IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

MICHAEL TANZI,

Petitioner,

v.

WALTER A. McNEIL, Secretary
Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

This is Petitioner's first habeas corpus petition in this Court. This petition for habeas corpus relief is being filed in order to preserve Mr. Tanzi's claims arising under recent United States Supreme Court decisions and to address substantial claims of error under Florida law and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution; claims demonstrating that Mr. Tanzi was deprived of the effective assistance of counsel on direct appeal and that the proceedings that resulted in his convictions and death sentences violated fundamental constitutional guarantees.

Citations to the record on the direct appeal shall be as "R. _____." Citations to the postconviction record shall be as "PC-R. _____." All other citations shall be self-explanatory.

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Florida Rule of Appellate Procedure 9.100. This Court has original jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(3) and Article V, Section 3(b)(9), Florida Constitution. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without

cost." Article I, Section 13, Florida Constitution. This petition presents issues which directly concern the constitutionality of Mr. Tanzi's convictions and sentences of death.

Jurisdiction in this action lies in this Court, *see e.g. Smith v. State*, 400 So. 2d 956, 960 (Fla. 1981), because the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Tanzi's direct appeal. *See Wilson v. Wainwright*, 474 So. 2d 1162, 1163 (Fla. 1985); *Baggett v. Wainwright*, 229 So. 2d 239, 243 (Fla. 1969). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors is warranted in this case.

REQUEST FOR ORAL ARGUMENT

Mr. Tanzi requests oral argument on this petition.

STATEMENT OF CASE AND FACTS

Petitioner was indicted on May 16, 2000 for one count of first-degree murder in violation of section 782.04, Florida Statutes (1989). An amended information was filed on March 26, 2002 charging Mr. Tanzi with five additional counts: carjacking with a weapon in violation of section 812.133, Florida Statutes (1989); kidnapping to facilitate a felony with a deadly weapon in violation of

section 787.01, Florida Statutes (1989) and section 775.087, Florida Statutes (1989); armed robbery with a deadly weapon in violation of section 812.13, Florida Statutes (1989); and two counts of sexual battery with a deadly weapon in violation of section 794.011, Florida Statutes (1989).

Petitioner entered a plea of guilty to the counts of first-degree murder, carjacking, kidnapping, and armed robbery on January 31, 2003. (R. 1242-44; 2269; 2423-25). The court conducted Mr. Tanzi's penalty phase on February 10-19, 2003. On March 14, 2003 the court conducted a *Spencer* hearing (R. 2214-34). On April 11, 2003, the trial court sentenced Petitioner to death for first-degree murder and 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. (R. 1831).

This Court upheld the convictions and sentences on direct appeal. *Tanzi v. State*, 964 So. 2d 106 (Fla. 2007). Petitioner's motion for rehearing was denied on August 27, 2007, and the Mandate issued on September 12, 2007. Petitioner then filed a Writ of Certiorari in the United State's Supreme Court which was denied on February 19, 2008. *Tanzi v. Florida*, 128 S. Ct. 1243 (2008).

On February 13, 2009 Mr. Tanzi filed a Rule 3.850 Motion to Vacate Judgment of Convictions and Sentences With Special Request for Leave to Amend in the Circuit Court for the Sixteenth Judicial Circuit. (PC-R. 1-175). A Motion for

Leave to Amend with two additional claims was filed by Mr. Tanzi on July 28, 2009. (PC-R. 324-358). The circuit court issued an order denying Mr. Tanzi's request for leave to amend on August 14, 2009. (PC-R. 392-393). On January 25-28, 2010, an evidentiary hearing was held. (PC-R.-T 1-433). On March 22, 2010, the circuit court denied Mr. Tanzi relief. Following the trial court's order denying his Rule 3.850 Motion for Postconviction Relief, Mr. Tanzi timely filed an appeal.

This Petition is being filed simultaneously with Mr. Tanzi's initial brief following the denial of his motion for post-conviction relief.

CLAIM I

MR. TANZI WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL TO THE FLORIDA SUPREME COURT AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I §§ 9, 16(a) AND 17 OF THE CONSTITUTION OF THE STATE OF FLORIDA.

Mr. Tanzi had the constitutional right to the effective assistance of counsel for purposes of presenting his direct appeal to this Court. *Strickland v. Washington*, 466 U.S. 668 (1984). "A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). The two-prong *Strickland* test applies equally to ineffectiveness allegations of trial counsel

and appellate counsel. *See Orazio v. Dugger*, 876 F.2d 1508 (11th Cir. 1989). Appellate counsel's performance was deficient and Mr. Tanzi was prejudiced because these deficiencies compromised the appellate process to such a degree as to undermine confidence in the correctness of the result of the direct appeal. *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000).

Appellate counsel failed to present for review to this Court compelling issues concerning Mr. Tanzi's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Tanzi involved "serious and substantial deficiencies." *Fitzpatrick v. Wainwright*, 490 So. 2d 938, 940 (Fla. 1986). Individually and "cumulatively," *Barclay v. Wainwright*, 477 So. 2d 956, 959, (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." *Wilson* , 474 So. 2d 1162, 1165 (Fla. 1985).

In *Wilson v. Wainwright*, this Court said:

> [O]ur judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science.

Id. In Mr. Tanzi's case appellate counsel failed to act as a "zealous advocate." Mr. Tanzi was therefore deprived of his right to the effective assistance of counsel by the failure of direct appeal counsel to raise a number of issues to this court, which, had they been raised, would have entitled Mr. Tanzi to relief.

This Court has established the criteria for proving a claim of ineffective assistance of appellate counsel:

> The criteria for proving ineffective assistance of appellate counsel parallels the *Strickland* standard for ineffective trial counsel: Petitioner must show 1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and 2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result.

Id. at 1163, citing *Johnson v. Wainwright*, 463 So. 2d 207 (Fla. 1985).

Applicable professional standards are set forth in the American Bar Association Standards of Criminal Justice and Guidelines for the Performance of Counsel in Death Penalty Cases (ABA Guidelines).[1] "Given the gravity of the

[1] The ABA Guidelines were originally promulgated in 1989, and revised in 2003. The 2003 version of the guidelines spells out in more detail the reasonable professional norms that trial counsel should have utilized in the investigation of Mr. Tanzi's case. However, notwithstanding the fact that Mr. Tanzi's case was tried in 2002, there is no doubt as to the applicability of the 2003 Guidelines to his

punishment, the unsettled state of the law, and the insistence of the courts on rigorous default rules, it is incumbent upon appellate counsel to raise every potential ground of error that might result in a reversal of defendant's conviction or punishment." Commentary to ABA Guideline 6.1 (2003). Appellate counsel failed to raise a number of such grounds.

In light of the serious reversible error that appellate counsel failed to raise, there is more than a reasonable probability that the outcome of the appeal would have been different.

Several times during the initial stages of voir dire, prospective jurors were improperly instructed on Florida law. Specifically, two members of Mr. Tanzi's jury panel were improperly instructed as to their role in weighing aggravating and mitigating circumstances and returning a sentencing recommendation. Several times throughout the initial stages of voir dire the State erroneously stated that the Florida law required the potential jurors to return with a sentence of death if they fund that the aggravating circumstances outweighed the mitigating circumstances.

During voir dire of prospective juror Ms. Covino, the Court instructed her

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case. The United States Supreme Court has recently reaffirmed the applicability of the Guidelines to those cases tried before the Guidelines were promulgated. In *Rompilla v. Beard*, 545 U.S. 374 (2005) in which case the trial took place in 1989 prior to the promulgation of either the 1989 or the 2003 Guidelines, the Supreme Court applied not only the 1989 Guidelines but also the 2003 Guidelines to the case.

that the weighing standard in Florida required that "if [the State] prove[d] that sufficient aggravating circumstances existed, then our law states that the jury should recommend the death penalty." (R. Vol. II, voir dire p.110). Mr. Kuypers objected to this comment, informing the court that the jury instructions contained no language either way to that effect. (R. Vol. II, voir dire p.110-11). The court's reply to Mr. Kuypers's objection was telling, "Well I'm not sure what you're—I've been saying this all day long-as the state of the law." (R. Vol. II voir dire p.111).

Shortly thereafter, during questioning of prospective panel member Plowden, State Attorney Vogel stated, "the law is going to tell you that if you find these aggravating factors, you're supposed to recommend the death penalty." (R. Vol. II, voir dire p. 134). Mr. Kuypers again raised a contemporaneous objection that the State was misstating the law. (R. Vol. II voir dire p. 134). The court then sua sponte stated for the record what it believed to be the proper standard for weighing of the evidence, "first you determine whether or not there's aggravating circumstances sufficient that has been presented to you or proved to you, and then you look at the mitigating circumstance and see if they override the aggravating circumstances, and if they do, then you recommend life. If they do not, then you would recommend death." (R. Vol. II, p. 135). Following the court's comments, in an attempt to further clarify the issue, the State again misstated the law when

attempting to state the appropriate standard "and if the aggravating circumstances do not—I mean if the mitigators do not outweigh the aggravators, then your recommendation should be fore death." (R. Vol. II, p.136).

At the charge conference, Mr. Kuypers specifically requested that the court provide a special jury instruction relating to the initial jury selection misstatements of law. (R. 1162-1664). The court denied the request but agreed to permit the defense the opportunity to make argument about the proper standard during closing. (R. 1664).

Mr. Tanzi's trial counsel properly preserved the issue by raising objections during voir dire. During the early stages of voir dire Mr. Kuypers objected numerous times to both the court's and the State's misstatement on whether jurors were required to return a sentence of death. (R. 110-11, 134- 137). Each of Mr. Kuypers's objections stated clearly the basis for his objection and his desire to have the court prohibit the error from being continued. During the close of the penalty phase Mr. Kuypers renewed these objections, stating to the court his concern that two of the jurors who served in Mr. Tanzi's case had been part of the early stages of voir dire before any objection was lodged and both the court and the State had made misstatements of law. (R. 1162-64). As such, this error was properly preserved for purposes of appeal through Mr. Kuypers's contemporaneous objection. *Gore v. State*, 964 So. 2d 1257, 1265 (Fla. 2007)

(holding that "To preserve error for appellate review, the general rule is a contemporaneous, specific objection must occur during trial at the time of the alleged error"); *see also Insko v. State* , 969 So. 2d 992, 1001 (Fla. 2007); *Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978).

Direct appeal counsel failed to raise the issue of the misstatements of law regarding the jury's obligation to return a life sentence on appeal to this Court. Direct appeal counsel's failure to raise this issue cannot be considered reasonable strategy for purposes of the Sixth Amendment. Misstatements of law improperly informing members of the jury that they are obligated to return a sentence of death is undoubtedly of significant magnitude to necessitate appellate review. However, due to ineffective assistance by appellate counsel this court was never presented with this issue for review. Direct appeal counsel's failure to perform this task rendered his performance deficient for purposes of the Sixth Amendment. The resulting prejudice is that Mr. Tanzi was denied the opportunity for this Court to review both the state attorney's and the trial court's misstatement of law for fundamental error. Mr. Tanzi is entitled to relief in the form of a new sentencing proceeding.

This Court has repeatedly held that comments to jury members to the effect that if the aggravators outweigh the mitigators, a recommendation of a death sentence is mandatory, misstate the law. *See Franqui v. State*, 804 So. 2d 1185,

1192-93 (Fla. 2001); *Brooks v. State*, 762 So. 2d 879, 903 (Fla. 2000); *Henyard v. State*, 689 So. 2d 239, 250 (Fla. 1996); *Garron v. State*, 528 So. 2d 353, 359 n.7 (Fla. 1988); *Darling v. State*, 966 So. 2d 366, 385 (Fla. 2007). As such, the law in Florida on this issue is clear: "[A] jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors." *Franqui*, 804 So. 2d at 1192*; see also Brooks v. State*, 762 So. 2d 879, 902 (Fla. 2000) (stating that prosecutor misstated the law in commenting that jurors must recommend a death sentence unless the aggravating circumstances are outweighed by the mitigating circumstances); *cf. Garron v. State*, 528 So. 2d 353, 359 & n. 7 (Fla. 1988) (finding that it was a misstatement of the law to argue that "when the aggravating factors outnumber the mitigating factors, then death is an appropriate penalty").

In *Henyard v. State*, this Court held that a prosecutor's comments during voir dire that jurors must recommend death when aggravating circumstances outweigh mitigating circumstances misstated the law. 689 So. 2d 239 (Fla. 1996). In *Franqui v. State*, this Court again found error where the both the trial court and the State improperly instructed the panel during voir dire that it was required to recommend a death sentence if the aggravating circumstances outweighed mitigating circumstances. 804 So. 2d 1185, 1192-94 (Fla. 2001). Despite finding error in both the court's and the State's misstatements of law, this Court

determined the trial court's isolated misstatements of law during voir dire to be harmless. *Id.* at 1194; *see also Henyard,* 689 So. 2d at 250. This Court stressed the fact that the lower court had not repeated the misstatement of law when instructing the jury prior to deliberations. *Franqui*, 804 So. 2d at 1193. Additionally, this Court stressed that the trial court in *Franqui* had also given an additional instruction, requested by defense counsel and emphasized in *Henyard* and *State v. Dixon,* 283 So. 2d 1, 10 (Fla. 1973), apprising the jury that the weighing process was not a mere counting of aggravating and mitigating circumstances, but rather a reasoned judgment as to what the appropriate sentence should be in light of the nature of the aggravating and mitigating circumstances found to exist. *Id.*

Unlike both *Franqui* and *Henyard*, the jury instructions which were read to the jury following the close of the penalty phase in Mr. Tanzi's case did not effectively apprise the jury of their proper role in assessing the evidence in both mitigation and aggravation and rendering their sentencing recommendation. No additional instruction was provided by the Court to attempt to address the issue of the prior misstatements of law. Regardless of the fact that these misstatements occurred early on during the initial stages of voir dire, it is of no consequence to the issue of the prejudice which resulted. The issue should have been addressed by the Court when delivering the final jury instructions to the jurors.

Appellate counsel's failure to raise on appeal the issue of the misstatements of law regarding the jury's obligation to return a life sentence was deficient performance that prejudiced Mr. Tanzi. Had appellate counsel raised this meritorious claim, there is a reasonable probability that this Court would have remanded the case for a new penalty phase.

CLAIM II

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE CLAIM THAT MR. TANZI WAS DEPRIVED OF HIS RIGHT TO CONFRONT TESTIMONIAL EVIDENCE USED AGAINST HIM AT HIS CAPITAL TRIAL, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. The Sixth Amendment right of an accused to confront witnesses against him is a fundamental right which has been made obligatory on the states by the due process clause of the Fourteenth Amendment. *Engle v. State*, 438 So. 2d 803, 814 (Fla. 1983); (citing *Pointer v. Texas*, 380 U.S. 400 (1965)). "The primary interest secured by, and the major reason underlying the confrontation clause, is the right of cross-examination." *Id.* This right has been

applied to the sentencing process in capital cases. *Specht v. Patterson*, 386 U.S. 605 (1967).

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that the Sixth Amendment guarantees a defendant's right to confront those "who 'bear testimony' " against him. 541 U.S. at 51. A witness's testimony against a defendant is [thus] inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. *Id.* at 54.

The Court outlined in *Crawford* that the nature of what constitutes 'testimonial statements' which are covered by the Confrontation Clause consists of:

> *ex parte* in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Id. at 51-52.

Recently, in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009); the Supreme Court extended this class of testimonial statements to scientific experts' "certificates of analysis" which the Court considered "affidavits within [the] the

core class of testimonial statements covered by [the] Confrontation Clause." *Id.* The Court further stated that "analysts were [also] not removed from coverage of Confrontation Clause on [the] theory that their testimony consisted of neutral scientific testing." *Id.* Based upon the understanding that such statements were created with the sole intention of establishing or proving some fact, the Court held that drug analysis certificates were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" *Melendez-Diaz*, 129 S. Ct. at 2532; (citing *Davis v. Washington*, 547 U.S. 813, 830 (2006)) (emphasis deleted).

The Court determined that the analyst certificates functioned as "testimonial" statements and the analysts amounted to "witnesses" for purposes of the Sixth Amendment. *Melendez-Diaz*, 129 S. Ct. at 2532. Without some showing that the analysts were unavailable to testify at trial and that the defendant had a prior opportunity to cross-examine them, the Court held that the defendant was entitled to be confronted with the analysis at trial.[2]

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[2] Melendez-Diaz was charged with distributing and trafficking in cocaine. At his trial the prosecution placed into evidence the bags seized from the defendant and another co-defendant along with three certificates of analysis showing the results of the forensic analysis performed on the seized substances. The certificates reported the weight of the seized bags along with indicating the results of the examinations which had been performed to determine their consistency and the possible presence of narcotics. The defendant objected to the admission of the

At Mr. Tanzi's trial, the State relied upon DNA Analyst Ragsdale's testimony to establish that various samples of blood taken from the crime scene "matched" DNA samples taken from Mr. Tanzi. Ragsdale's testimony relied on notes and reports of other analysts who were not called to testify and were not subject to cross-examination. Ragsdale testified that samples had been "dried down" and a stain card created by Donna Isannidis (R. 761-5). Ragsdale later testified to serology tests performed by Lara Bahnweg, which defense counsel noted "just for a point of clarification, [ ] was not done by her. It was done by a different analyst." (R. 770-7). Ragsdale was also permitted to testify regarding testing of duct tape that was performed by others.

Most significantly, Ragsdale was permitted to testify to Analyst Bahnweg's notes and statements regarding Bahnweg's opinion of the origin of the blood found in Ms. Acosta's pocket which the State argued was evidence of sexual assault:

> Q: Okay so is it accurate to say that by Ms. Bahnweg's opinion the bloodstain that was taken from the pocket of Ms. Acosta's jeans appeared to have soaked through from the outside of the jeans?
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> * * *

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certificates, arguing that the submission of the certificates into evidence, without requiring the analyst who actually performed the tests to testify in court, violated his right to confront and cross examine the witnesses against him. The Supreme Court found that introduction of such evidence did in fact violate the core principles of the Sixth Amendment's Confrontation Clause.

A: No. I believe from her notes and from looking at the stain, the blood appeared to have originated from inside the pocket.

Q: Well she wrote all stains appear to be coming from outside. Maybe I'm misunderstanding outside. I'm looking at, let's see, submission five, page two, about tow-thirds of the way down.

A: Under submission five she discussed the jeans. She has at the bottom of the page, note, stain C is on the inside surface of the pocket lining closest to the hip.

(R. 817-18).

On redirect examination, State introduced more of Bahnweg's hearsay statements through Ragsdale:

Q: Okay. And in this particular exhibit that pocket-did Ms. Bahnweg indicate that that came from the inside of the pocket or did that come from the outside of the pocket?

A: In her opinion by looking at the stain it appeared that the blood originated from the inside of the pocket next to the person's body, not from the inside of the pocket like if you had your hand in the pocket.

Q: It wasn't a soak through?

A: It didn't appear to be.

(R. 820-21).

Given that Ragsdale's testimony was instrumental in establishing aggravating factors justifying Mr. Tanzi's death sentence, it was critical that Mr. Tanzi be provided the opportunity to test the accuracy, methodology, and honesty of the analysts whose statements were presented to the jury. Donna

Isannidis and Laura Bahnweg were responsible for creating, handling, and preserving some of the samples of the blood stains used to perform the DNA analysis and examining evidence used against Mr. Tanzi. Their statements, made in anticipation of prosecution, were offered as evidence against Mr. Tanzi at his penalty phase, without the opportunity to cross examine the declarants. "Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross examination." *Melendez-Diaz*, 129 S. Ct. at 2537.

Statements, whether in the forms of reports, sworn affidavits, depositions, etc., which were made "under circumstances which would lead an objective witness [to] reasonably believe that the statement would be available for use at a later trial" have been long deemed 'testimonial' in nature. *Crawford*, at 541 U.S. at 52. Like the certificates of analysis addressed in *Melendez-Diaz*, the notes and reports testified to by Ragsdale at Mr. Tanzi's trial were created specifically for the purpose of establishing Mr. Tanzi's guilt and penalty at trial. As such, such statements should have been subject to the rigors of the Confrontation Clause of the Sixth Amendment at Mr. Tanzi's trial. "Forensic evidence is not uniquely immune from the risk of manipulation." *Melendez-Diaz*, 129 S. Ct. at 2536. Given that these particular statements were made by FDLE analysts working in conjunction with the State Attorney's Office, the incentive to falsify or favorably

skew some of the findings is a credible concern. Statements based on forensic evidence which is being offered to establish a defendant's guilt or penalty are precisely the kind of statements contemplated by the Sixth Amendment. The analysts' statements, whatever their form, which were testified to at Mr. Tanzi's penalty phase should have been subject to in court confrontation to evaluate their reliability and credibility. Allowing Ragsdale to testify to the statements and opinions of other analysts without Mr. Tanzi being afforded the opportunity to confront those witnesses violates the Sixth Amendment.

Appellate counsel has a duty to raise both preserved and unpreserved errors. This Court has held that trial counsel's failure to preserve an error will not excuse appellate counsel's failure to raise the error on direct appeal where the error is fundamental. *See Hughes v. State,* 22 So. 3d 132 (Fla. Dist. Ct. App. 2d Dist. 2009) (holding fundamental error is error that can be considered on appeal without objection in the lower court.). To be fundamental, an error must "reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Brown v. State,* 124 So. 2d 481, 484 (Fla. 1960). This Court has further defined fundamental error as one "where the interests of justice present a compelling demand for its application. *Sochor v. State*, 619 So. 2d 285, 290 (Fla. 1993).

This Court has employed the totality of the circumstances approach in determining whether fundamental error has occurred, *Power v. State*, 886 So. 2d 952 (Fla. 2004); *Brown v. State*, 846 So. 2d 1114 (Fla. 2003). If the error is of such magnitude that an appellate court would likely consider it plain or fundamental error, this Court has provided relief. *Maddox v. State*, 760 So. 2d 89, 95 (Fla. 2000). Here, the evidence was instrumental in establishing the aggravating circumstance of commission of a capital crime while engaged in a sexual battery, to which the trial court afforded great weight. The violation of Mr. Tanzi's right to confront the evidence used against him to establish aggravating factors constituted fundamental error which "reaches down into the validity of the trial itself to the extent that a [recommendation of death] could not have been obtained without the assistance of the alleged error." *Urbin v. State*, 714 So. 2d 411, 418 n.8 (1998). Appellate counsel was ineffective for failing to raise this meritorious claim.

CONCLUSION

For the reasons stated herein, Mr. Tanzi respectfully requests that this Court grant his petition for writ of habeas corpus and order a new penalty phase proceeding and grant any other relief that this Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by United States Mail, postage prepaid, to Scott Brown, Asst. Attorney General, Concourse Center 4, 3507 E. Frontage Road, Suite 200, Tampa, Florida 33607, this 12th day of January, 2011.

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PAUL KALIL
Assistant CCRC-South