorder NOS. (T. 1302). He never mentioned Bipolar Disorder. The State's misunderstanding is apparently based on Dr. Raphael's testimony referencing his report, wherein he describes the rule-out diagnosis of "Schizoaffective Disorder, Bipolar Type." (Raphael Report, p. 27). Schizoaffective Disorder is not the same thing as Bipolar Disorder. According to the Diagnostic and Statistical Manual of Mental Disorders, Bipolar Disorder is an Axis I "mood disorder" DSM-IV-TR at 382. In contrast, Schizoaffective Disorder is classified as a "Psychotic Disorder." DSM-IV-TR at 318. While there is a subcategory of "Schizoaffective Disorder – Bipolar Type," this diagnosis is neither the same category of illness, nor does it have the same diagnostic criteria as Bipolar Disorder. An accurate reading of Dr. Raphael's testimony reveals that the word "bipolar" was used merely to specify the subcategory of the psychotic disorder which Dr. Raphael considered, and was not meant to suggest that Mr. Tanzi suffered from the distinct Bipolar Disorder. The State's assertion that Dr. Raphael suspected Mr. Tanzi suffers from Bipolar Disorder is simply not true.[3]

[3] The State's assertion that "Raphael testified that he suspected Tanzi also suffered psychotic disorders including bipolar disorder but could not determine if Defendant met all the criteria (T. 1304)" (Answer Brief, p. 38, FN 11) is similarly

The State next argues that trial counsel made a "wise tactical move" by not "having his experts collaborate or discuss their opinions with one another prior to testifying." (Answer Brief, p. 38). While it is true that Mr. Kuypers testified that he had "learned at a seminar" that such collaboration would be unwise, the State fails to mention that Mr. Kuypers could not recall which seminar or cite to any authority for this proposition. To the contrary, the ABA Guidelines, which are considered authoritative but of which trial counsel was patently unaware[4], express a different view. ABA Guideline 11.7.1 advises that "as the investigations…produce information, counsel should formulate a defense theory." Furthermore, "[f]ormulation of **and adherence to a defense theory are vital in any criminal case**. In the bifurcated proceedings of a capital trial, the defense theory is especially important." (Commentary to Guideline 11.7.1, emphasis added). The same considerations that encourage "adherence" to a consistent "defense theory" between guilt and penalty phase apply with equal, if not greater, force to matters solely within the penalty phase. At the evidentiary hearing, trial counsel agreed

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incorrect, but demonstrates the State's lack of understanding of the distinction between Schizoaffective Disorder and Bipolar Disorder. Bipolar Disorder is a mood disorder, not a psychotic disorder.

[4] Despite the fact that the ABA Guidelines have been considered "guides to determining what is reasonable" since at least 1984, trial counsel was not aware of whether the Guidelines were "in effect" at the time of Mr. Tanzi's trial – in 2005. (PCR-T. 133).

that mental health diagnoses are, in effect, theories of mitigation. Notwithstanding what he might have learned at an un-named seminar which he could not recall, the ABA Guidelines are clear that adherence to such theories is vital to a criminal case. As such, his decision to forego a consistent theory of mitigation in favor of presenting divergent theories cannot be deemed a "wise tactical move," nor reasonable performance of counsel.

Regarding trial counsel's presentation of Dr. Vicary, the State implies that trial counsel made a reasonable strategic decision to present Dr. Vicary even though his credibility would be highly suspect due to the suspension of his medical license for lying in a California capital case. (Answer Brief, p. 48). This position ignores the fact that counsel's strategic decisions cannot be based on failure to investigate. "Strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." *Wiggins v. Smith*, 123 S. Ct. 2527 (2003). Trial counsel testified at the evidentiary hearing that he had no knowledge of Dr. Vicary's background and had never worked with him before. (PCR-T. 100). However, no efforts were made to investigate Dr. Vicary's background other than to obtain his resume. (PCR-T. 100). As a result, trial counsel did not learn about Dr. Vicary's disciplinary problems until he was alerted to them by the State shortly before trial. (PCR-T. 101). Thus, Mr. Kuyper's testimony that they "had no readily

available alternative" to presenting Dr. Vicary (Answer Brief, p. 48), rather than supporting the notion that presenting Dr. Vicary was a wise move, merely demonstrates that they had not adequately prepared for Mr. Tanzi's penalty phase.

The State also argues that trial counsel's failure to provide the videotape of Mr. Tanzi's police statement to Dr. Vicary did not prejudice Mr. Tanzi because the videotape would not have changed or altered Dr. Vicary's opinion (Answer Brief, p. 40). However, this argument does not answer Mr. Tanzi's claim. It appears that the State, having benefitted from trial counsel's failure to provide the videotape to Dr. Vicary, is now attempting to re-frame the claim rather than rebut it.

As Mr. Tanzi argued in his 3.851 motion and in his Initial Brief, trial counsel's failure to provide Dr. Vicary with the videotape exposed Dr. Vicary, whose credibility was already an issue before the jury due to his untruthful testimony in the California murder case, to effective impeachment on cross-examination:

> THE PROSECUTOR: Isn't' it – an your analysis in this case is completely devoid of his appearance during the time he's confessing, a mere number of days after he's killed Janet Acosta?
>
> DR. VICARY: If you're pointing out that I have not seen the videotape, I agree, that's true.
>
> Q: And would you agree that that's an important component into this equation.

A: I think it would have been better if I had seen the videotape.

Q: So you're telling this jury that you could have done a better job on this case?

A: To the extent that I didn't see the videotape, yes.

(T. 1184-85).

The only reason Dr. Vicary did not have the benefit of viewing the videotape is that trial counsel failed to provide it to him. Had counsel provided all available information, including the videotape of Mr. Tanzi's police statement, Dr. Vicary, whose credibility was already an issue before the jury, would not have been so effectively impeached. The question is not whether viewing the videotape would have changed Dr. Vicary's opinion. Rather, the issue is whether the jury was swayed by the State's arguments that his opinion was not credible because he had not reviewed this "important component into this equation."

While attempting to excuse trial counsel for presenting a highly incredible witness, the State criticizes postconviction counsel for presenting Dr. Richard Dudley at the postconviction proceedings. The State claims that Dr. Dudley is not credible because, in part, he diagnosed Borderline Personality Disorder and "did not relate the personality disorder to any of Tanzi's conduct on the day of the murder." (Answer Brief, p. 44). This argument is flawed in several respects.

At the outset, Mr. Tanzi would point out that there is no requirement that

mitigation presented share a causal nexus to the crime. Indeed, the United States Supreme Court has disapproved of such a "nexus" requirement. *Tennard v. Dretke*, 542 U.S. 274 (2004). In any event, Dr. Dudley testified that Mr. Tanzi's mental health conditions, including the factors related to 47,XYY Syndrome, his personality disorder and his traumatic history, contributed to Mr. Tanzi's sense of loss and abandonment which affected his behavior at the time of the offense. People with Borderline Personality Disorder have extremely unstable attachment issues, frantically trying to connect with someone and not believing their connections will remain stable. (PCR-T. 389). They exhibit instability in their own understanding of who they are, instability in their mood, and chronic depressive sorts of moods. (PCR-T. 389). Under stress they deteriorate into dissociative or brief psychotic states. "Its a very fragile personality structure." (PCR-T. 389). The circumstances of the crime can be explained in part because of the rejection Mr. Tanzi experienced when abandoned in Miami:

> [H]e has all the features . . . this history of losses and rejection and abandonments, and lack of real certainty about any primary attachments that left him with major issues around attachments, a history of just kind of frantically trying to connect and have somebody there for him virtually at any cost, then having enormous difficulty when there were experiences that seemed to be being left again or being abandoned again just would send him into tail spins.

(PCR-T. 389-90).

The State's criticism that Dr. Dudley's opinion is "inconsistent with every other expert in the case" ignores a very significant fact. Dr. Dudley's opinion was based, in part, on the knowledge that Mr. Tanzi suffers from 47,XYY Syndrome, a genetic disorder that affected his development. Moreover, the fact that Dr. Dudley did not diagnose Mr. Tanzi with Antisocial Personality Disorder, whereas other experts did, is not indicative of anything other than the fact that Dr. Dudley had additional information, including the 47,XYY diagnosis, on which to base his opinion. As Dr. Dudley explained, Mr. Tanzi is "much more severely disturbed than antisocial." (PCR-T. 414).

Lastly, the State contends that "no competent 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." (Answer Brief, p. 45). This argument is spurious, as there is no risk that this information would have been presented to the jury. Unlike the situation in *Muehleman v. State*, 503 So. 2d 310 (1987), on which the State relies, Dr. Dudley repeatedly explained that he did not rely on the facts of the Massachusetts crime in forming his opinion. (PCR. 421, 422, 424). Thus, the facts of the Massachusetts crime were not relevant and were inadmissible for the purposes of the penalty phase.

Moreover, as the State is aware, Mr. Tanzi filed several pre-trial motions in

limine to exclude evidence of the alleged Massachusetts homicide being presented as evidence of guilt or aggravation, either at guilt phase, penalty phase or the *Spencer* hearing (R. 626, R. 637, R. 640). The State did not object to the exclusion of such evidence and those motions were granted (R. 702). Mr. Tanzi also filed a "Motion in Limine to Exclude Evidence of Alleged Massachusetts Homicide During or in Rebuttal to the Defense Presentation of Mitigation Evidence in the Penalty Phase of the Trial" (R. 643) on which the court reserved ruling but admonished that:

> The State, before it attempts to use evidence of the alleged Massachusetts homicide during, or in rebuttal to, the defense presentation of mitigation evidence in the penalty phase, shall set a pretrial hearing and obtain a ruling from the Court on the admissibility of such evidence.

(R. 699). Thus, the issue is not whether a competent attorney would have presented Dr. Dudley at the risk of opening the door to damaging evidence which would have been inadmissible. Rather, the issue is whether a competent prosecutor would have violated the court's pre-trial order in limine at the risk of causing a mistrial.

Despite the State's assertions, Mr. Tanzi has established that trial counsel's performance was constitutionally deficient and that he was prejudiced as a result. This Court should vacate his sentence of death and grant a new penalty phase proceeding.

REPLY TO ARGUMENT IV

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

With regard to Mr. Tanzi's Confrontation Clause claim, the State argues that "the trial court did not abuse its discretion in refusing to allow amendment on a meritless and procedurally barred claim." (Answer Brief, p. 91). However, that is not what the trial court did. The court denied leave to amend based on its mistaken belief, despite counsel's arguments to the contrary, that because *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), and *Crawford v. Washington*, 541 U.S. 36 (2004), were not retroactive, they did not apply to Mr. Tanzi's case. Counsel for Mr. Tanzi explained at the hearing on the motion to amend that Mr. Tanzi's conviction and sentence were not final on direct appeal when the United States Supreme Court decided *Crawford*. Thus, retroactivity was not an issue barring Mr. Tanzi raising the claim. (PCR. Vol. VI, p. 91). However, the State insisted that neither *Crawford* nor *Melendez-Diaz* apply because they are not retroactive. The circuit court agreed with the State and denied the motion to amend based on non-retroactivity (PCR. Vol. VI, p. 93).

The State now recognizes that the trial court's ruling is error and that "any *Crawford* claim was not barred by retroactivity" (Answer Brief, p. 91), contrary to their argument below. The State now argues to this Court that the claim is based on

evidentiary error which should have been raised on direct appeal, but that the issue was not preserved by contemporaneous objection (Answer Brief, p. 92). In answer to Mr. Tanzi's claim that trial counsel was ineffective for failing to object to the admission of hearsay, the State argues that trial counsel's failure to preserve the issue is excused because "counsel cannot be deemed ineffective for failing to anticipate changes in the law." (Answer Brief, p. 93, citing *Peede v. State*, 955 So. 2d 480, 502-03 (Fla. 2007)).

The State's reliance on *Peede* is misplaced. In *Peede*, this Court addressed the defendant's claim of ineffective assistance of appellate counsel for failing to raise a *Crawford* claim on direct appeal:

> Peede next argues that his right to confrontation articulated in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), was violated during his trial. This Court has recently held that *Crawford* does not apply retroactively. *See Chandler v. Crosby*, 916 So.2d 728, 731 (Fla.2005), cert. denied, 549 U.S. 956, 127 S.Ct. 382, 166 L.Ed.2d 275 (2006). As Peede's conviction became final prior to *Crawford*, relief is denied on this claim. To the extent Peede is arguing ineffectiveness of appellate counsel, appellate counsel cannot be deemed ineffective for failing to raise a meritless claim or to anticipate a change in the law; therefore, relief is denied.

Peede, 955 So. 2d 480 (2007) . Unlike the situation presented in *Peede*, Mr. Tanzi asserts that *trial* counsel was ineffective for failing preserve the issue *at trial*. Unlike in *Peede*, Mr. Tanzi's conviction and sentence were *not* final when

Crawford was decided, and the principles of non-retroactivity do not apply.

Notwithstanding the obvious and significant procedural distinction, the State's argument that counsel cannot be deemed ineffective for failing to anticipate changes in the law in this circumstance is not consistent with trial counsel's obligations. The ABA Guidelines set out the requirements for preserving potential claims:

> Guideline 10.8 The Duty to Assert Legal Claims
>
> A. Counsel at every stage of the case, exercising professional judgment in accordance with these Guidelines, should:
>
> 1. consider all legal claims potentially available; and
>
> 2. thoroughly investigate the basis for each potential claim before reaching a conclusion as to whether it should be asserted; and
>
> 3. evaluate each potential claim in light of:
>
> a. the unique characteristics of death penalty law and practice; and
>
> b. the near certainty that all available avenues of post-conviction relief will be pursued in the event of conviction and imposition of a death sentence; and
>
> c. the importance of protecting the client's rights against later contentions by the government that the claim has been waived, defaulted, not exhausted, or otherwise forfeited; and
>
> d. any other professionally appropriate costs and

benefits to the assertion of the claim.

ABA Guideline 10.8. The Commentary to the Guideline explains:

> Because of the possibility that the client will be sentenced to death, counsel must be significantly more vigilant about litigating all potential issues at all levels in a capital case than in any other case. As described in the Commentary to Guideline 1.1, counsel also has a duty to preserve issues calling for a change in existing precedent; the client's life may well depend on how zealously counsel discharges this duty. Counsel should object to anything that appears unfair or unjust even if it involves challenging well-accepted practices.

In the immediate case, counsel knew, or should have known, that the issues presented in *Crawford* were being litigated at or about the time of Mr. Tanzi's trial. Moreover, counsel had the foresight to raise a concern, if not an objection, to the State's presentation of hearsay testimony:

> Ms. Rosell: Judge for a point of clarification this particular work was not done by her. It was done by a different analysis.

(R. Vol. 18, p. 771).

Having realized that the testimony was hearsay, counsel had a duty to argue the objection vigorously. "Counsel should consider, when deciding whether to object to legal error and whether to assert on the record a position regarding any procedure or ruling, that post judgment review in the event of conviction and sentence is likely, and counsel should take steps where appropriate to preserve, on all applicable state and Federal grounds, any given question for review." ABA

Guideline 11.7.3 (1989). Further, Counsel should not refrain from objecting to or otherwise bringing to the attention of the court a perceived injustice not addressed by existing law. Counsel should not hesitate to try and change the law, or at least its application in the client's case. Commentary to Guideline 11.7.3 (1989). Trial counsel failed to fulfill these obligations.

The trial court abused its discretion in summarily denying these meritorious claims. This Court should remand for evidentiary proceedings so that Mr. Tanzi is afforded the right to prove that he is entitled to relief.

REPLY TO ARGUMENT V

THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. TANZI'S CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES IN VIOLATION OF FLA. R. CRIM. P. 3.852

The State's contends that Mr. Tanzi's public records claim regarding the denial of the personnel file of Monroe County Sheriff's Department officer James Norman is "truly puzzling" because the lower court granted Mr. Tanzi's request for Officer Norman's internal affairs file and training file (Answer Brief, p. 96). This claim is not as puzzling as the State believes.

The State's assertion that "the post-conviction court granted collateral counsel's request for records relating to Detective Norman" (Answer Brief, p. 96), is only half-true. While it is true that the lower court granted Mr. Tanzi access to

Officer Norman's internal affairs and training files, the fact remains that the court denied Mr. Tanzi's request for his personnel files. (Supp. PC-R. Vol. VI 50).

Officer Norman's personnel files were necessary for a full investigation of Mr. Tanzi postconviction claims and are reasonably calculated to lead to the discovery of admissible evidence. Officer Norman was involved with Key West Police Department and the City of Miami Police Department in the investigation of Mr. Tanzi's case and testified for the State at Mr. Tanzi's trial. Any information in his personnel files demonstrating misconduct, veracity or incompetence would be relevant to Mr. Tanzi's case. Mr. Tanzi is entitled to information which would tend to show whether the integrity of the crime scene was appropriately protected. The lower court's denial of access to Detective Norman's personnel files, notwithstanding disclosure of other records, was an abuse of discretion.

CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing and the record, Mr. Tanzi respectfully urges this Court to reverse the lower court, grant a new trial and/or penalty phase proceeding, and grant such other relief as the Court deems just and proper.

Respectfully submitted,

PAUL KALIL
Assistant CCRC-South
Florida Bar No. 0150177

SCOTT GAVIN
Staff Attorney
Florida Bar No. 0058651

CCRC-South
101 N.E. 3rd Avenue, Suite 400
Fort Lauderdale, Florida 33301
Tel. (954) 713-1284

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by United States Mail, first-class postage prepaid to Scott A Browne, Assistant Attorney General, Concourse Center 4, Suite 200, 3507 East Frontage Road, Tampa, Florida 33607-7013, this 22nd day of June, 2011.

_____
PAUL KALIL
Assistant CCRC-South

CERTIFICATE OF FONT

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Assistant CCRC-South